

FRONTIERS OF JUSTICE

DISABILITY, NATIONALITY,
SPECIES MEMBERSHIP

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natives get onto the table and are taken seriously.⁴⁴ These principles, together with the theoretical analysis that supports them, are at least a sign of what the capabilities approach can offer as we move from goals and entitlements to the construction of a decent global society. If our world is to be a decent world in the future, we must acknowledge right now that we are citizens of one interdependent world, held together by mutual fellowship as well as the pursuit of mutual advantage, by compassion as well as by self-interest, by a love of human dignity in all people, even when there is nothing we have to gain from cooperating with them. Or rather, even when what we have to gain is the biggest thing of all: participation in a just and morally decent world.

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BEYOND “COMPASSION AND HUMANITY”

JUSTICE FOR NONHUMAN ANIMALS

In conclusion, we hold that circus animals . . . are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live, with no respite and the impugned notification has been issued in conformity with the . . . values of human life, philosophy of the Constitution . . . Though not hominids, they are also beings entitled to dignified existence and humane treatment sans cruelty and torture . . . Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights . . . If humans are entitled to fundamental rights, why not animals?

—*Nair v. Union of India*, Kerala High Court, no. 155/
1999, June 2000

i. “Beings Entitled to Dignified Existence”

In 55 B.C.E. the Roman leader Pompey staged a combat between humans and elephants. Surrounded in the arena, the animals perceived that they had no hope of escape. According to Pliny, they then “entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation.” The audience, moved to pity and anger by their plight, rose to curse Pompey—feeling, writes Cicero, that the elephants had a relation of commonality (*societas*) with the human race.¹

We humans share a world and its scarce resources with other intelligent creatures. We have much in common with these crea-

Before we can perform this extension with any hope of success, however, we need to articulate an adequate theoretical approach. In this area our conceptual materials are in their infancy. It seems premature to head directly to conclusions, urgent though these conclusions are, and obvious though many of them are, if we do not at the same time seek to refine our philosophical categories.

The capabilities approach provides better theoretical guidance than do other approaches to the question of animal entitlements. Because it is capable of recognizing a wide range of types of animal dignity, and of corresponding needs for flourishing, and because it is attentive to the variety of activities and goals that creatures of many types pursue, the approach is capable of yielding norms of interspecies justice that are subtle and yet demanding, involving fundamental entitlements for creatures of different types. The approach will have to be transformed and extended in order to meet the challenge. But its Aristotelian ingredients enable it to meet the challenge well.

As I have repeatedly emphasized, Kantian social contract theories have great strengths. In this area, however, they fall more clearly short than in any other. Both because of their commitment to rationality as the ground of dignity and because of their conception of political principles as deriving from a contract among rough equals, they deny that we have obligations of justice to nonhuman animals. They view such obligations as we might have either as derivative from obligations to humans or as simply different in kind, as duties of charity and not of justice. I shall argue that we should criticize such views in two ways: by recognizing the extent of intelligence in many nonhuman animals, and by rejecting the idea that only those who can join a contract as rough equals can be primary, nonderivative subjects of a theory of justice.

tures, although we also differ in many ways. These commonalities sometimes inspire sympathy and moral concern, although they are more often treated obtrusely. We also have many types of relationships with members of other species, relationships involving responsiveness, sympathy, joy in excellence, and concerned interaction, as well as manipulativeness, indifference, and cruelty. It seems plausible to think that these relationships ought to be regulated by justice, instead of the war for survival and power that now, for the most part, obtains.

Nonhuman animals² are capable of dignified existence, as the Kerala High Court says. It is difficult to know precisely what that phrase means, but it is rather clear what it does not mean: the conditions of the circus animals in the case, squeezed into cramped and filthy cages, starved, terrorized, and beaten, given only the minimal care that would make them presentable in the ring the following day. Dignified existence would seem at least to include the following: adequate opportunities for nutrition and physical activity; freedom from pain, squalor, and cruelty; freedom to act in ways that are characteristic of the species (rather than to be confined and, as here, made to perform silly and degrading stunts); freedom from fear and opportunities for rewarding interactions with other creatures of the same species, and of different species; a chance to enjoy the light and air in tranquility. The fact that humans act in ways that deny animals a dignified existence appears to be an issue of justice, and an urgent one, although we shall have to say more to those who would deny this. Moreover, although the questions thus raised are in many ways different from the questions we have confronted so far, there seems to be no good reason why existing mechanisms of basic justice, entitlement, and law cannot be extended across the species barrier, as the Indian court boldly does.

ii. Kantian Social Contract Views: Indirect Duties, Duties of Compassion

It is not surprising that one of our most far-reaching legal judgments in favor of animals comes from an Indian court; the Hindu traditions of India teach reverence for at least many animals, and vegetarianism is an important moral ideal. By contrast, all philosophers writing in the modern Western tradition, whatever their religious beliefs, have been deeply influenced by the Judeo-Christian tradition, which teaches that human beings were given dominion over animals and plants. Even though Jewish and Christian writers studied the Greeks and Romans and incorporated many of their ideas, it is not very surprising that the school of ancient ethical thought that had the greatest influence on their thinking, with respect to the animal question, was Stoicism, of all ancient Greco-Roman views the least sympathetic to the idea that animals might have ethical standing.³ Late Platonist writers defended an elaborate ethic of vegetarianism and respect for animal life; but they grounded it in metaphysical doctrines (including the transmigration of souls into animal bodies) that Jews and Christians repudiated. Aristotelians argued that all of nature is a continuum, and that all living creatures are worthy of respect and even wonder. But to make Aristotelianism compatible with Christianity it was necessary to revise those particular elements, creating a sharp divide between humans and other species, as Aquinas and other Christian Aristotelians do. Epicureans argued that humans, like all animals, are composed of mortal bodies and corporeal souls that disintegrate upon death. But such doctrines, which at least break down the sense of unique sanctity surrounding human life, were rejected by Jews and Christians as paradigmatic of atheism and godless materialism.

In Stoicism, however, Jews and Christians found a natural

ally: for Stoic views, like Judeo-Christian views, taught that the capacity for reason and moral choice is the unique source of dignity in any natural being. Beings who lack that source of dignity are in an important sense outside the ethical community. Christians, Jews, and Stoics can still hold that we have duties not to abuse animals; indeed, they can also hold that we have duties toward inanimate objects. But animals are not regarded as participants in the ethical community, creatures in partnership with whom we ought to work out our ways of living.

Thus we should begin our scrutiny of social contract theories by recognizing that these theories arose within a more general Stoic/Judeo-Christian culture, and that the treatment of animals, once a prominent ethical issue in the ancient Greco-Roman world, did not become so again until at least the eighteenth century. We must ask which shortcomings in such theories are due to their social contract form, and which to the more general background from which they spring.⁴

Kant does not talk about animals in his major works on moral and political philosophy; he says nothing to connect them to his theory of the social contract. In the earlier *Lectures on Ethics*,⁵ however, he does address the topic of duties toward nonhuman animate beings, "animals and spirits."⁶ Baumgarten, whose text he uses as the basis for his lecture course, speaks of "duties toward beings which are beneath us and beings which are above us." But Kant denies that we have any duties directly toward animals. Moral duties have to be toward self-conscious beings. Animals have no self-consciousness. Therefore they "are there merely as a means to an end. That end is man. . . . Our duties toward animals are merely indirect duties towards humanity."⁷

Kant's argument for indirect duties begins from an idea of analogical similarity. Animals, he argues, behave in ways that are analogous to the ways human beings behave: for example, they display an analogue of loyalty. If we habituate ourselves to treat

animals kindly when they behave this way, we strengthen the disposition to behave kindly to humans when they behave in similar ways. More generally (and here Kant appears to have dropped the point about analogical similarity), when we are kind to animals we strengthen our tendencies of kindness, when we are cruel to animals, we nourish tendencies to be cruel to humans. Kant here alludes to Hogarth's famous and influential engravings, *The Stages of Cruelty*, which depict a young boy torturing animals, and then going on to commit a variety of cruel and wanton acts toward human beings, culminating in murder. Kant thinks that Hogarth's ideas offer important lessons for children. He also expresses approval of the British custom by which butchers and doctors do not sit on juries because they are accustomed to the sight of death and "hardened."⁷

Thus it would appear that Kant rests the whole case for kindness to animals on fragile empirical claims about psychology. He cannot conceive that creatures who (in his view) lack self-consciousness and the capacity for moral reciprocity could possibly be objects of moral duty. ("He does not fail in his duty to the dog," he writes, "for the dog cannot judge.") More generally, he does not believe that such a being can have a dignity, an intrinsic worth. Its value must be derivative and instrumental.

Kant's views about animals are not entailed even by the Judeo-Christian culture of his time. For one might hold that humans rightly have dominion over animals while also holding, as Baumgarten apparently does, that humans have obligations of good stewardship that require them to treat animals decently. Kant's views express his own particular conceptions of moral obligation and of humanity, according to which the capacity for moral rationality is essential for ethical status.

One may, however, be a contractarian—and indeed, in some sense a Kantian—without espousing these narrow views. For Rawls, justice, while "the first virtue of social institutions," is not

the only virtue even in the political sphere, and certainly not the entirety of moral virtue. Although his remarks on animals are not lengthy, he does not hesitate to say that there are moral duties to animals, which he calls "duties of compassion and humanity" (*TJ* 512). The fact that animals feel pleasure and pain imposes such duties.

But for Rawls these are not issues of justice, and he is explicit that the contract doctrine cannot be extended to deal with them "in a natural way": "Certainly it is wrong to be cruel to animals . . . The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way" (*TJ* 512).

Similarly, in an important earlier section titled "The Basis of Equality," Rawls argues that animals lack those properties of human beings "in virtue of which they are to be treated in accordance with the principles of justice" (504). Being a moral person is a sufficient condition for being entitled to be treated with justice on a basis of equality with others. Rawls defines moral persons with reference to the two features that he later (in *Political Liberalism*) calls the two moral powers: a capacity for a conception of the good and a capacity for a sense of justice, at least "to a certain minimum degree" (505). Similarly, in *PL*, referring back to this discussion, he says "Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal" (19). Although he never insists that the capacity for moral personality is a necessary condition for being owed strict and equal justice, Rawls does indicate his sympathy for that conclusion in the case of animals: "While I have not maintained that the capacity for a sense of justice is

necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity . . . Our conduct toward animals is not regulated by these principles, or so it is generally believed" (*TJ* 512, 504).

Once again, we must ask how much of Rawls's position is explained by his contractarianism, and how much by his Kantian political conception of the person. Clearly, the Kantian conception of the person suffices, in Rawls's view, to rule nonhuman animals out as members of the community who work out and are bound by principles of justice. The two moral powers belong, in his view, to humans only, and not to all of these. Animals, like mentally disabled humans, fail to be persons in the requisite sense. Similarly, the political freedom of persons is conceived, as we have seen, in terms of an idealized rationality, including the capacity to be "self-authenticating sources of valid claims." And the dignity and inviolability of persons is also understood in terms of their membership in the moral community. If animals can be said to possess any sort of dignity or inviolability for Rawls, it will not be the sort that persons possess, an "inviolability founded on justice that even the welfare of society as a whole cannot override" (*TJ* 3).⁸

One might try to reply that Rawls's error is empirical rather than philosophical. He has not understood how intelligent animals are, how capable they are of relationships (with both humans and one another) involving complex forms of reciprocity. If we see animals with sufficient richness and complexity, we may after all find the idea of a social compact involving them perfectly plausible, at least as an illuminating hypothesis. But this reply proves inadequate. Rawls's theory is indeed incomplete empirically. He makes no effort to study the intelligence of animals, and he offers no argument that they are incapable of reci-

procity. It seems likely that many of them are indeed capable of at least some forms of reciprocity. It seems doubtful, however, that we can include animals sufficiently in a Rawlsian theory simply by acknowledging these facts. First, the capacity for reciprocity is present in only some animals; and yet issues of unfair and cruel treatment extend very broadly. If there is reciprocity between humans and dogs or apes, it is not clear that there is reciprocity between humans and birds or lions. And yet, our treatment of all these animals appears to raise questions of justice. Second, insofar as there is reciprocity between humans and some nonhuman animals, it is not the type of reciprocity described in Rawls's theory, based on the possession of complex reflexive rational and moral capacities.

But we might in principle separate the contractarian doctrine from its Kantian elements, supplying Rawls with a political conception of the person more Aristotelian in spirit, ready to accord dignity to a wide range of creatures in the universe. Let us suppose that we have done so. Would this suffice to make the contract doctrine a suitable way to deal with issues involving animals that appear to be issues of justice, in the sense that animals seem to have a dignity that is being violated, and justifiable moral entitlements that are being denied? I believe not. Here again, as in the case of human beings with mental disabilities, there are problems in the very structure of the contract doctrine.

In a very basic way, the whole idea of a contract involving both humans and nonhuman animals is fantastic, suggesting no clear scenario that would assist our thinking. Although the state of nature is not supposed to be an actual historical condition, it is supposed to be a coherent fiction that can help us think well. This means that it has to have realism, at least, concerning the powers and needs of the parties and their basic circumstances. There is no comparable fiction about our decision to make a

deal with other animals that would be similarly coherent and helpful. Even though Hume's Circumstances of Justice are not the only way in which one might understand the need for justice in human affairs, they at least are familiar and plausible circumstances in which a large proportion of human beings actually live. And if we imagine people in such circumstances (or the analogous circumstances posited by Locke and Kant) we can see how they would want to make a contract for mutual advantage, and imagine roughly the kind of contract they might make.

By contrast, although we do share a world of scarce resources with animals, and although there is in a sense a state of rivalry among species that is comparable to the rivalry in the state of nature, the asymmetry of power between humans and nonhuman animals is too great to imagine any contract we might make with them as a real contract. Certainly, we cannot imagine that the contract would actually be for mutual advantage: for if we want to protect ourselves from the incursions of threatening animals we can just kill them, as we do. It has been a long time since human beings were threatened in a general way by the power of "the beasts." Thus, the Rawlsian condition that no one party to the contract is strong enough to dominate or kill all the others is not met. Furthermore, because animals do not make contracts, we are blocked, here again, from imagining plausibly what a social compact would look like. The type of intelligence that animals possess is not the sort that we need to postulate to imagine a contractual process.

So there is no good analogue of the Circumstances of Justice, no good analogue to the contractarian account of the purposes of social cooperation, no good analogue to the account of the abilities of the parties in virtue of which a contract is possible, no good analogue to their situation as "free, equal, and independent" parties. Unlike humans in a state of extreme mental dis-

ability, animals may be very independent and in their own way free. Although some depend on humans, many do not. But they certainly are not equals of humans in power and resources, and this asymmetry means that humans seeking to make a contract for mutual advantage will simply omit them, as all existing contract theories imagine the parties as doing. Why make a deal with creatures that are securely controlled and dominated? If the point of social cooperation is seen in social contract terms, no answer is forthcoming.

The omission of animals from the process of making the contract might not matter, if there were some other way of constructing them as subjects of justice. For example, humans might represent the interests of animals, assuming that they are among the parties in the society to be designed. Here, however, we run into the conflation we have often had occasion to notice. The parties who frame the social contract are framing principles by which they, those very people, are to live together. The principles are chosen to regulate their dealings with one another. To the extent that the interests of other parties can be included in their deliberations, it will have to be done in a derivative way, and at a later stage. Animals cannot be primary subjects of justice, because they cannot be framers of contracts.

In the case of people with disabilities, moreover, Rawls is prepared to deal with their interests at a later stage; in the case of animals, he denies altogether that the issues before us are issues of justice.

Rawls's omission of animals from the theory of justice is motivated, then, both by his Kantian conception of the person and by the structure of the social contract position. Unlike Kant, he holds that we have some moral duties to animals;⁹ justice, however, is confined to the human realm.

I have said that the cruel and oppressive treatment of animals

raises issues of justice, but I have not really defended that claim against the Rawlsian alternative. What exactly does it mean to say that these are issues of justice, rather than issues of "compassion and humanity"? The emotion of compassion involves the thought that another creature is suffering significantly, and is not (or not mostly) to blame for that suffering.¹⁰ It does not involve the thought that someone is to blame for that suffering. One may have compassion for the victim of a crime, but one may also have compassion for someone who is dying from disease (in a situation in which that vulnerability to disease is nobody's fault). "Humanity" I take to be a similar idea. So compassion, all by itself, omits the essential element of blame for wrongdoing: that is the first problem. It would seem that analyzing the harms we do to animals in terms of duties of compassion alone entails blurring the important distinction between the compassion we might have for an animal who dies of a disease that is nobody's fault and the response we might have to the sufferings of an animal who is being cruelly treated by humans. But suppose we add that element, saying that duties of compassion involve the thought that it is *wrong* to cause animals suffering. Where that suffering is caused by a wrongful act, a duty of compassion would involve acknowledgment of that wrongfulness. That is, a duty of compassion would not be just a duty to have compassion, but a duty, as a result of one's compassion, to refrain from, inhibit, and punish acts of the sort that cause the suffering occasioning the compassion. I believe that Rawls would probably make this addition, although he certainly does not tell us what he takes duties of compassion to be. What is at stake, further, in the decision to say that the mistreatment of animals is not just morally wrong, but morally wrong in a special way, raising questions of *justice*?

This is a hard question to answer, since justice is a much-dis-

puted notion, and there are many varieties of justice, political, ethical, and so forth. It seems, however, that what we typically mean when we call a bad act unjust is that the creature injured by that act has an entitlement not to be treated in that way, and an entitlement of a particularly urgent or basic type (since we do not believe that all instances of unkindness, thoughtlessness, and so forth are instances of injustice, even if we do believe that people have a right to be treated kindly, and so forth). The sphere of justice is the sphere of basic entitlements. When I say that the mistreatment of animals is unjust, I mean to say not only that it is wrong *of us* to treat them in that way, but also that they have a right, a moral entitlement, not to be treated in that way. It is unfair *to them*.¹¹

What other ideas are conceptually linked to seeing animals as having urgent entitlements? I believe that thinking of animals as active beings who have a good naturally leads us to have the further thought that they are entitled to pursue that good. If we have that thought, we are likely to see important damages done to them, blocking them from their pursuit of the good, as unjust. What is lacking in Rawls's account, as in Kant's (though more subtly), is the sense of the animal itself as an agent and a subject, a creature to whom something is due, a creature who is itself an end. As we shall see, the capabilities approach does treat animals as agents seeking a flourishing existence; this basic conception, I believe, is one of its greatest strengths.

We certainly should not deny that compassion is very important in thinking correctly about our duties to animals. Compassion overlaps with the sense of justice, and a full allegiance to justice requires compassion for beings who suffer wrongfully, just as it requires anger at the offenders who inflict wrongful suffering. But compassion by itself is too indeterminate to capture our sense of what is wrong with the treatment of animals. An ad-

equate response involves compassion of a special sort, compassion that focuses on wrongful action and sees the animal as an agent and an end.

iii. Utilitarianism and Animal Flourishing

In general, the capabilities approach is a close ally of contractarian approaches and is more deeply critical of Utilitarianism. And yet in this particular area things look different. Nobody could deny that, historically, Utilitarianism has contributed more than any other ethical theory to the recognition of animal suffering as an evil. Both Bentham and Mill in their time and Peter Singer in our own have courageously taken the lead in freeing ethical thought from the shackles of a narrow species-centered conception of worth and entitlement. No doubt this achievement was connected with the founders' general radicalism and their skepticism about conventional morality, their willingness to follow the ethical argument wherever it leads. These remain very great virtues in the Utilitarian position.

Moreover, Utilitarianism has an outcome-oriented view of justice, which seems required in order to deal well with all three of our problems. Procedural views in the social contract tradition run into difficulty when they ask who is included in the procedure, stipulating conditions, such as the possession of a certain type of rationality, or a rough equality of positions, that restrict entry. Because they conflate the question "Who frames the principles?" with the question "For whom (at least in the first instance) are the principles framed?" they must consider obligations to beings who cannot take part in the contractual process as derivative and posterior. Outcome-oriented views, by contrast, have no difficulty considering, in a primary and nonderivative way, the interests of powerless, disabled, and non-linguistic beings. Because such views do not conflate the two

questions, they may imagine human beings framing principles of justice directly for a much wider group of beings.

Moreover, Utilitarianism's focus on the sentence that links humans with all other animals and on the badness of pain are particularly attractive starting points when we consider issues of justice involving animals: for there is no doubt that a central problem of justice in this area is the problem of pain wrongfully inflicted.

Thus it is in a spirit of alliance that I now address some criticisms to the Utilitarian view. In general, all Utilitarian views have three aspects: *consequentialism*, *sum-ranking*, and a *substantive view about the good*.¹² *Consequentialism* holds that the right act is the one that promotes the best overall consequences. *Sum-ranking* tells us how to aggregate consequences across lives—namely, by adding together, or aggregating, the goods present in distinct lives. Views about the *good* in Utilitarianism have taken two distinct forms. Bentham's is a pure hedonistic Utilitarianism, asserting the supreme worth of pleasure and the badness of pain.¹³ Peter Singer's modern version is somewhat different. He calls it "preference utilitarianism," and it holds that the consequences we should aim to produce are those that on balance "further the interests (i.e. desires or preferences) of those affected."¹⁴ Killing is wrong only when individuals killed have a preference to continue living; the killing is a wrong to that individual.¹⁵

There are some difficulties with the Utilitarian view, in both of its forms. Having explored some of these in Chapters 1 and 5, we must recapitulate and extend our critique. Consequentialism by itself causes the fewest difficulties, since one may always adjust the account of well-being, or the good, in consequentialism so as to admit many important things that Utilitarians typically do not make salient: plural and heterogeneous goods, the protection of rights, even personal commitments or agent-centered

goods. More or less any moral theory can be "consequentialized," put in a form in which the matters valued by that theory appear in the account of consequences to be produced.¹⁶ There is, however, some question about whether any view that urges us to produce the best¹⁷ overall consequences is the right starting point for political justice.

So far, in framing principles of justice in the capabilities approach, we have focused on a small number of core entitlements. Like Rawls's approach, our approach insists that these entitlements have a special priority or salience for political purposes, constraining the pursuit of other goods. Ever since John Stuart Mill said something like this about justice in chapter 5 of *Utilitarianism*, philosophers have debated whether giving political priority to basic justice, as Mill does, is compatible with consequentialism. Can consequentialism give the requirements of justice sufficient centrality for political purposes? Even if this problem can be solved, there is another and deeper problem to be faced, concerning restraint or parsimony.

Politics is unlike other aspects of life, in that we are choosing principles to govern the lives of people who disagree about the (rest of the) good, who have different religious conceptions and conceptions of value. Respecting them, as I have argued in Chapter 5 (agreeing with the idea of political liberalism developed by Rawls and Larmore),¹⁸ means not imposing on them some other person's comprehensive view of the good. What we want political actors to do, in a liberal state, is *just* to take care of basic justice, and not to be maximizers of overall good. We actively want them *not* to pursue the maximization of overall good, because we don't want them to be in the business of defining what the good is in a comprehensive way. The right division of labor in a liberal society is for political institutions to take care of justice, and for individuals to be left free to pursue on

their own other parts of their comprehensive conceptions of the good.

From such a perspective, to ask of political actors that they be consequentialists looks illiberal: for surely people cannot make choices as consequentialists without having some comprehensive conception of the good.¹⁹ But such a conception may be precisely what we do not want political actors to employ, on the grounds that each citizen will have, and pursue, her own, within limits set by justice. Making a short list of the central capabilities, as core entitlements based on justice, is a way of taking a stand on content. But it is also, importantly, a way of announcing our restraint to people with different comprehensive conceptions. We thereby say, "We ask you to endorse, as a linchpin of our society's basic structure, only this partial conception of the good; for the rest, you are free to pursue your religious or secular conception, whatever it is."

Singer's preference Utilitarianism obviously does better with this problem than other types of Utilitarianism; for it is liberal in deferring to what people actually prefer. But it is not clear that this move solves the problem of overambition on the part of the political doctrine. For many comprehensive doctrines that citizens hold do not endorse preference-satisfaction as a correct view of the good; most religious and many moral doctrines disagree with Singer on this point. So even in pursuing satisfaction as a goal, the political actor would be invading territory that the liberal wants to reserve for each person's choices. Preference Utilitarianism has, in addition, some familiar problems, which I have discussed in Chapters 1 and 5:²⁰ the ambiguity of the very notion of a preference; the existence of preferences shaped by ignorance, greed, and fear; still worse, the existence of "adaptive preferences," preferences that simply adapt to the low level of living one has come to expect.

So I tentatively conclude that, while we do want political principles to focus on consequences, we need to assign them a task more limited than that assigned them by the consequentialist, that of dealing with a limited range of consequences in areas that are matters of basic justice. Outside this sphere society as a whole and its basic structure should not be governed by anyone's single comprehensive conception of the good, even the preference Utilitarian's.

Let us now focus on *sum-ranking*. Outcome-oriented views need not simply add all the relevant goods together. They may weight them in other ways: for example, as in the capabilities approach applied to the human case, they may simply insist that each and every person has an indefeasible entitlement to come up above a threshold on certain key goods. In addition, such a view may focus, as does Rawls's theory, on the situation of the least well-off, refusing to permit inequalities that do not raise that person's position. These ways of considering well-being insist on treating people as ends: they refuse to allow some people's extremely high well-being to be purchased, so to speak, through other people's disadvantage. Even the welfare of society as a whole does not lead us to violate an individual.

Utilitarianism notoriously refuses such insistence on the separateness and inviolability of persons. Because it is committed to sum-ranking of all relevant pleasures and pains (or preference-satisfactions and frustrations), it has no way of ruling out in advance results that are extremely harsh toward a given class or group. Slavery, the lifelong subordination of some to others—none of this is ruled out by the theory's core conception of justice, which treats all satisfactions as fungible in a single system. As we saw in Chapters 1 and 5, such results will be ruled out, if at all, only by empirical considerations regarding total or average well-being. These questions are notoriously indeterminate (es-

pecially when the number of individuals involved is also unclear, a point I shall take up later). Even if they were not, it seems that the best reason to be against slavery, torture, and lifelong subordination is a reason of justice, not an empirical calculation of total or average well-being. Even if we could get around that problem, we would then have to confront the problem of adaptive preferences once again, given the fact that unjust treatment often makes allies out of the oppressed.

When we turn to animals, all these problems are acute. Inter-species comparisons of utility are even more difficult and indeterminate than are interpersonal comparisons within a single species. The interpretation of animals' preferences is fraught with obscurity and difficulty. But even if we were able to solve these problems, a more general difficulty awaits us. Utilitarian sum-ranking seems to have no way to rule out, on grounds of basic justice, the great pain and cruel treatment of at least some animals. Suppose the circus animals described in my Indian court case were the only animals who were being treated cruelly: it is not obvious that the pleasure that their performance affords large human audiences could not outweigh the pain suffered by a small number of animals; and yet it seems unfortunate not to be able to say directly, as the Indian court does, "This is intolerable. This is a moral violation." To make basic ethical entitlements contingent on other people's malicious pleasure in this way is to give them far too weak and vulnerable a place, ignoring direct moral reasons for objecting to cruel practices.

Does preference Utilitarianism do better? In the first place, there is conceptual obscurity there, too: it is obviously very difficult to ascribe preferences to animals. I have argued that in the human case the theory has some grave problems, including the problem of misinformed, malicious, fear-induced preferences, and including that of adaptive preferences formed under bad or

unjust background conditions. These problems are problems for the preferences of animals, too, though many of the deformed preferences emerge only in diseased relationships between animals and humans. Animals, too, can learn submissive or fear-induced preferences. Martin Seligman's experiments show that dogs who have been conditioned into a mental state of learned helplessness have immense difficulty learning to initiate voluntary movement, if they can ever do so.²¹ Creatures accustomed to captivity may never be able to learn to live in the wild. Simply aggregating all these deformed preferences, without winnowing out those that are the product of unjust background conditions, here as in the human case, is a recipe for endorsing an unjust status quo.

Both consequentialism and sum-ranking cause difficulties for the Utilitarian. Let us, finally, consider the views of the good most prevalent within Utilitarianism: hedonism (Bentham) and preference-satisfaction (Singer). Pleasure is a notoriously elusive notion. Is it a single feeling, varying only in intensity and duration, as Bentham thought, or are the different pleasures as qualitatively distinct as the activities with which they are associated? Mill, following Aristotle, believed the latter; but if we once grant that point, we are looking at a view that is very different from standard Utilitarianism, which is firmly wedded to the homogeneity and qualitative singleness of good.

Such a commitment looks like an especially grave error when we consider basic political principles for animal entitlements. For animals as well as humans, each basic entitlement pertains to a separate domain of functioning; it is not bought off, so to speak, by even a very large amount of another entitlement. Animals, like humans, pursue a plurality of distinct goods: friendship and affiliation, freedom from pain, mobility, and many others. Aggregating the pleasures and pains connected to these distinct areas seems premature and misleading: we may want to

say that animals have distinct entitlements to all of these things, based on justice.

Once we ask the hedonist to admit plural goods, not commensurable on a single quantitative scale, it is natural to ask, further, whether pleasure and pain are the only things we ought to be looking at when we consider the entitlements of animals. It seems plausible to think that there may be goods they pursue that are not felt as pain and frustration when they are absent: for example, free movement and physical achievement, and also altruistic sacrifice for kin and group. It is also possible that some animal pains may even be valuable: the grief of an animal for a dead child or parent, or for the suffering of a human friend, may be a constituent part of an attachment that is intrinsically good, as may the pain involved in the effort required to master a difficult activity.

Finally, all Utilitarian views are highly vulnerable on the question of numbers. The meat industry brings countless animals into the world who would never have existed but for that. To John Coetzee's fictional character Elizabeth Costello, in *The Lives of Animals*, this is one of the worst aspects of its moral cruelty: it "dwarfs" the Third Reich because "ours is an enterprise without end, self-regenerating, bringing rabbits, rats, poultry, livestock ceaselessly into the world for the purpose of killing them."²² For the Utilitarian, these births of new animals are not by themselves a bad thing: indeed, we can expect new births to add to the total of social utility. So long as each animal has a life marginally worth living, however close to that margin, the existence of more life experience rather than less is a positive good.

So Utilitarianism has great merits, but also great problems. Consequentialism is in tension with liberal respect for a plurality of comprehensive conceptions of good. Sum-ranking treats some as means to the ends of others. Hedonism and preference Utilitarianism efface the heterogeneity and distinctness of the

good, ignore goods that do not reside in sentience, and fail to criticize preferences and pleasures developed under unjust background conditions.

On all of these points, the Utilitarianism of Mill is distinctly preferable to the mainstream Utilitarian views we have just considered. Mill does give justice and rights a central place in thought about social well-being, although there is much dispute as to how consistent this position is with his Utilitarianism. In some works, for example *The Subjection of Women*, Mill refuses to count malicious pleasures for purposes of social choice; he also gives each person's inviolability considerable salience. Finally, Mill insists on the qualitative heterogeneity of pleasures, and even suggests at times that pleasures are best viewed as forms of activity. Indeed, Mill's view strikes an interesting balance between an Aristotelian emphasis on activity and flourishing and a Utilitarian emphasis on pleasure and the absence of pain.²³ This complexity makes his view an important ally of the capabilities approach, as we attempt to extend it into the realm of human-animal relations.

iv. Types of Dignity, Types of Flourishing: Extending the Capabilities Approach

The capabilities approach in its current form does not address the problem of justice for nonhuman animals. It starts from the notion of human dignity and a life worthy of it. And yet I would argue that the capabilities approach lends itself to such an extension far more readily than either of the theories currently under discussion. Its basic moral intuition concerns the dignity of a form of life that possesses both abilities and deep needs. Its basic goal is to address the need for a rich plurality of life activities. With Aristotle and Marx, the approach has insisted that there are waste and tragedy when a living creature with the innate or "ba-

sic" capability for some functions that are evaluated as important and good never gets the opportunity to perform those functions. Failures to educate women, failures to promote adequate health care, failures to extend the freedoms of speech and conscience to all citizens—all these are treated as causing a kind of premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder. The idea that human beings should have a chance to flourish in their own way, provided they do no harm to others, is thus very deep in the view's whole approach to the justification of basic political entitlements. (We should bear in mind that any child born into a species has the dignity relevant to that species, whether or not it seems to have the "basic capabilities" relevant to that species. For that reason, it should also have all the capabilities relevant to the species, either individually or through guardianship.)

The species norm is evaluative, as I have insisted; it does not simply read off norms from the way nature actually is. But once we have judged that a capability is essential for a life with human dignity, we have a very strong moral reason for promoting its flourishing and removing obstacles to it.

The same attitude to natural powers that guides the approach in the case of human beings guides it in the case of other animals. For there is a more general attitude behind the respect for human powers that is basic to the capabilities approach, and it is different from the type of respect that animates Kantian ethics. For Kant, only humanity and rationality are worthy of respect and wonder; the rest of nature is just a set of tools. The capabilities approach judges instead, with the biologist Aristotle, that there is something wonderful and wonder-inspiring in all the complex forms of life in nature.²⁴

In *The Parts of Animals*, Aristotle gives his students a lecture on why they should not "make a sour face" at the idea of studying animals, including the ones that seem not very exalted.

(Since Aristotle's main area of research was marine biology, much of the work is focused on marine and shoreline creatures.) He insists that all animals are akin, in being made of organic materials; humans should not plume themselves on being special. "If there is anyone who thinks it is base to study animals, he should have the same thought about himself." All animals are objects of wonder for the person who is interested in understanding:

We won't leave out any of them if we can help it, whether more exalted or less exalted. For even in the case of those animals that give no delight to our senses, nature the artificer provides countless pleasures to those who can study the causes of things and who have a philosophical spirit . . . So we should not embark on the study of the less exalted animals with a childish disgust: for in everything in nature there is something wonder-inspiring. There is a story that some visitors once wanted to meet Heraclitus, and when they came in they found him warming himself in the kitchen. He told them, "Come in, don't shrink back. There are gods here too." So too, we should approach the study of each type of animal, not making a sour face, knowing that in every one of them is something natural and wonderful.²⁵

Heraclitus reminded his visitors that there were gods in the kitchen, too (or in the toilet, since the meaning of the Greek term is disputed). So, too, Aristotle urges his students to look at animals with wonder and curiosity, not disdain.

Aristotle's scientific spirit is not the whole of what the capabilities approach embodies. The approach includes, in addition, an ethical concern that the functions of life not be impeded, that the dignity of living organisms not be violated. Unlike Greek thinkers in the Platonist tradition, Aristotle seems not to have pursued such thoughts. He has nothing to say (or nothing that survives) about the moral case for vegetarianism, or about the

humane treatment of animals more generally. And yet, if we feel wonder looking at a complex organism, that wonder at least suggests the idea that it is good for that being to persist and flourish as the kind of thing it is. This idea is at least closely related to an ethical judgment that it is wrong when the flourishing of a creature is blocked by the harmful agency of another. That more complex idea lies at the heart of the capabilities approach.

So I believe that the capabilities approach is well placed, intuitively, to go beyond both contractarian and Utilitarian views. It goes beyond the contractarian view in its starting point, a basic wonder at living beings, and a wish for their flourishing, and for a world in which creatures of many types flourish. It goes beyond the intuitive starting point of Utilitarianism because it takes an interest not just in pleasure and pain, but in complex forms of life and functioning. It wants to see each thing flourish as the sort of thing it is.

Laws and political principles are made by humans. So how can animals be full subjects of justice, when they are not among those who participate in the framing of principles of justice? This way of putting things derives from the contractarian perspective on justice; it is foreign to the capabilities approach. Social contract doctrines, as I have often observed, run together two questions that the capabilities approach keeps carefully distinct. For the contractarian, the question "Who makes the laws and principles?" is treated as having, necessarily, structurally, the same answer as the question "For whom are the laws and principles made?" This is so because of the contractarian's whole picture of social cooperation: people under pressure get together to secure their mutual advantage, by accepting constraints that are dictated by equal respect for the other parties to the bargain. That initial device ensures that they will be considering themselves as the primary if not the only subjects of the principles of justice

that they subsequently design. Other beings can enter only derivatively, through relations of concern and trusteeship.

But, once again, there is no reason why these two questions should be put together in this way. Once we understand that the point of justice is to secure a dignified life for many different kinds of beings, why shouldn't the people making the principles include nonhuman beings as full-fledged subjects of the principles they will choose? The capabilities approach, as so far developed for the human case, looks at the world and asks how to arrange that justice be done in it. Justice is among the intrinsic ends that it pursues. People are imagined looking at all the brutality and misery, the goodness and kindness, of the world and trying to think how to make a world in which a core group of very important entitlements, inherent in the notion of human dignity, will be protected. Because they look at the whole of the human world, not just people with resources and powers similar to their own, they are able to be concerned directly and nonderivatively with the good of people with mental disabilities. They want a world in which those lives will not be blighted, or at least blighted as little as possible. The fact that some people with mental disabilities cannot be party to the choice of principles does not suggest to users of this approach any good reasons why the laws should not be *for* and *about* them along with others.

Put another way, the point of social cooperation is not sought in the mutual advantage of "free, equal, and independent" people. Social cooperation (once again, sticking to the human case as so far developed) is seen as having a more capacious and diffuse set of ends, including the pursuit of justice and just interdependency for its own sake, for all sorts of different people, some of them free and some less free or differently free, some of them relatively independent and all in at least some ways dependent, some equal in capacity and others quite unequal in capacity (though this does not mean that they are not morally equal).

Cooperation itself is not seen as a matter of a bunch of similar "normal" people getting together to make a contract; instead, it has many facets, including many different types of dependency and interdependency. Prominent among the purposes of cooperation, and inherent in the approach's account of basic justice, will be prevention of the blighting of valuable natural powers. These features make it easy to extend the approach to include human-animal relations.

Let us now begin the extension. The purpose of social cooperation, by analogy and extension, ought to be to live decently together in a world in which many species try to flourish. (Cooperation itself will now assume multiple and complex forms.) The general aim of the capabilities approach in charting political principles to shape the human-animal relationship, if we follow the intuitive ideas of the theory, would be that no sentient animal should be cut off from the chance for a flourishing life, a life with the type of dignity relevant to that species, and that all sentient animals should enjoy certain positive opportunities to flourish. With due respect for a world that contains many forms of life, we attend with ethical concern to each characteristic type of flourishing, and strive that it not be cut off or fruitless.

Unlike contractarianism, this approach involves direct obligations of justice to animals; it does not make these derivative from or posterior to the duties we have to fellow humans. It treats animals as subjects and agents, not just as objects of compassion. Unlike Utilitarianism, it respects each individual creature, refusing to aggregate the good of different lives and types of lives. No creature is being used as a means to the ends of others, or of society as a whole. The capabilities approach also refuses to aggregate across the diverse constituents of each life and type of life. Thus, unlike Utilitarianism, it can keep in focus the fact that each species has a different form of life and different ends; moreover, within a given species, each life has multiple and heteroge-

neous ends. (The focus on sentient creatures will be defended below.)

In the human case, the capabilities approach does not operate with a fully comprehensive conception of the good, because of the respect it has for the diverse ways in which people choose to live their lives in a pluralistic society. It aims at securing some core entitlements that are held to be implicit in the idea of a life with dignity, but it aims at capability, not functioning, and it focuses on a small list. In the case of human-animal relations the need for restraint is even more acute, since animals will not in fact be participating directly in the framing of political principles, and thus there is much danger of imposing on them a form of life that is not what they would choose. We would do best, then, to seek a limited set of political principles focused on enabling or protecting, not a comprehensive conception of good animal lives.

v. Methodology: Theory and Imagination

Before we can go further, however, we need to face some difficult questions about proper philosophical method. The capabilities approach follows the method described by John Rawls as the method through which we aim at "reflective equilibrium."²⁶ Rawls, correctly, traces this method to Aristotle, as well as to Sidgwick. In a process of Socratic self-scrutiny, we scrutinize our moral judgments and intuitions, asking which are the "deepest and most basic," as Aristotle would say, the "considered judgments," as Rawls would say. We then investigate a variety of theories that claim to organize these and other judgments. We hold nothing fixed; we seek consistency and fit among theory and judgments taken as a group. We may revise our considered judgments, if the conclusions of an otherwise powerful theory entail this (although usually we will do so only if other judgments, per-

haps more general judgments, support the theory). We may also revise or reject a theory, in the light of our considered judgments. Nothing is held fixed in advance—not even how much weight to attach to formal principles such as simplicity and consistency.²⁷ The best and only judge is each person, and the community of concerned judges.²⁸

One aspect of the Aristotelian type of method that is not emphasized in Rawls's discussion is its use of the imagination. Frequently we inform ourselves about alternative possibilities by imagining the form of life that these possibilities would construct, asking ourselves what suffering or flourishing there would be in lives governed by these political principles.²⁹ Rawls's Original Position requires such an exercise, since the parties must take the measure of life opportunities in the different social positions they construct for people.³⁰ Such imaginings will not be used uncritically; always, they are held up against both theories and considered judgments. And yet they can often inform us, as we consider what is at stake in the choice to follow a theory, or to revise one of our considered judgments.

How would such an approach proceed in investigating the ethical claims of nonhuman animals? There is a difficulty about the imagination that looms less large in the human case. As Peter Singer and other Utilitarians have emphasized, the imagination can be a very self-serving instrument. All literary depictions of the lives of animals are made by humans, and it is likely that all our empathic imagining of the experiences of animals is shaped by our human sense of life. For such reasons, Utilitarians tend to prefer a pure reliance on principle: once we lay out the dictates of the correct theory, we simply apply it to the case of animals, and there is no need for slippery exercises of imagining animal suffering.

In practice, of course, no Utilitarian actually argues this way. For it would be difficult to see why Utilitarianism was in fact the

correct theory without some reliance on considered judgments and without some imagining of the sufferings of living creatures. If this is true in general, it is doubly true for the case of animals, who cannot offer their own judgments and theories, and whose lives we must somehow assess from our imperfect human point of view. How else, then, could we proceed except by imagining the lives of animals and their suffering? Jeremy Bentham lived at close quarters with animals, interacted with them often, and took delight in these playful interactions, in which such imagination as Bentham possessed was much in evidence.³¹ Peter Singer's writing contains some of the most powerful invitations to imagine animal suffering ever written. If even those whose theoretical perspective militates against reliance on imagination do in fact consult it, albeit critically, so much is clearly true of theorists from other starting points. Good imaginative writing has been crucial in motivating opposition to cruelty toward animals.

All human descriptions of animal behavior are in human language, mediated by human experience. As Singer emphasizes, there is a real risk of getting things wrong through anthropomorphic projection. But we should remind ourselves that the same problems vex our human relationships. A real human being, as Proust says, imposes "a dead weight that our sensitivity cannot remove,"³² an opaque area of mystery that even the most refined other mind can never fully penetrate. Only in our own imaginations can we experience the inner life of anyone else. From this observation Proust derives the startling claim that only literary artistry gives us access to another human mind: what we do when we read a novel is what we have to do always, if we are ever to endow another shape with life.³³ All of our ethical life involves, in this sense, an element of projection, a going beyond the facts as they are given. It does not seem impossible

for the sympathetic imagination to cross the species barrier—if we press ourselves, if we require of our imaginations something more than common routine. As J. M. Coetzee's imaginary character Elizabeth Costello, a novelist lecturing on the lives of animals, says, "The heart is the seat of a faculty, *sympathy*, that allows us to share at times the being of another."³⁴

So: the capabilities approach uses sympathetic imagining, despite its fallibility, to extend and refine our moral judgments in this area. It also uses theoretical insights about dignity to correct, refine, and extend both judgments and imaginings. There is no surefire recipe for doing this right; but we have to begin somewhere, and it is likely that any thoroughgoing and serious moral exercise will do better in this area than the self-serving and half-baked thinking that most of us typically do on this topic.

Although such a method can be used in conjunction with theories of many different types,³⁵ I believe that this complex holistic method, with its inclusion of narrative and imagination, does ultimately support the choice of the capabilities approach over other theories in the area of animal entitlements. Imagining and storytelling remind us in no uncertain terms that animal lives are many and diverse, with multiple activities and ends both within each species and across species. It would be odd if a method like this were to yield the conclusion that there is just one big thing that matters in all life, such as sentience or rationality. Imagination also informs us about asymmetries of power that we might miss if we did not closely investigate the texture of lives and relationships. Finally, imagining the lives of animals makes them real to us in a primary way, as potential subjects of justice, whereas a contractarian approach, focused on reciprocity between beings endowed with a specifically human type of rationality, is bound to make them only derivatively important.

vi. Species and Individual

What should the focus of these commitments be? It seems that here, as in the human case, the focus should be the well-being and dignity of the individual creature. The capabilities approach attaches no importance to increased numbers as such; its focus is on the well-being of existing creatures, and the harm that is done to them when their powers are blighted. Of course creatures cannot flourish in isolation, and thus for animals, as for humans, the existence of suitable groups and communities is an important part of the flourishing of individuals.

What about the continuation of species? Here my answers are tentative, and I am sure that they will not satisfy many thinkers about ecology. Further work clearly remains to be done in this area. But as of now I believe that the continuity of species would have little moral weight as a consideration of *justice* (though it may certainly have aesthetic significance, scientific significance, or some other sort of ethical significance), if species were becoming extinct in ways that had no impact on the well-being of individual creatures. But species are becoming extinct, typically, because human beings are killing their members and damaging their natural environment. Thus, damage to species occurs through damage to individuals. I believe that this individual damage should be the focus of ethical concern within the capabilities approach. Biodiversity as such may be a good, but what sort of good it is, and what its relation may be to political justice, seem to be questions best left for another inquiry. If I am right about what makes something a question of *justice*, rather than some other sort of question, animals are subjects of justice to the extent that individual animals are suffering pain and deprivation.

Should an endangered species get enhanced consideration for its individual members, as is now done when members of en-

In Chapter 3 much was made of the fact that the capabilities approach uses a political concept of the person that is different from that used in Kantian contractarian approaches. This Aristotelian conception situates human morality and rationality firmly within human animality, and insists that human animality itself has dignity. There is dignity in human neediness, in the human temporal history of birth, growth, and decline, and in relations of interdependency and asymmetrical dependency, as well as in (relatively) independent activity. That conception of the person is used in close connection with the holistic method of justification, and is one of the primary ways in which citizens imagine their humanity for political purposes.

We must now extend this aspect of the view. As we have said, laws and political principles are made by humans. So the political conception of the person as maker of law is still the Aristotelian conception we articulated in Chapter 3. But since the capabilities view does not run together the two questions of justice (who makes the principles, and for whom the principles are made), it now needs a different political conception of the creature as subject of justice. The fact that the human maker of principles is imagined as a needy, often dependent animal being prepares the way for that extension. People who see themselves in this way, and who do not pride themselves on an allegedly unique characteristic, are more likely than is the contractarian to see themselves as making principles for an interlocking world that contains many types of animal life, each with its own needs, each with its own dignity. Thus the conception of the creature as a subject of justice is exactly that: the conception of a world in which there are many different types of animals striving to live their lives, each life with its dignity. It is not a single conception at all, because the plurality of forms of life is very important to the whole idea.

dangered species get special protections for their habitats? There are times when something analogous to this happens in the human case. The Amish parents who were plaintiffs in *Wisconsin v. Yoder*, asking for permission to withdraw their children from the last two years of compulsory public education, said that their free exercise of religion was threatened by the danger that their entire way of life might cease to exist.³⁶ That was why those particular individuals had a free exercise claim. Through this argument they won a special concession in the education of their children. In a similar way, I think that one might justify a special attention to endangered species as a way of showing concern for the reproductive capabilities and the flourishing generally of the individual members of that species. Enhanced attention to habitat and reproductive environment is necessary, not so much for the sake of future individuals who are not yet born, but in order to continue the way of life that existing individuals are living. At any rate, this would be the focus of ethical concern where basic justice is in view. To the extent that we adopt a just savings principle in the human case—a topic on which I believe Rawls has written convincingly³⁷—we may adopt an analogous principle, as well, for the animal case. Such a focus on individuals does not rule out the idea that other principles, whether aesthetic or ethical or scientific, might dictate a concern for the continuity of species as a good in its own right.

The view, then, is individualistic in making the living creature, not the group or the species, the basic subject of justice. But there is another type of individualism that we must now consider: namely the view known as "moral individualism," the view that species membership in itself is of no moral relevance and that all moral relevance lies in the capacities of the individual.

Almost all ethical views of animal entitlements hold that there are morally relevant distinctions among forms of life. Kill-

ing a mosquito is not the same sort of harm as killing a chimpanzee. But the question is, what sorts of differences are relevant for basic justice? Singer, following Bentham, puts the issue in terms of sentience. Animals of many kinds can suffer bodily pain, and it is always bad to cause pain to a sentient being. If there are nonsentient or barely sentient animals—and it appears that crustaceans and mollusks, as well as sponges and the other creatures Aristotle called "stationary animals,"³⁸ are such animals—there is either no harm or only a trivial harm done in killing them. Among the sentient creatures, moreover, there are some who can suffer additional harms through their cognitive capacity: a few animals can foresee and mind their own death, and others will have conscious, sentient interests in continuing to live that are frustrated by death. The painless killing of an animal that does not foresee its own death or take a conscious interest in the continuation of its life is, for Singer and Bentham, not bad, for all badness, for them, consists in the frustration of interests, understood as forms of conscious awareness.³⁸ Singer is not, then, saying that some animals are inherently more worthy of esteem than others; he is simply saying that, if we agree with him that all harms reside in sentience, the creature's form of life limits the conditions under which it can actually suffer harm.

Tom Regan, who defends a rights-based view of animal entitlements,³⁹ refuses to admit differences of intrinsic value within the group of animals he considers, which includes all mammals who have reached the age of one year. All these, he holds, have intrinsic value, and intrinsic value is not a matter of degree. Nonetheless, he, too, gives conscious awareness a large place in his account of intrinsic value; his argument that all mammals who have reached one year have it is a large part of the support he provides for the claim that they do all have intrinsic value.

James Rachels, whose view has elements of both Utilitarian-

ism and Aristotelianism,⁴⁰ holds, like Singer, that the complexity and level of a creature's form of life make a difference when we think what forms of treatment are and are not permissible. But the harms he considers do not all reside in sentience, as they do for Singer: thus, he is prepared to count certain forms of constraint on free movement, say, as harmful whether or not the animal is aware of them as bad or limiting, or has conscious interests in free movement. But he is like Singer in his more general account of the *why* in which the complexity of forms of life matters. It is not that some creatures are more wonderful or admirable per se, from some detached point of view in the universe. (That may be what Aristotle believed.) Instead, the level of complexity of a creature affects what can be a harm for it. What is relevant to the harm of pain is sentience; what is relevant to the harm of a specific type of pain is a specific type of sentience (for example, the ability to imagine one's own death). What is relevant to the harm of diminishing freedom is a capacity for freedom or autonomy. It would make no sense to complain that a worm is being deprived of autonomy, or a rabbit of the right to vote.

To summarize, moral individualism of the type espoused by Singer and Rachels makes two claims that we must now assess: first, the claim that differences of capacity affect entitlements not by creating a hierarchy of worth or value, but only by affecting what can be a good or a harm to a creature; second, the claim that species membership itself is of no significance in affecting what can be a good or harm to a creature—only the capacities of the individual count.

The first claim is powerful, and the capabilities approach can easily agree with it. We should not follow Aristotle in saying that there is a natural ranking of forms of life, some being intrinsically more worthy of support and wonder than others. Considerations of intrinsic worth might have ethical significance of

some other kind in some comprehensive conceptions of the good life. It seems plausible for a comprehensive ethical view to judge that some activities and pleasures are "higher" and some "lower," some lives richer and some more impoverished; that it is better to live as a chimpanzee than to live as a worm, were that choice of lives a coherent thought experiment. But it seems dubious that these considerations should affect questions of basic justice and the political principles with which we frame an approach to those questions.

Here, then, we should agree with Rachels, putting his point in a slightly different way. Because the capabilities approach finds ethical significance in the unfolding and flourishing of basic (innate) capabilities—those that are evaluated as both good and central—it will also find harm in the thwarting or blighting of those capabilities. More complex forms of life have more and more complex (good) capabilities to be blighted, so they can suffer more and different types of harm. We can agree with Rachels that nothing is blighted when a rabbit is deprived of the right to vote, or a worm of the free exercise of religion. Level of life is relevant not because it gives different species differential worth per se, but because the type and degree of harm a creature can suffer varies with its form of life.

Is there a threshold beneath which the blighting of capabilities is not a harm? It seems minimally bad to kill a mosquito, because it appears that a mosquito does not feel pain. It is easy for Singer to explain this conclusion; it is more difficult for the capabilities theorist to do so, since the good resides in opportunities for flourishing, not in sentience alone. Why isn't the mosquito's ability to continue living one of the capacities that it is bad to cut off? Here I believe that the capabilities approach should admit the wisdom in Utilitarianism.⁴¹ Sentience is not the only thing that matters for basic justice; but it seems plausible to consider the possession of sentience as a threshold condition for member-

ship in the community of beings who have entitlements based on justice. If we abstract from the harm that mosquitoes do to other animals (I shall consider this below), there would seem to be something wanton and unpleasant about devoting a lot of energy to killing mosquitoes. Harmless insects of similar capacities should not be unnecessarily killed. But is this a matter of basic justice, a matter that political principles should be framed about? I believe that we have enough on our plate if we focus for the time being on sentient creatures.

Given the fact that pleasure and pain are not the only things of intrinsic value for the capabilities approach, the approach, strictly speaking, should not say that the capacity to feel pleasure and pain is a necessary condition of moral status. Instead, we should adopt a disjunctive approach: if a creature has *either* the capacity for pleasure and pain *or* the capacity for movement from place to place⁴² *or* the capacity for emotion and affiliation *or* the capacity for reasoning, and so forth (we might add play, tool use, and others), then that creature has moral standing. Science fiction reminds us that there are intelligent creatures who lack the ability to feel pleasure and pain. So does religion: God, in many traditional views, is a rational being who lacks sentience. But nature as we know it is not like science fiction or theology. All the creatures that have one of the other salient capabilities mentioned above also have the capacity to feel pleasure and pain. Aristotle reminds us that this is no accident: for sentience is central to movement, affiliation, emotion, and thought. We may, however, admit the science fiction possibility for theoretical purposes.

Now let us turn to the second claim. For the Utilitarians, and for Rachels, the species to which a creature belongs has no moral relevance. Utilitarian writers are fond of comparing apes to young children and to human beings with mental disabilities. The capabilities approach, by contrast, with its talk of character

istic functioning and forms of life, seems to attach some significance to species membership as such. I argued in Chapter 3 that the species to which Sessa belongs has moral relevance in describing what capabilities society should extend to her, either directly or through guardianship.

We should admit, first of all, that we need to know a great deal more than we presently do about the capacities of animals. Second, we should admit that there is much to be learned from reflection on the continuum of life. Rachels' study of Darwinism and its ethical implications shows us in a very convincing way that the world is not the way the Stoics, and the Judeo-Christian tradition, see it, with human beings sharply set off from the rest of nature.⁴³ Capacities crisscross and overlap; a chimpanzee may have more capacity for empathy and perspectival thinking than a very young child, or an older autistic child. And capacities that humans sometimes arrogantly claim for themselves alone are found very widely in nature: Rachels gives a telling account of Darwin's important essay on the practical intelligence of the flatworm. Such reflection helps us to see ourselves more correctly and less arrogantly. It helps us to see reason as an animal capacity whose dignity is not opposed to animality, but inherent in it. It helps us to see compassion and altruism as characteristics that extend broadly in nature, rather than special outgrowths of a God-given moral nature.⁴⁴

On the other hand, it seems wrong to conclude from this examination that species membership is morally and politically irrelevant. A child with severe mental impairments is actually very different from a chimpanzee, though in certain respects some of her capacities may be comparable. Her life is lived as a member of the human community and not some other community; it is there that she will either flourish or not flourish. The possibilities of flourishing in that community are defined around species norms. Sessa and Jamie do not have the option of going off

mal social capacity (such as Mr. Spock). Humans expect certain things of him, and so education must nourish those capacities, even if it is very expensive to devise such forms of education. The relevance of the species norm is that it defines the context, the political and social community, in which people either flourish or do not. So they need to have support in order to attain the core capabilities that form part of that species norm, as politically defined.

In short, the species norm (duly evaluated) tells us what the appropriate benchmark is for judging whether a given creature has decent opportunities for flourishing. The same thing goes for nonhuman animals: in each case, what is wanted is a species-specific account of central capabilities (which may include particular interspecies relationships, such as the traditional relationship between the dog and the human), and then a commitment to bring members of that species up to that norm, even if special obstacles lie in the way of that.

Take Bear for example. Bear was the highly intelligent and loving German Shepherd who lived for eight years in the home of Cass Sunstein and Ellen Ruddick-Sunstein. When Bear began to age, his hips began to fail. He was not in pain, but he could not move as he formerly could; increasingly, he had to drag his hind quarters along. Because he was not in pain, moral individualism probably would not have recommended any special treatment for Bear. His family thought otherwise, providing him with a newly engineered dog wheelchair that supported his hindquarters, making it possible for him to roll his body along by walking on his front legs. Bear is analogous to Jamie and Sesha: each needs unusual types of support in order to attain, as much as possible, a species-specific norm of flourishing. Mobility is a key part of flourishing for dogs, in a way that it is not for sponges. Having access to movement was an essential part of a life with dignity for Bear. Thinking of the characteristic func-

and living in a nonlinguistic community of primates; for this reason, their disabilities with respect to linguistic capacity must be addressed by society: in Jamie's case, by specially designed education and physical therapy; in Sesha's, through relations of guardianship. Moreover, the fact that their disabilities create impediments to species-typical ways of flourishing creates a moral imperative for society: such impediments should be treated and cured, where possible, even if the treatment is expensive. Such issues are obscured by the facile comparison of Sesha and Jamie to chimpanzees. For chimpanzees, language use is a frill, constructed by human scientists; their own characteristic mode of flourishing in their own community does not rely on it. For Sesha and Jamie, some access to language, preferably through one's own development, but, where that is not possible, through guardianship, is essential to a dignified life. Each can flourish only as a human being. They have no option of flourishing as happy chimpanzees.

Arthur's case adds a fresh dimension to the problem. Arthur used to have less social capacity than some chimpanzees, according to experiments on perspectival thinking. There is no non-human animal that is even closely comparable to Arthur, whose linguistic and mathematical capacities are very high. Moral individualism appears to suggest that for normative purposes we treat Arthur as a *swi generis* being, not really fitting into any kind; we should simply develop the mixed capacities he has, not making any special effort in any one area. But in fact, Arthur will flourish, if he does, as a human being; and that fact means that special efforts must be made to develop his social capacities. It is clear that without such efforts he will not form friendships, wider social relationships, or useful political relationships. Such a lack matters for Arthur, because the human community is his community. He has no option to go off and search somewhere in the universe for a community of intelligent aliens with mini-

tioning and interactions of dogs helps us to see where unusual support for individuals with disabilities is needed.

To say this does not entail that humans should always take on the task of supporting all the animal capabilities in this direct and somewhat interventionist way. For dogs, however, with rare exceptions, there is no option to flourish in an all-dog community; their community is always one that includes intimate human members, and so it is obvious that human support for their capabilities is morally permissible and in some cases required. Moral individualism says too little to guide us in such matters.

vii. Evaluating Animal Capabilities: No Nature Worship

In the human case, the capabilities view refuses to extract norms directly from some facts about human nature. We should know what we can about the innate capacities of human beings, and this information is valuable in telling us what our opportunities are and what our dangers might be. But we must begin by evaluating the innate powers of human beings, asking which ones are the good ones, and the ones that are central to the notion of a decently flourishing human life, a life with human dignity. Thus not only evaluation but also ethical evaluation are put into the approach from the start. Many things that are found in human life are not on the capabilities list. The political conception does not have the job of fostering greed or making sure that crime and brutality get a chance to flourish, although all these activities are surely based in human powers. The conception of flourishing is thoroughly evaluative and ethical; it holds that the frustration of certain tendencies is not only compatible with flourishing, but actually required by it.⁴⁵

There is a danger in any theory that alludes to the characteris-

tic flourishing and form of life of a species. This is the danger of romanticizing nature, or suggesting that things are in order as they are, if only we humans would stop interfering. This danger looms large when we turn from the human case, where it seems inevitable that we will need to do some moral evaluating, to the animal case, where evaluating is elusive and difficult, if it can be done at all. Inherent in at least some environmentalist writing is a picture of nature as harmonious and wise, and of humans as wasteful overreachers who would live better were we to get in tune with this fine harmony. This image of nature is already very sensibly attacked by John Stuart Mill in his essay "Nature," which points out that nature, far from being morally normative, is actually violent, heedless of moral norms, prodigal, full of conflict:

In sober truth, nearly all the things which men are hanged or imprisoned for doing to one another, are nature's every day performances. Killing, the most criminal act recognized by human laws, Nature does once to every being that lives; and in a large proportion of cases, after protracted tortures such as only the greatest monsters whom we read of ever purposely inflicted on their living fellow-creatures. If, by an arbitrary reservation, we refuse to account anything murder but what abridges a certain term supposed to be allotted to human life, nature also does this to all but a small percentage of lives, and does it in all the modes, violent or insidious, in which the worst human beings take the lives of one another. Nature impales men, breaks them as if on the wheel, casts them to be devoured by wild beasts, burns them to death, crushes them with stones like the first Christian martyr, starves them with hunger, freezes them with cold, poisons them by the quick or slow venom of her exhalations, and has hundreds of other hideous deaths in reserve, such as the ingenious cruelty of a Nabis or a Domitian never surpassed.⁴⁶

We may add that nature does these unpleasant things not only to human beings, but also to other animals, whose relationship to one another, and to the natural environment, is hardly harmonious.

Nor is Mill's view of things merely a product of his human-focused perspective. It lies at the heart of much modern ecological thinking. To quote from a leading expert in environmental protection, Daniel Botkin:

There has been a revolution in environmental sciences. At the heart of this revolution is a shift from the old idea of the constancy of Nature which is a part of the ancient myth of the Balance of Nature. Briefly stated, the Balance of Nature myth has three basic features: First, Nature, undisturbed by human influences, achieves a permanency of form and structure that persists indefinitely. Second, this permanent condition is the best condition for Nature: best for other creatures, best for the environment, and best for humans. Third, when disturbed from this perfect state, Nature is capable of returning to it. The idea of the Balance of Nature is deeply rooted in our history, civilization, and religions . . . Unfortunately, the Balance of Nature myth is not true. During the past 30 years, this has been demonstrated as part of the revolution in environmental sciences.⁴⁷

Botkin goes on to support this claim in many ways, arguing, *inter alia*, that many of the natural ecosystems that we admire as such actually sustain themselves to the extent that they do only on account of various forms of human intervention. He concludes that we cannot just leave nature alone and expect it to manage itself; instead, we must have precise information about each species, and a precise sense of what our goals should be, supported with good normative arguments. In the process, he argues, we should not repudiate human changes as if they are by

definition bad: for they just might be what would make an ecosystem survive.

These issues take us well beyond the entitlements of animals, which are our focus. They do tell us, however, that a no-evaluation view, which extracts norms directly from observation of animals' characteristic ways of life, is probably not going to be a helpful way of promoting the good of animals. Instead, we need a careful evaluation of both "nature" and possible changes. Respect for nature should not and cannot mean just leaving nature as it is, and must involve careful normative arguments about what plausible goals might be. It makes sense to begin with the best studies we can devise of what animals do when left to their own devices, for how else are we to understand how they conceive their own flourishing, or how they pursue flourishing, whether they conceive it or not? But that is the beginning, not the end, of evaluation.

In the case of humans, the primary area in which the political conception inhibits or fails to foster tendencies that are pervasive in human life is the area of harm to others. Animals, of course, pervasively cause harm, both to members of their own species and, even more often, to members of other species. These harm-causing capabilities are of two sorts. In one sort of case, an animal directly attacks and kills another, often for food; let us call this the case of the predator. In another case, some characteristic activity of the animal causes harm to other species (bearing disease, killing crops), even though the animal is just going about its life without hostile intent or even hostile behavior; let us call this the case of the mosquito.

In both of these cases, the capabilities theorist will have a strong inclination to say that the harm-causing capabilities are not among those that should be protected by political and social principles. But to say this—if we preserve the general conception of core capabilities that we employ in the human case—

would require us to judge that these capabilities, and the associated functionalities, are not central to the ability of the creature to live a flourishing and dignified life as the sort of creature it is. This judgment, however, is difficult to make, if we are giving subjective experience any role at all in saying what a creature's flourishing is. The capabilities approach is not Utilitarian, and does not hold that all good is in sentience; nor does it extract norms directly from human desire or preference. Instead, it uses a freestanding moral argument to support its claims about the connection between capabilities and a life with human dignity. But desire is not utterly repudiated: the approach (in the human case) does use the results of the best informed-desire approaches as a cross-check on the capabilities list, on the assumption that no view that systematically frustrates human desire can be stable over time.⁴⁸ If we apply this approach to other species, it will be difficult to maintain that a creature who feels frustration and pain at the inhibition of its predatory capacities is living a flourishing life. A human being can be expected to learn to flourish without homicide and, let us hope, even without most killing of animals. But a lion who is given no exercise for its predatory capacity appears to suffer greatly, and there is no chance that education or acculturation would remove this pain.

Here the capabilities view may, however, distinguish two aspects of the capability in question. The capability to kill small animals, defined as such, is not valuable. Basic political principles can omit it, and even inhibit it. But the capability to exercise one's predatory nature, avoiding the pain of frustration, may well have value, if the pain of frustration is considerable. Zoos have learned how to make this distinction. Noticing that they were giving predatory animals insufficient exercise for their predatory capacities, they had to face the question of the harm done to smaller animals by allowing these capabilities to be exercised. Should they give a tiger a tender gazelle to crunch on?

The Bronx Zoo has found that it can give the tiger a large ball on a rope, whose resistance and weight symbolize the gazelle. The tiger seems satisfied. People with predatory house animals (cats especially) are familiar with such stratagems. (Competitive sports probably play a related role in human life.) Wherever predatory animals are living under direct human support and control, these solutions seem the most ethically sound.

As for the case of the animal that is not aware of killing anything, but whose normal activities spread disease or kill plants: some of these animals are beneath the threshold of sentience, nor do they have any of the other abilities that figure in our disjunctive account of moral standing; so we should not mind greatly if killing them is the way to protect ourselves and others. On the other hand, if it is possible to sterilize them and prevent spread that way, rather than through killing, it seems all the better to do that. With animals above the threshold of sentience, rats for example, it seems to me that here, too, we may admit the wisdom in Utilitarianism and say that the primary goal should be painless humane killing, if there has to be killing—and there might have to be, to prevent the spread of disease or damage to human children and other animals. On the other hand, once again, sterilization and other nonviolent methods are morally preferable.

Apart from the issue of harm to others, it seems best for humans not to engage in too much second-guessing of animal capabilities, but to try to observe what each creature actually considers important, on the basis of what it does. The distortions that make preference-based approaches highly undependable in the human case are the result of socialization in complex human societies, with their hierarchies and their codes of what is fitting and proper. Although we do find such adaptive preferences in the lives of animals who live in a context of pervasive human influence, they are likely to be less common in other animal lives.

Part of respect for other species is a willingness to look and study, learning the internal rhythms of an animal community and the sense of value the way of life expresses.

viii. Positive and Negative, Capability and Functioning

In the human case, there is a traditional distinction between positive and negative duties that it seems important to criticize. Traditional moralities hold that it is wrong to harm another by aggression or fraud, but that letting people perish of hunger or disease is not morally problematic, even though a more equitable distribution of social resources could solve these problems. We have a strict duty not to commit bad acts, but we have no correspondingly strict duty to stop hunger or disease or to give money to promote their cessation.⁴⁹

The capabilities approach calls into question both this positive/negative distinction and the distinction between matters of justice and matters of material aid that typically underlies it. All the human capabilities cost money to support. This is just as true of protecting property and personal security as it is of health care, just as true of the political and civil liberties as it is of providing adequate shelter. As we saw in Chapter 5, the capabilities approach criticizes the approach to human rights that defines rights in terms of "negative liberty" alone, and also the distinction between "first-generation" and "second-generation" rights that is often linked to the "negative liberty" conception of political rights. The state that protects capabilities has affirmative tasks in every area, and in every area these jobs require money, which typically must be gathered through taxation that is to some extent redistributive. Both the distinction between state action and noninterference and the distinction between justice and material aid need to be criticized if we are to make progress. Even the concept of redistribution, which I have just employed,

needs to be called into question, since it rests on the prior determination that people own the unequal amounts they have. Many views of ownership in the history of philosophy, from Grotius to Mill, have called this judgment into question, saying that the part of a person's holdings that is needed to support other members of a society (or world, in the case of Grotius) are actually owned by the people who need them, not by the people who are holding on to them.

In the case of animals, however, there might appear to be room for a positive/negative distinction that makes some sense. It seems at least coherent to say that the human community has the obligation to refrain from certain egregious harms toward animals, but that it is not obliged to support the welfare of all animals, in the sense of ensuring them adequate food, shelter, and health care. Fulfilling our negative duties would not be enough to ensure that all animals have a chance to pursue flourishing in their own way, but it might be that nothing more is morally required of us: the species themselves have the rest of the task of ensuring their own flourishing. We might further defend such a conclusion on the grounds that we would just mess up the lives of animals if we tried to be benevolent despots of the world. More adequately, we could defend it by saying that the very idea of a benevolent despotism of humans over animals, supplying their needs, is morally repugnant: the sovereignty of species, like the sovereignty of nations, has moral weight. Part of what it is to flourish, for a creature, is to settle certain very important matters on its own, without human intervention, even of a benevolent sort.

There is much truth in this imagined argument. And certainly, if our political principles simply ruled out the many egregious forms of harm to animals, they would have done quite a lot. But the rebuttal, and the distinction between negative and positive duties that it suggests, cannot be accepted in full. First

of all, large numbers of animals live under humans' direct control: domestic animals, farm animals, and those members of wild species that are in zoos or other forms of captivity. Humans have direct responsibility for the nutrition and health care of these animals, as even our defective current systems of law acknowledge.⁵⁰ Animals in the "wild" appear to go their way unaffected by human beings. But of course that can hardly be so in many cases in today's world. Human beings pervasively affect the habits of animals, determining opportunities for nutrition, free movement, and other aspects of flourishing. Even a person who wanted to deny that we had responsibilities to animals in the "wild" before this century ought to grant that our pervasive involvement with the conditions of animal flourishing gives us such responsibilities now.

Moreover, as Botkin points out, human intervention is actually necessary to maintain "the balance of nature" in many cases. Preserving species, for example, requires human action, even when the threat to the species is not human in origin. Should human beings fail to protect animals in ways that are available, unless and until a clear determination is made that the problem the animals are facing is human in origin? In many cases it clearly is; often, however, the factors involved are so numerous that it is difficult to tell. Thus, while we may still maintain that one primary area of human responsibility to animals is that of refraining from a whole range of bad acts (to be discussed in section x), we cannot plausibly stop there. We have the ability to make countless choices that spoil or preserve the habitats of animals. In many cases, too, we have the power to save animals who might otherwise die of disease or the aftereffects of a natural disaster. It seems implausible to think that we have no duties of material aid in such cases; the only question should be how extensive they are, and how to balance them against appropriate respect for the autonomy of a species. This question is very simi-

lar in form to the question of foreign aid, and must, like that question, be dealt with cautiously, with delicate balancing of the various factors involved. As in the foreign-aid case, the best form of aid is a form that preserves and enhances autonomy, rather than increasing dependency. It would be a bad result if all animals ended up in zoos, completely dependent on human arrangements.

In the human case, one way we respect autonomy is to focus on capability, not functioning, as the legitimate political goal. But we also insisted that for children, and in some cases for people with lifelong mental disabilities, it was appropriate to aim at functioning instead, or to leave choice-making to a guardian. In general, paternalistic treatment is appropriate wherever the individual's capacity for choice and autonomy is compromised. This principle suggests that paternalism is usually appropriate when we are dealing with nonhuman animals. That conclusion, however, should be qualified by our previous endorsement of the idea that species autonomy, in pursuit of flourishing, is part of the good for nonhuman animals. Can the two principles be coherently combined, and, if so, how should this be done?

I believe that they can be combined, if we adopt a type of paternalism that is highly sensitive to the different forms of flourishing that different species pursue. It is no use saying that we should just let tigers flourish in their own way, given that human activity ubiquitously affects the possibilities for tigers to flourish, and, indeed, to live at all. This being the case, the only decent alternative to complete neglect of tiger flourishing is a policy that thinks carefully about the flourishing of tigers and what habitat that requires, and then tries hard to create such habitats. (In this way, the decent treatment of actual living tigers does turn out to be bound up with the preservation of species.)

In many cases, the intelligent and careful use of zoos and animal parks may well be part of a policy aimed at giving mem-

bers of these species decent lives. Many animals will do better in an imaginative and well-maintained zoo than in the wild, at least in present conditions of threat and scarcity. Especially when Country A cannot affect the behavior of Country B toward its animals, or ensure their flourishing in their natural habitat in Country B, zoos established in Country A may serve an invaluable function. Zoos, when well designed, can also build interspecies friendship by promoting education of young human beings. The long-term goal of policy should always, however, be preservation of at least some part of the creature's original habitat, and there is no way of doing this without consistent human intervention.

Domestic animals raise special problems. There is a romantic view of domestic animals that goes like this. These animals are being held prisoner by humans, and treated as mere property. The best thing for them would be simply to let them go to live in the wild as nature intended. The 2002 movie *Spirit* is one example of this fantasy: the wild horse bursts every barrier on the way to his freedom, and is happy only when he is running in the hills along with his fellow wild horses.

In reality, however, there are many species of animals for whom no plausibly flourishing existence in the wild is possible, given that they have evolved over millennia in symbiosis with human beings. Dogs, domestic cats, and most breeds of horse are in this situation, and many farm animals and some birds as well. Such animals should surely not be treated like mere objects for humans' use and control: their own flourishing and their own ends should be held constantly in view. But to say that is not to say that we ought simply to let them run off without human control. The morally sensible alternative is to treat them as companions in need of prudent guardianship, but endowed with entitlements that are theirs, even if exercised through guardianship. In other words, they may be treated as we currently treat

children and many people with mental disabilities, who have a large menu of rights and are in that sense far from being "mere property," although those rights must be exercised through human guardianship. (It seems to me that there is nothing evil about exchanging guardianship of animals through buying and selling, provided that their rights are duly protected in this way.)

The romantic fantasy also suggests that animals should not be made to do things that humans want them to do. This, too, is a delicate issue. The corresponding romantic fantasy about children has by now been thoroughly refuted, in the sense that we now know children will not learn in schools that allow them to choose what they want to learn. Children do not even toilet train themselves. We generally feel that it is culpable neglect not to toilet train, and in countless ways to discipline and educate, our children, since flourishing life requires possibilities for choice and excellence that are opened up only by compulsory education. A good education is sensitive to the individuality of the child, and is not rigid and above all not cruel or humiliating; but it does have goals and standards, and exacting though respectful discipline is often appropriate in leading children toward those goals. Why should we think differently about non-human animals? Most domestic animals profit from some training and discipline. Many, in addition, are capable of fine feats of athletic excellence if they are given the appropriate training. Surely cruel forms of training should be condemned, and the circus described in my case from Kerala does sound extremely cruel. But it does not seem to follow from this that horses should not be taught to jump hedges and fences, or to perform dressage, or to race; or that dogs capable of complicated feats, such as the border collie, should not be trained to be able to manifest those excellences. Here again, an intelligent, species-sensitive paternalism seems to give the right result. Such a paternalism will ponder the nature of each animal's flourishing,

thinking of the characteristic achievement not only of species, but of breeds, and will design an education, and a whole form of life, suited to those opportunities for excellence.

The capacities and personality of the individual animal must also be considered. Should the aging hunter-jumper be turned out to pasture? This is not a simple question. It is similar to the question whether an aging athlete should keep on doing the sport he or she is good at. No sensible answer is possible in the abstract: Martina Navratilova is one case, but there are many other cases. It is condescending to animals (as it is to aging humans) to assume that lazing around the pasture is their only good. In most cases, some sort of continued activity is better than lazing around, even when the animal cannot initiate the requisite sort of activity entirely on its own.

An intelligent, respectful paternalism cultivates spaces for choice. Animals are centers of activity, and no treatment is respectful that does not allow them to initiate activity on their own in some ways and to some degree. Any physical situation that is too confining is inimical to flourishing, as is any routine that does not allow play and uncoerced social interaction. Once again, the touchstone should be a respectful consideration of the species norm of flourishing and a respectful attention to the capacities of the individual.

In this difficult matter of control and freedom the capabilities approach, suitably extended, offers possibilities for the support of animal flourishing that are greatly superior to those offered by Utilitarianism, with its single-minded focus on pain and pleasure (or the fulfillment of conscious interests). Consideration of the species norm helps us to craft forms of paternalism that are respectful of animal needs, even when those needs are plural, qualitatively nonhomogeneous, and not necessarily present to the animal's consciousness.

I have said that nonintervention is not a plausible choice for

human beings, in a world where human choices ubiquitously affect animal lives. Some forms of affirmative protection are required. What implications should this observation have for the question of harm, as we have raised them in the previous section? It is one thing to say that a tiger in a zoo should not be given a gazelle to eat: but what about the tiger in the wild? Should humans police the animal world, protecting vulnerable animals from predators?

In one sense, this seems absurd. And yet to the capabilities approach, as to Utilitarianism, what happens to the victim is the key issue, not who does the bad thing. The death of a gazelle after painful torture is just as bad for the gazelle when torture is inflicted by a tiger as when it is done by a human being. That does not mean that death by tiger is as blameworthy; obviously it is not. But it does suggest that we have similar reasons to prevent it, if we can do so without doing greater harms. The capabilities approach is entitlement-based and outcome-oriented. One way of preventing gruesome deaths of animals at the hands of other animals is to put all vulnerable animals (or, alternatively, all predators) in protective detention, so to speak. But this alternative surely does greater harms, by closing off the very possibility of flourishing in the wild. So the question must remain a very difficult one, especially given that death by predation may be more gruesome than death by hunger or disease. It seems plausible that we have less responsibility to protect gazelles than we do to protect domestic dogs and cats, since we are the guardians of the latter and they have evolved in symbiosis with us. But where we can protect gazelles without the type of massive intervention that would be harm-producing, perhaps we should do so. The problem is that the needs of the predatory animal must also be considered, and we do not have the option of giving the tiger in the wild a nice ball on a string to play with.

One very complicated question in this area is that of control-

ling animal populations by the introduction of "natural predators": for example, an overpopulation of elks is controlled by the introduction of wolves. Is this method actually better than hunting? Humans may be able to preserve moral purity, but the elks may die a more painful death. Nor is the alternative—allowing the population to expand without limit and then to die off for lack of nutrition—one that promises good deaths for elks. Once again, any nonviolent method of population control (for example, by sterilization) is to be preferred to a violent method. But if such methods are not available, it would appear that the most painless death is to be preferred. R. M. Hare's cautious support of carefully controlled human predation seems plausible, and it certainly is not tantamount to the endorsement of hunting as sport in its current form, where animals are hunted without regard to overpopulation, and both agonizing fear and painful death are inflicted.⁵¹

Whatever we say about this difficult case, it shows us once again that the positive/negative distinction cannot be maintained in anything like its classical form. Humans are intervening in animals' lives all the time, and the question can only be what form this intervention should take. An intelligently respectful paternalism is vastly superior to neglect.

ix. Equality and Adequacy

Some writers on animal rights, in particular David DeGrazia in his impressive book,⁵² have pressed the question of equal consideration: Do animals' interests count on a par with those of humans? We have already said that animals have different interests from those of humans, and that those interests affect what can be a harm for an animal. Thus the denial of the right to vote is not a harm for nonhuman animals, or the denial of the freedom of religion. But that does not yet answer DeGrazia's question.

Answering the equality question is crucial for Utilitarians (among whom I number DeGrazia, although his form of Utilitarianism is much more subtle and multivalued than many), since Utilitarians produce an account of social welfare by aggregation, and thus must know how much each life and each interest within a life counts. The capabilities approach has to some extent a very different structure. Because it is a threshold-based approach, it focuses on adequacy rather than equality, in the human case as well as the animal case. That is, we specify a minimum threshold, below which justice has not been done. As I have frequently noted, the approach does not yet take a stand on how far it would be imperative to pursue equality of wealth and income above the threshold; thus it is a partial rather than a complete theory of justice even with regard to the items that it does discuss. Up to a point, then, the capabilities approach simply does not run into DeGrazia's question. What is minimally just is the securing to animals of each of the group of core capabilities (to be specified), up to some minimum threshold. For humans as for animals, conflicts may occur; and conflicts may also occur among the species. But if the threshold has been correctly set, any failure to secure a capability at a minimum level is a failure of justice, and we should work for a world in which those conflicts will not occur. I shall return to that question in section xi.

In Chapter 5, however, I argued that there are some capabilities in the human case that have not been *adequately* secured unless they have been *equally* secured. The freedom of religion, the political liberties, and access to education all fall within that class, or so I argued. I argued that the core idea of the approach is not simply the bare idea of human dignity but, instead, the idea of *equal* human dignity; and I argued that some inequalities in capability compromise that equality. Concerning other capabilities, such as housing rights and employment rights, adequacy

rather than equality is the appropriate social goal, since those capabilities do not have an intrinsic connection to dignity. Now we must ask: Are there animal capabilities that are like political liberty for humans, that is, they cannot be adequately secured unless they are secured on a basis of equality? And is this equality within the species only, or does adequacy require equality across the species?

The reason why we insisted on equality in certain areas, in the human case, was a concern with equal dignity and equal respect. Unequal voting rights or unequal religious liberties signal a society's failure of equal respect for persons, in a way that unequal housing, within the constraints of adequacy, probably does not. The reason why these capabilities are intrinsically connected to equal dignity pertains to ideas of nonhumiliation and reciprocity that seem peculiarly human; and of course those capabilities in general are important only for humans. It is difficult to imagine a nonhuman animal analogue, in which the unequal distribution of a capability compromises equal respect and reciprocity. I am inclined to think that the urgent issues of animal entitlement pertain more to adequacy than to equal distribution. If the minimum threshold of health protection or decent working conditions is correctly set, that is all that justice requires, although the threshold should be ample.

We have not, however, confronted the large question: Should the idea of dignity, in the case of nonhuman animals, be understood as an idea of fully equal dignity? Even if specific entitlements are conceived in terms more of adequacy than of equality, there is still this abstract question to consider, and considering it does seem to matter. It is really two questions: Should dignity within each species be understood as equal dignity, and should the dignity of creatures across the species line be understood as fully equal dignity? The former question seems less pressing, and an affirmative answer does not pose any difficult problems. The

implications of the latter question for situations of conflict are obvious.

Because the capabilities approach has such a different structure from DeGrazia's approach, the abstract question about equality does not play such a fundamental role for us as it must for him. He must think of a social calculus that aggregates the interests of all creatures, so he must therefore think all the time, and from the very start, about how much each creature shall count in this calculus. Since our focus is, instead, on bringing each creature up above a capability threshold specific to each species, not on aggregating, then in many contexts the approach can simply avoid this question, which appears very threatening from the point of view of establishing an overlapping consensus. The questions we need to face concern particular capabilities for particular creatures. Where those questions are concerned, it would appear that a high threshold of adequacy is the right approach. On the other hand, since many thinkers hold that human interests always take precedence over animal interests in case of conflict,⁵³ a position that appears to deny equal dignity across species, we need to have something to say about this issue.

It seems that there is no respectable way to deny the equal dignity of creatures across species. On the other hand, it is also clear that an overlapping consensus on a basic minimum of capability for animals, difficult already, will be made far more difficult if we supply it with such a foundation. So I would like at this point to treat the question of equal dignity as a metaphysical question on which citizens may hold different positions while accepting the basic substantive claims about animal entitlement that will subsequently be laid out here. Where humans are concerned, the idea of equal dignity is not a metaphysical idea, but a central element in political conceptions that have long been prevalent in modern constitutional democracies. Asking peo-

ple to agree to it does not involve asking them to disregard central elements in their religious or other comprehensive doctrine. Things are different across species, I believe: an idea of cross-species dignity is not a political idea that can readily be accepted by citizens who otherwise differ in metaphysical conception. It is a divisive metaphysical idea, in contradiction with many religious ideas of the soul, and so forth. So let us simply say that the idea of equal cross-species dignity is an attractive idea, indeed from many points of view a compelling idea, but that we do not need to rely on it in our political overlapping consensus. We may rely, instead, on the looser idea that all creatures are entitled to adequate opportunities for a flourishing life.

x. Death and Harm

So far we have avoided a large question: What sort of harm is death for animals of different types, and what harm is done by killing, for animals of different types? Utilitarians typically hold that painless death is not a harm to an animal, because animals cannot have conscious interests in the future such that these interests are frustrated by painless killing. Thus Bentham opposed all forms of cruelty but permitted the painless slaughter of animals for a useful purpose. R. M. Hare, similarly, holds that it is permissible to slaughter certain sorts of animals for food, so long as the slaughterer is genuinely painless: thus he will buy fish from his local fishmonger, who conks the fish soundly on the head with a mallet, but he would not eat fish caught in the usual painful way.

One problem with these Utilitarian arguments is that they may be wrong about the interests of animals. Some animals probably do have a sense of their life as a narrative extended over time, to at least some degree. Any animal with memory (as opposed to rote repetition) is likely to have such a sense. So it

would seem that death is a harm to those creatures, though it will often be a lesser harm than continuing to live in pain and decrepitude. People's treatment of animals whom they love, whether dogs or cats or horses, usually displays appropriate judgment about the harm of death and the related harm of killing: that is, killing seems morally appropriate when the alternative is a painful or undignified life (such as a life with incontinence, which animals feel as shameful and embarrassing), but it is not to be chosen simply for the human's convenience, any more than we should kill our aged parents to avoid the inconvenience of caring for them. Probably the euthanizing of aged animals is more often permissible than the euthanizing of humans: humans who are not severely demented have a right to consent to any such procedure, and humans also have more life interests that are compatible with physical pain and decrepitude; thus a human might find worth living a painful and diseased life that for an animal would not be worth living.

But there are many animals concerning whom Bentham and Hare are probably correct: they have conscious interests, but these interests do not extend into the future in such a way as to give them temporally extended projects of a type that sudden death would frustrate. So what about the killing of such animals for food? And what about the humane killing of animals for other reasons, such as the killing of rats to prevent health problems for human or other animal populations, or the painless predation of animals who would otherwise starve to death in the wild or be torn apart by other animals? Are Bentham and Hare correct that a painless death is not a harm for such animals and that a humane form of slaughter is consequently not harmful?

The capabilities approach has a more difficult time reaching this conclusion than the Utilitarian view, since we recognize many goods and bads that do not consist in forms of sentient awareness. The ability to move around freely, for example, may

be valuable for an animal even if the animal does not feel its absence as a pain. The ability to have loving and supportive relationships with other animals and humans can be a good, even if the animal, raised in isolation, is not aware of the deprivation or pained by it. So what we need to ask is a different question from the Utilitarian question: it is, whether there are centrally valuable forms of capability, in such animal lives, that are cut short by sudden painless death. If so, then it is a harm to inflict such a death.

We have already concluded that painless death can be non-harmful, if the alternative is life with pain or decrepitude. We have also concluded that it is not a morally significant harm to kill a nonsentient creature.⁵⁴ But most animals who are killed for food are sentient, and they are typically killed in their prime or even in their youth, well before the alternative is life with pain and decrepitude. We can admit that a large part of the harm we currently do to animals raised for food consists in the ways we treat them during their lives without conceding that the painless death of such an animal, after (let us suppose) a flourishing free-ranging life, is no harm at all.

There are many different cases here. The level of capacity a creature has affects what can be a harm for it. More complexly sentient animals can suffer more and different harms than less complexly sentient creatures. Think of a cow and a shrimp. It seems likely that the cow can suffer many harms, at death, that the shrimp cannot: deprivation of a social network, deprivation of varied pleasures of moving and eating, deprivation of mobility. A shrimp probably does not even feel pain; certainly, it has a restricted range of functions and little awareness of those functions. Unlike the Utilitarian approach, the capabilities approach, not being entirely focused on sentience, can still see some harm in the termination of a minimally sentient life; but the harm

seems less grave, since sentience is extremely important, and the shrimp does not have one of the other major life functions either (like our science fiction case of the nonsentient but thinking being). The infliction of pain on a sentient being is a particularly grave harm. The termination of many and varied functionalities is also a grave harm. Neither of these seems to be present in the case of the shrimp. Hare's fishmonger is a more complicated case, since fish, by his own account, have sentience of a sort. Thus, even if the death is painless there is deprivation of positive good, namely opportunities for enjoyment and movement, given that the fish is not likely to be killed on the brink of old age and decrepitude. The capabilities theorist will take this deprivation more seriously than the Utilitarian. Nonetheless, the harm of painlessly killing a fish seems a different sort of harm from the harm of killing a cow, and at least possibly less grave.

These are very slippery issues. We should admit that we are likely to be self-serving here, and biased toward our own form of life. Nonetheless, it would appear that the Utilitarian is partly right: the prevention of suffering, both during life and at death, is of crucial importance always. As for painless death, that can involve a harm, but the harm seems to vary with the nature of the creature in question, and it may often be a less grievous moral harm than the harm of inflicting suffering.

Where animals are killed to stop harm that they would otherwise do (killing rats in cities, for example), we can say once again that the harm of killing varies with the form of life involved, and in the case of a rat the harm is not comparable to the harm of killing a healthy dog; a rat has many fewer interests and capabilities to be frustrated—although we have said that this does not mean that its life is *per se* less valuable. Nonetheless, to the extent that a different solution to the problem is available, such as sterilization, that is clearly morally preferable, in a way relevant

to the moral content of principles of political justice; even painless killing of a relatively simple animal like a rat inflicts some harm.

xi. An Overlapping Consensus?

The capabilities approach is a form of political liberalism: it relies on the idea that an overlapping consensus of the reasonable comprehensive doctrines can emerge over time to support and sustain the political conception. To show this, and thus to justify the conception, we do not have to show that the consensus exists at present; but we do need to show that there is sufficient basis for it in the existing views of liberal constitutional democracies that it is reasonable to think that over time such a consensus may emerge. Because the political conception rests not on metaphysical theories but on judgments that are ethical all the way down, it is important that they be the sort of judgment that citizens can share.

When we turn to animals, we must face two difficult questions: first, who takes part in this consensus? And second, is it reasonable to hope that the rights of animals can, over time, become the object of an overlapping consensus?

Who takes part? By appropriating the idea of overlapping consensus, the capabilities approach converges, to at least some extent, with social contract views, since it is at this point that the idea of reasonable agreement, crucial to such views, plays a role in our own approach. It seems obvious that the actual parties to such an agreement must be humans, and it also seems obvious that even hypothetically we should not try to imagine what animals would "reasonably" agree to. That question is just as fanciful as the question we have already rejected, the question what contract they would make in a state of nature. What we can, however, ask is: What would a guardian appointed to pro-

tect the entitlements of such creatures reasonably agree to, on their behalf? Thus the solution of trusteeship, which is not satisfactory if the framers of the contract are identified with the primary subjects of justice, as in contractarian approaches, seems to be one that, in a limited way, a theorist who rejects that conflation is entitled to use.

The fact that the members of the consensus are in that sense all human does not mean that animals are not direct subjects of the theory of justice. They are. It does mean, however, that the agreement of humans plays a special role in justification, for the stability of the conception can be guaranteed only if we can show that it is supported by a family of reasonable comprehensive doctrines. The comprehensive doctrines in question will be those held by humans, plus those that they may impute (through imagination) to those that they represent: that is, their own good-faith estimate of a conception of the good for each type of animal.

The whole idea of a justification that looks for a reflective equilibrium and uses the idea of overlapping consensus is an anthropocentric idea. The holism in ethics that Rawls and I share may be contested at this point by a reasonable Benthamite, who will insist that what justifies changes in our treatment of animals is not the coherence of a family of human theories and judgments, even bolstered by reasonable agreement and overlapping consensus; it is, instead, a fact utterly external to the human point of view, namely animal suffering. This challenge raises profound metaethical issues that go beyond the arguments of this book. They also go beyond my current understanding. I believe that we have good reasons to work toward a holistic justification of the Rawlsian sort; but we do need to think further about how the perceptions and experiences of other sentient creatures enter into the account of what justification is, and I have not solved that problem to my own satisfaction.

Can we hope for an overlapping consensus on the entitlements of animals? I see two problems: one concerning the animal conceptions in their relation to one another, another concerning human conceptions. First, then, even in fiction and through trusteeship, can we imagine an animal supporting a decent life for species to which it is hostile? Would the trustee of the tiger rightly impute to it a conception that supports decent life for a gazelle? Nature is not just, and species are not all nice. We cannot expect that they will become nice, or supportive of the good of their enemies. I think, however, that this is not such a severe problem for the political conception, since at this point the trustee can just say, the tiger's conception is unreasonable insofar as it seeks the death of gazelles, and I, as trustee, shall advance it politically only insofar as it is reasonable. The stability of the political conception is not at stake here: if we do not persuade the tigers to change their mind, so to speak, we can always control them.

The real stability problem is the human problem. Most of the existing religious and secular comprehensive doctrines are miles away from the positions being defended here. Hindu, Jain, and Buddhist traditions contain many elements of what I recommend, as did early Platonism. But Christianity, Judaism, Islam, and most people's secular comprehensive doctrines rank the human species metaphysically above the other species and give the human secure rights to the use of animals for many purposes.

Even in these traditions there are prohibitions on cruelty and ideas of moral trusteeship, such as those advanced by Baumgartner in the book that Kant criticized. Nor is an ampler recognition of animal entitlements ruled out, I believe, by anything basic in these religions: it is just not insisted on. In fact, it would seem, if we focus on the foundational texts, that the case for overlapping consensus here is much more promising than the case for overlapping consensus concerning the equality of

the sexes. The core texts of each major religion all pronounce on matters of sexual subordination in ways that cause problems for liberal reform. Even so, to a great extent this reform has taken place, and the religions have altered their understandings to support this political consensus. By contrast, religious texts do not say, typically, that one *must* or *should* wear fur or leather, or that one *should not* be a vegetarian. That space is left open, and there are conscientious supporters of animal rights in every major religion. Certainly, the cruel treatment of animals, whether in the food industry or in other areas of life, is very hard to square with the approaches to animals in key religious texts, as Baumgartner seems to have noted. By expressing the core idea of the extended capabilities approach in terms of a threshold of capability, and by leaving aside the difficult metaphysical question of equality, I hope to have shown that we can advance the approach in a strong form without putting at risk any of the core metaphysical commitments of the major religions. We must continue to emphasize that the principles we are advancing are political and not metaphysical: they are expressed in a practical (albeit moral) form that is metaphysically abstemious, intended not to conflict with key metaphysical doctrines of the major religions.

In practical terms people have not yet taken the direction that Bentham thought they would, when he wrote that the oppression of animals would eventually seem as morally heinous as slavery. People frequently do not even want to think about the issue seriously, because they like meat, they feel they need it, and they are also convinced that human lives are being prolonged by research with animal subjects. It is clearly incumbent upon the supporter of animal entitlements to provide answers to the questions such people have, about how human life will be supported. But eventually, as people acquire more information about the treatment of animals and gain the ability to make more informed

consumer choices, it seems reasonable to expect that opposition to cruel practices will increase, and that some, if not all, of what I tentatively recommend can become the object of an overlapping consensus.

Recent developments in animal law in Europe are very encouraging in this regard, particularly the tough new law passed in Austria in May 2004, which bans cages for poultry, the use of wild animals in circus acts, and a variety of invasive practices such as clipping ears and cropping tails. Germany is phasing out the mass farming of caged chickens by 2006; Italy is considering a law that forbids sending horses to the slaughterhouse when their competitive life is over. Tougher penalties for cruelty to animals are being adopted across Europe. If all this can happen in nations predominantly Christian, there is reason to think that other religions, often more metaphysically supportive of animal life, will also be able to join the overlapping consensus.

xii. Toward Basic Political Principles: The Capabilities List

It seems premature to map out any definite content for our political principles in this area; and yet we cannot go further without content. So let us see whether we can use the human basis of the capabilities approach to map out, in a highly tentative and general way, some basic political principles that can guide law and public policy in dealing with animals.

The core of the approach, as we have said, is that animals are entitled to a wide range of capabilities to function, those that are most essential to a flourishing life, a life worthy of the dignity of each creature. Animals have entitlements based upon justice.

The entitlements of animals are species-specific and based upon their characteristic forms of life and flourishing. Nonetheless, let us see to what extent we can use the existing core of the

capabilities list to sketch out directions for political principles. Even though the more concrete specification of each capability will lead ultimately to a plurality of lists, it seems that the big general categories on the list offer good guidance.

1. *Life*. Utilitarian approaches focus only on sentience, and thus give animals no entitlement to life except to the extent that the interest in continuing life is one of their conscious interests. In the capabilities approach, all animals are entitled to continue their lives, whether or not they have such a conscious interest, unless and until pain and decrepitude make death no longer a harm. This entitlement is less robust when we are dealing with insects and other nonsentient or minimally sentient forms of life. The gratuitous killing of such creatures is still wrong, and perhaps law should in some cases prevent it (as, for example, the killing of butterflies for school projects). But when there is a plausible reason for the killing (preventing harm to crops or people or other animals, preventing pain, even gaining necessary or useful food), no entitlement based on justice has been violated.

With sentient animals, things are different. All these animals have a secure entitlement against gratuitous killing for sport. Killing for luxury items such as fur falls in this category, and should be banned. So, too, should all cruel practices and painful killings in the process of raising animals for food. On the other hand, intelligently respectful paternalism supports euthanasia for elderly (and younger) animals in irreversible pain. In the middle, as we saw, are the very difficult cases, involving painless killing, whether for food or to control populations. It seems wise to focus initially on banning all forms of cruelty to living animals and then moving gradually toward a consensus against killing at least the more complexly sentient animals for food. One of the most useful steps we can take would be to insist on clear labeling of all meat as to the conditions in which the

animals were raised. Practices vary widely, and consumers lack adequate information on which to base ethically responsible choices. Demivegetarians who press this search for information may advance the goals of public policy at least as well as vegetarians.

A further advantage of the capabilities approach over Utilitarianism emerges here. Unlike the Utilitarian, we do not have to perform complicated and indeterminate calculations of welfare in order to know whether an entitlement has been violated. If people lose jobs in the meat industry, that is no part of our concern, as it must be for the Utilitarian: for they have no entitlement to jobs that exploit and tyrannize. Animals, by contrast, do have entitlements, and it is on these that our policy toward them should focus.

As for painless predation to control populations, this may often be preferable to other deaths that elks would die, such as starving or being torn apart by wolves. That does not mean, however, that no harm is done by painlessly killing a creature in its prime; so if we can work for a future in which our menu of choices includes some harmless options, such as sterilization, so much the better.

2. Bodily Health. One of the most central entitlements of animals is the entitlement to a healthy life. Where animals are directly under human control, it is relatively clear what policies this entails: laws banning cruel treatment and neglect; laws banning the confinement and ill treatment of animals in the meat and fur industries; laws forbidding harsh or cruel treatment for working animals, including circus animals; laws regulating zoos and aquaria, mandating adequate nutrition and space. Many of these laws already exist, although they are not well enforced.⁵⁵ The striking asymmetry in current practice is that animals raised for food are not protected in the way domestic animals are protected. This asymmetry must be eliminated. In general, humans

are guardians of the animals who live with them, and laws governing permissible treatment can be closely modeled on laws dealing with parental responsibility to children.

3. Bodily Integrity. Under the capabilities approach, animals have direct entitlements against violations of their bodily integrity by violence, abuse, and other forms of harmful treatment—whether or not the treatment in question is painful. Thus the declawing of cats would probably be banned under this rubric, on the grounds that it prevents the cat from flourishing in its own characteristic way, even if it may be done in a painfree manner and cause no subsequent pain.⁵⁶ Other mutilations that simply make the animal more beautiful to humans are similarly inappropriate.⁵⁷ On the other hand, forms of training that, though involving discipline, equip the animal to manifest excellences that are part of its characteristic capability profile would not be eliminated. Again, the fact that the horse is at first annoyed by the bridle is not a negative thing in the capabilities approach, any more than is the annoyance of human children at compulsory schooling. It can be justified by its role in promoting adult flourishing and capability.

The positive side of this entitlement, in the human case, is having opportunities for reproduction and sexual satisfaction. What should we say about this in the animal case? Other things equal, it would seem good to protect this capability for animals; but the castrating of certain male animals (horses, dogs, cats) seems (on the basis of long experience) to be compatible with flourishing lives for those animals, with diverse forms of activity and no suffering—and often lives of less violence toward other animals, some of which typically results in pain and injury to the male animal himself. Whereas castration of a violent human seems utterly inappropriate, a "cruel and unusual punishment," the castration of a nonhuman animal seems very different—because of these animals' lesser capacity for character change and

choice. One cannot tell a dog inclined to aggression to change and behave differently; so castration may in many cases be the course most appropriate to its own flourishing and that of other animals. These cases have to be carefully scrutinized, and justified on a case-by-case basis.

In other instances, sterilization, while not particularly affecting the life of the individual animal, may create better lives for future animals by preventing overpopulation and consequent shortage and neglect. Is this just using one animal as a means for the good of others? That would be a grave point against such policies if the sterilization of, say, a female dog or cat produced a life incompatible with flourishing and the form of dignity characteristic of that animal. I am inclined to think that it does not. The enforced sterilization of human beings is objectionable because it is a violation of an entitlement to certain types of freedom and choice that are particularly important in human life.⁵⁸ I am inclined to think that such considerations are not central in the flourishing of animals.

4. *Senses, Imagination, and Thought.* For humans, this capability creates a wide range of entitlements: to appropriate education, to free speech and artistic expression, to freedom of religion. It also includes a more general entitlement to pleasurable experience and the avoidance of nonbeneficial pain. By now it ought to be rather obvious where the latter point takes us in thinking about animals: toward stringent laws regulating the harsh, cruel, and abusive treatment of animals, and ensuring their access to sources of pleasure, such as free movement in an environment that is such as to please their senses.⁵⁹ It also means a ban on hunting and fishing for sport, which inflict painful deaths on animals. The freedom-related part of this capability has no precise analogue, and yet we can come up with appropriate analogues in the case of each type of animal, by asking what choices and areas of freedom seem most important to each

Clearly, this reflection would lead us to reject confinement and to regulate the places in which animals of all kinds are kept for spaciousness, light and shade, and the variety of opportunities they offer the animal for a range of characteristic activities.⁶⁰ One of the greatest defects of most zoos has been their boringness, which constitutes a cruel assault on animals' opportunities for flourishing. Again, the capabilities approach seems superior to Utilitarianism in its ability to recognize such entitlements: for few animals will have a conscious interest, as such, in engaging in a variety of activities or living in a nonboring environment.

Some animals also have entitlements to suitable education. A border collie who is not trained has been abused, and the same is true of many breeds of horses. All domestic animals, like children, are abused if they are not toilet trained, that is, shown a way to dispose of their wastes, since animals connect cleanliness with the absence of shame.

Animals "in the wild" are entitled to an environment that is the sort in which they characteristically flourish: so protecting this capability also means protecting animal environments.

5. *Emotions.* Animals have a wide range of emotions. All or almost all sentient animals have fear. Many animals can experience anger, resentment, gratitude, grief, envy, and joy. A small number—those who are capable of perspectival thinking—can experience compassion.⁶¹ Like human beings, they are entitled to lives in which it is open to them to have attachments to others, to love and care for others, and not to have those attachments warped by enforced isolation or the deliberate infliction of fear. We understand well what this means where our cherished domestic animals are in question. Oddly, we do not extend the same consideration to animals we think of as "wild." Until recently, zoos took no thought for the emotional needs of animals; and animals being used for research were often treated with gross carelessness in this regard, being left in isolation and

confinement when they might easily have been given a decent emotional life.⁶² Some very famous animal experiments are sullied by similar neglect: the experiment in which infant monkeys were deprived of maternal holding, only to end up emotionally disturbed; Martin Seligman's experiments with dogs, which induced in them a state of "learned helplessness" analogous to depression.⁶³ The difficult question of research will be taken up in the next section. But these are at least *prima facie* examples of entitlement violations in the area of emotion.

6. *Practical Reason.* This is a key architectonic entitlement in the case of human beings. It pervades and informs all the others, making their pursuit fully human. There is no precise analogue in the case of nonhuman animals. In each case we need to ask to what extent the creature has a capacity to frame goals and projects and to plan its life. To the extent that this capacity is present, it ought to be supported, and this support requires many of the same policies already suggested by Capability 4: plenty of room to move around, opportunities for a variety of activities.

7. *Affiliation.* In the human case, this capability has two parts: an interpersonal part (being able to live with and toward others), and a more public part, focused on self-respect and non-humiliation. It seems to me that the same two parts are pertinent for nonhuman animals. Animals are entitled to opportunities to form attachments (as in Capability 5) and to engage in characteristic forms of bonding and interrelationship. They are also entitled to relations with humans, where humans enter the picture, that are rewarding and reciprocal rather than tyrannical. At the same time, they are entitled to live in a world public culture that respects them and treats them as dignified beings. This entitlement does not just mean protecting them from instances of humiliation that they will *feel* as painful. The capabilities approach here extends more broadly than Utilitarianism, holding that animals are entitled to world policies that grant them politi-

cal rights and the legal status of dignified beings. Whether or not they are able to comprehend that status, it shapes a world in which they are seen and treated differently.

Being from the first an evaluative approach, the capabilities approach does not protect all forms of affiliation that animals actually have with one another. We have already mentioned the obvious instances of destructive interspecies behavior. What about intraspecies harms? This is a very complicated issue. On the one hand, there are some harms that we can straightforwardly oppose and prevent, such as assaults on infants by parents, and harsh policies toward sick, disabled, or elderly species members. Whether among domestic animals or "in the wild," human beings are obliged to intervene to prevent these abuses. But what about hierarchy and inequality? Animal cultures are full of humiliation of the weak by the strong and of sometimes violent competition for sexual advantage. Animals do not always, or even commonly, pursue the human capability of "being able to be treated as a dignified being whose worth is equal to that of others." It seems clear that humans cannot intervene to change all that, especially "in the wild," without greatly upsetting the economy of species life. Probably this is a case in which we must say that only the most egregious harms to weaker species members must be prevented, and other forms of hierarchy may be tolerated, though they will not be protected as central animal capabilities. Human dealings with animals, at least, should be regulated by respectful attention to each species member, and the idea that each is worthy of a flourishing life.

8. *Other Species.* If human beings are entitled to "being able to live with concern for and in relation to animals, plants, and the world of nature," so, too, are other animals, in relation to species not their own, including the human species, and the rest of the natural world. This capability, seen from both the human and the animal side, calls for the gradual formation of an

interdependent world in which all species will enjoy cooperative and mutually supportive relations. Nature is not that way and never has been. So it calls, in a very general way, for the gradual supplanting of the natural by the just.

9. *Play*. This capability is obviously central to the lives of all sentient animals. It calls for many of the same policies we have already discussed: protection of adequate space, light, and sensory stimulation in living places, and, above all, the presence of other species members.

10. *Control over One's Environment*. In the human case, this capability has two prongs, the political and the material. The political is defined in terms of active citizenship and rights of political participation. For nonhuman animals, the important thing is being part of a political conception that is framed so as to respect them, and is committed to treating them justly. It is important, however, that animals have entitlements directly within the conception, even if a human guardian must go to court, as with children, to vindicate those entitlements. On the material side, the human form of the capability includes certain sorts of protection for property rights and employment rights, including the right to form unions and the free choice of occupation. For nonhuman animals, the analogue to property rights is respect for the territorial integrity of their habitat, whether domestic or "in the wild." The analogue to work rights is the right of laboring animals to dignified and respectful labor conditions.

Are there animal capabilities not covered by this list, suitably specified? If so, we will discover them over time, as we work further both on the general level and on the species-specific level.

In general, the capabilities approach suggests that each nation should include in its constitution or other founding statement of principle an inclusion of animals as subjects of political justice, and a commitment that animals will be treated as beings entitled to a dignified existence. The constitution might also

spell out some of the very general principles suggested by this capabilities list. The rest of the work of protecting animal entitlements will be done by suitable legislation and by court cases demanding the enforcement of the law, where it is not enforced. If animals are indeed granted entitlements, they will have standing to bring a suit (argued by a guardian), a right they do not currently have.⁶⁴

At the same time, many of the issues covered by this approach cannot be dealt with by nations taken in isolation, but can be addressed only by international cooperation. So we also need international accords committing the world community to the protection of animal habitats and the eradication of cruel practices.

xiii. The Ineliminability of Conflict

In the human case, we often face the question of conflict between one capability and another. But in the human case, if the capabilities list and its threshold are suitably designed, we ought to say that the presence of conflict between one capability and another is a sign that society has gone wrong somewhere.⁶⁵ We should focus on long-term planning that will create a world in which all the capabilities can be secured to all citizens. Thus, the conflict displayed in Sophocles' *Antigone*, between civic order and the free exercise of religion, is removed (in the Hegelian sense *aufgehoben*) by the creation of societies that honor each individual's free exercise of religion as a part of what constitutes the political sphere and its basic values. If parents face a conflict between life-sustaining food and the education of their children, in the sense that only sending their children to work all day will enable the family to survive, that again is a sign that society is not well designed. Even in very poor regions, intelligent planning can make it possible for people to live healthy lives and also

to educate their children. (The Indian state of Kerala, a relatively poor state, has achieved 99 percent literacy for both boys and girls in adolescence through flexible school hours and other creative policies.)

In discussing the capabilities of human beings, I have argued that the threshold of each capability should be set with an eye to the other capabilities. In framing the education capability, for example, it is sensible to ask what we can expect to deliver compatibly with delivering all the other capabilities. On the one hand, the threshold of each should not be set in a utopian or unrealistic way: so we must ask what combination we can hope to deliver to people under reasonably good conditions. On the other hand, we should not set our sights too low, deferring to present bad arrangements. Thus it would have been wrong to conclude that universal primary and secondary education of children is not a good goal for a just public policy, on the grounds that right now it is not feasible in some badly managed states.

The world we live in contains persistent and often tragic conflicts between the well-being of human beings and the well-being of animals. Some bad treatment of animals can be eliminated without serious losses in human well-being: such is the case with the use of animals for fur, and the brutal and confining treatment of animals used for food. The use of animals for food in general is a much more difficult case, since nobody really knows what the impact on the world environment would be of a total switch to vegetarian sources of protein, or the extent to which such a diet could be made compatible with the health of all the world's children. In this case, it appears that the best solution might be to focus initially on good treatment during life and painless killing, setting the threshold there, at first, where it is clearly compatible with securing all the human capabilities, and not very clearly in violation of any major animal capability, de-

pending on how we understand the harm of a painless death for various types of animals. Even that threshold is utopian at present, but it seems to be realistically utopian.

Such a Hegelian approach, however, cannot solve all problems. One problem that will have to be faced is the issue of cost. If health care for animals (even those that live directly under human control) requires lowering the threshold for human health care, how should we think about these trade-offs? I believe that we should think about the whole set of capabilities together when facing such questions, rather than thinking that health costs must always be traded off against health costs. There are very likely to be other costs not associated with fundamental entitlements that could be trimmed way back before we would have to cut anyone's health care. That is the sort of question that each nation needs to consider for itself when setting the thresholds of all the major capabilities. We have not yet even begun to deliberate well about such questions, and I believe it is premature right now to say what the precise result of such deliberations would be. But surely support for luxury items would be our first target. If, for example, people stopped driving SUVs, there would be many gains, not the least of which would be decreased spending on gasoline, which would free up money to be used in other ways, connected with fundamental entitlements—and health would be the gainer, on both sides.

The most obvious unresolved area of conflict is the use of animals in research. On the one hand, research using animals remains crucial to medical advances, both for humans and for other animals. It also gives us crucial information about many other topics, from depression to the nature of attachment. Such research cuts short the lives of animals prematurely, and often inflicts other harms upon them.

A lot can be done to improve the lives of research animals without stopping useful research. As Steven Wise has shown,

primates used in research often live in squalid, lonely conditions while they are used as medical subjects. This situation of course is totally unnecessary and morally unacceptable, and could be ended without ending the research. Some research that is done is unnecessary and can be terminated: for example, the testing of cosmetics on rabbits, which has been bypassed without loss of quality by some cosmetics firms. But much important research with major consequences for the life and health of human beings and other animals will inflict disease, pain, and death on at least some animals, even under the best conditions.

We should admit, then, that there will be an ineliminable residue of tragedy in the relationships between humans and animals. Research that should be allowed to promote human health and safety will continue to inflict the risk of disease, pain, and premature death on animals. As a matter of ideal entitlement theory, this research is morally bad. As a matter of current implementation, I do not favor stopping all such research immediately. What I do favor is: (a) asking whether the research is really necessary to promote a major human or animal capability; (b) focusing on the use of less complexly sentient animals where possible, on the grounds that they suffer fewer and lesser harms from such research; (c) improving the conditions of research animals, including palliative terminal care when they have contracted a terminal illness, and supportive interactions with both humans and other animals; (d) removing the psychological brutality that is inherent in so much treatment of animals in research;⁶⁶ (e) choosing topics cautiously and seriously, so that no animal is harmed for a frivolous reason, without a good chance of an important benefit; and, finally, (f) a vigorous and publicly funded effort to develop experimental methods (for example, computer simulations) that do not have these bad consequences.

Above all, my approach favors constant public and philosophic

ical discussion of these issues, together with an acknowledgment that such uses of animals in research are tragic, that they do in some cases violate basic animal entitlements. This sort of public acknowledgment is far from useless, even in the non-Hegelian world we share with animals. First of all, it states what is morally true, and thus acknowledges the dignity of animals and our own culpability toward them. Second, it reaffirms dispositions to behave well toward them where no such urgent exigencies intervene. Finally, it prepares us for a world in which at least some of the pertinent research could in fact be done in other ways, for example through the use of computer simulations. It informs us that we should actively seek such a world, and take advantage of any progress toward it to cut back on the abuse of animals.

xiv. Toward a Truly Global Justice

It has been obvious for a long time that the pursuit of global justice requires the inclusion of many people and groups who were not previously included as fully equal subjects of justice: the poor; the lower classes; members of religious, ethnic, and racial minorities; more recently, women. Classic liberal approaches in the social contract tradition were designed to deal with these inequalities, and they dealt with them, for the most part, very well. Their most unsatisfactory aspect, with regard to this traditional list of the disadvantaged, was their failure to scrutinize sufficiently the distribution of opportunities and benefits within the family, and to consider the family itself a site where justice is either done or not done.

More recently, it has become evident that another large and heterogeneous group of citizens demands full and equal justice: people with physical and mental impairments, temporary or lifelong. Classic social contract doctrines, even Rawls's very subtle and morally sensitive such doctrine, cannot adequately handle

these problems of justice for and to the disabled, or the related problems of care for dependents that the existence of disabled and elderly people in our societies creates. The capabilities approach seems well placed to offer a fruitful way forward.

It has also been clear for some centuries that the pursuit of global justice requires political philosophy to depart from the paradigm of the self-sufficient nation-state and to think what justice may require of nations in their dealings with one another. Since the late twentieth century it has been obvious that an adequate treatment of international and cosmopolitan justice must address not only the traditional topics of war and peace, but also the topics of economic justice and material redistribution. Traditional social contract doctrines cannot solve these problems very well, and even Rawls's brave and fascinating approach does not adequately do so. Once again, I have suggested that the capabilities approach offers a useful way forward, and I have argued that only an outcome-oriented approach can adequately confront the bewildering and rapidly changing world scene, with its variety of constantly shifting institutional forms.

But a truly global justice requires not simply looking across the world for other fellow species members who are entitled to a decent life. It also requires looking, both in one's own nation and around the world, at the other sentient beings with whose lives our own are inextricably and complexly intertwined. Traditional contractarian approaches to the theory of justice do not and, in their very form, cannot confront these questions as questions of justice. Utilitarian approaches have boldly done so, and they deserve high praise for bringing abuses to light and promoting the beginnings, at least, of an adequate ethical awareness. But in the end, that approach is too homogenizing—both across lives and with respect to the heterogeneous constituents of each life—to provide us with an adequate theory of animal justice. The capabilities approach, which begins from an ethi-

cally attuned wonder before each form of animal life, offers a model that does justice to the complexity of animal lives and their strivings for flourishing. Here I have offered only a sketch of what this approach might ultimately say. But even a sketch is a step forward, on the way to a fully global theory of justice.

see Barclay (2003) and my reply in Nussbaum (2003d). I develop these issues further in a short book on *PL* under contract to Columbia University Press.

23. See Sen (1997).

24. See Maritain (1951) and (1943).

25. See Glendon (2001).

26. See Stiglitz (2002), who, however, does not challenge the idea of mutual advantage explicitly enough.

27. See Murphy (2000).

28. See Green (2002).

29. In one form, this family of objections is eloquently pressed in Williams (1973).

30. See also Nagel (1991).

31. This distinction is sometimes run together with the public/private distinction, but it is not the same. Many comprehensive doctrines are shared and public (in the sense that they are part of civil society) and the political sphere itself takes on the protection of central capabilities of women and children in the family, an area traditionally deemed private.

32. I am grateful to Iris Young for pressing me to take on this question.

33. See Nussbaum (2000a), chap. 3, for some general balancing principles, with regard to religion, that can be adjusted to guide the nation-state relation.

34. Nussbaum (2004b).

35. The announcement by Great Britain in late September 2004 that it would pay off around 20 percent of the debt of the poorer nations is a hopeful beacon, and a creative way of using aid in a nondominating fashion.

36. See, for example, Stiglitz (2002) and Friedman (2002).

37. Conversation with François Bourguignon, April 2002.

38. See Pogge (2002).

39. In several cases, for example, the norms of sex equality in CEDAW have been held to be binding on nations that have ratified it,

in a way that has affected the outcome of legal disputes and also generated new legislation.

40. See Nussbaum (2000a), chap. 4; and (1999a), chap. 2.

41. Thus I take a stand against child marriage and marriage without consent: not against arranged marriage, when practiced with a person over some reasonable legal age of consent, who has options, is not coerced, and consents to the arrangement in question.

42. For a comparison of India and Western traditions in this regard, see Nussbaum (2002a).

43. See Nussbaum (2004a).

44. Cf. Stiglitz (2002), xii, analyzing the failings of international development policies: "What was at issue . . . is a matter of *ideas*, and conceptions of the role of the government that derive from these ideas."

6. BEYOND "COMPASSION AND HUMANITY"

1. The incident is discussed in Pliny, *Natural History* 8.7.20–1; and Cicero, *Ad Familiars* 7.1.3. See also Dio Cassius, *History* 39, 38. See the discussion in Sorabji (1993).

2. I shall often refer to other animal species this way; my use of the word "animals" should be understood as a shorthand for the longer and more accurate term.

3. See Sorabji (1993). He blames much of our later obtuseness on Stoicism, without, to my mind, sufficiently appreciating the force of Judeo-Christian sources, which influenced which Greek views were likely to gain a hearing.

4. Hobbes and Locke say nothing interesting about animals, so the Kantian tradition is the only evidence for what classical social contract theory says about this.

5. These lectures, edited from student notes, were probably given between 1775 and 1780; *Groundwork* was published in 1785, the second *Critique* in 1788, *Metaphysics of Morals* (with its account of the social contract) in 1797–98.

6. Kant (1963), 239–240.

7. For a history of such arguments in the eighteenth century, particularly in Britain, see Lee (2002), which also discusses the influence of Hogarth's engravings. Lee also examines modern psychological findings on the question, and concludes that there is at least some evidence in favor of the "cruel habits" claim.

8. A more extensive consideration of duties to animals in the context of a Kantian moral theory is in Gewirth (1978), which goes further than Rawls by suggesting that animals have certain limited rights in virtue of their similarity to humans.

9. Are these duties supposed to be part of the political realm? This is unclear, because *TJ* is less clear than *PL* about the distinction between political principles and comprehensive moral doctrines. I tentatively conclude that for Rawls these duties are part of a comprehensive moral doctrine, and not the part that forms a portion of the "overlapping consensus" in the political realm; thus, in the terms of *PL*, he would not feel free to form political principles on the basis of his beliefs about them.

10. See the analysis in Nussbaum (2001a), chap. 6. This part of the analysis is uncontroversial, recapitulating a long tradition.

11. When Rawls contrasts "the love of mankind" with "the sense of justice," (*TJ* 190 ff.) he states that the love of mankind is more comprehensive and prompts us to actions of supererogation as well as justice. In terms of this contrast, I am suggesting that at least some of our duties to animals are not merely supererogatory, but are requirements generated by animals' legitimate moral entitlements.

12. See Sen and Williams (1982).

13. Bentham (1789/1823/1948), 1: "the standard of right and wrong" is "fastened to their throne."

14. Singer (1980), 12. See the good analysis in Regan (1983), 206-208.

15. Singer (1980), 238.

16. See Nussbaum (2000e).

17. This may mean simply that there is none clearly better: thus consequentialism can admit incomplete rankings, as it must if it is to include plural and incommensurable goods.

18. See Nussbaum (2000a); *PL*; Larmore (1996).

19. Not all forms of Utilitarianism require that actors choose as consequentialists. Sidgwick's indirect Utilitarianism urges that ordinary people should usually abide by conventional virtue, and that only a few experts should use the Utilitarian calculus. This version of Utilitarianism seems defective on account of its lack of publicity. Rule Utilitarianism, which urges actors to follow rules that can be given a Utilitarian justification, does not have this defect, but it has another: there is no reason for such an agent to follow the rule in a case in which he knows that the Utilitarian calculus gives a different result. So rule Utilitarianism seems to collapse into act Utilitarianism, with provision made for the use of rules in situations of imperfect information.

20. See also Nussbaum (2000a), chap. 2.

21. Seligman (1975).

22. Coetzee (1999), 21.

23. See Nussbaum (2004c).

24. I do not comment here on the issue of plants or of the natural world in general, although I do think that the capabilities approach can be extended to deal with these issues.

25. *Parts of Animals* 645a26-27. Aristotle goes on to say that it is not possible to look without disgust at the blood, bones, etc. of which the human body is made; he seems to find wonder in the contemplation of form and structure alone. Here he stops short of what his own view suggests, an embracing of all of life, including its material stuffs.

26. See my detailed discussion of Rawls's view, and my own, in Nussbaum (2000a), chap. 2.

27. On this see Richardson (1994).

28. In *TJ* Rawls thinks of the deliberation as carried out by each individual person, in a Socratic fashion; in *PL* he adds a requirement of communal endorsement; see Chapter 5.

29. Narrative fiction is frequently valuable in such an exercise: see Nussbaum (1990), (1995a).

30. See Okin (1989).

31. See Lee (2002).

32. Proust (1954), 105.

33. See my discussions of this idea in Nussbaum (1995a).
34. Coetzee (1999), 45.
35. Thus Rawls, Sidgwick, and Aristotle, all with very different theories, have used it.
36. 406 U.S. 205 (1972).
37. See *PL* 20, 244, 273-274.
38. Singer (1980).
39. Regan (1983), 240-241.
40. Rachels (1990). See my discussion in Nussbaum (2001c).
41. See DeGrazia (1996), 226 ff.
42. Here we should probably exclude one-celled creatures that appear to have the capacity for locomotion. I focus here on locomotion in its Aristotelian sense, in which it involves the ability to become aware of a good thing at a distance, to desire that good, and to move toward it in consequence.
43. Rachels (1990); and see the excellent treatment of these issues in DeGrazia (1996).
44. See de Waal (1996). Similar is David Hume's attempt to get his reader to consider human and animal rationality and emotion together, as related species of a general capacity.
45. I argue that this is also Aristotle's approach, in Nussbaum (1995b). Whether that argument is accepted or not, it shows what my own approach is.
46. Mill (1850/1988), 28-29.
47. Botkin (1996), 26-27.
48. Nussbaum (2000a), chap. 2.
49. See my critique in Nussbaum (1999b). Several of the essays in Sunstein and Nussbaum (2004) discuss current legal arrangements and their problems.
50. See Sunstein (2004).
51. See Hare (1999).
52. DeGrazia (1996). I am also grateful to DeGrazia for excellent comments on a draft of this material when it was presented as a Tanner Lecture.
53. See, for example, Gewirth (1978).

54. Here we must supply the caveat mentioned above: if there should be a creature that is not sentient, but has one of the other central life functions, such as thinking, affiliation with others, and so on, then the killing of such a creature would also be problematic; but in the real world we do not find such cases.
55. As mentioned above, the new animal rights law enacted by Austria in May 2004 requires chickens to be free to run around, bans lions and tigers in circuses, and institutes a wide range of other protections for both domestic and nondomestic animals.
56. The declawed cat cannot climb or jump (well), both of which seem to be important ingredients in its characteristic form of life. The lion who cannot tear a gazelle and is given a ball instead can still rip things to shreds and is able to move in a nonmutilated way; so the two cases do not appear to be symmetrical. Even to the extent that they are, cats are declawed only because people want to protect their rugs and furniture, whereas forbidding lions access to gazelles saves gazelles from excruciating pain.
57. The new Austrian law bans clipping dogs' ears and tails.
58. See Sen (1999).
59. Again, the new Austrian law points the way, requiring that all farm animals be allowed to roam freely for at least three months in the year.
60. Austria's law bans keeping puppies and kittens in cramped, airless conditions in pet shops.
61. On all this, see Nussbaum (2001a), chap. 2.
62. See Wise (2000), chap. 1.
63. On the monkeys, see Nussbaum (2001a), chap. 4; on the dogs, Seligman (1975).
64. See Sunstein and Nussbaum (2004).
65. See Nussbaum (2000d).
66. Does this mean banning experiments whose very topic is psychological brutality, such as those of Seligman and the attachment research reported by Bowlby? It seems so—although the illumination we have derived from Seligman's work is very great, as is its fruitfulness for constructing better modes of treatment for both humans and other ani-

mals. We will have to observe the same constraints that we already observe for psychological research on human subjects.

7. THE MORAL SENTIMENTS AND THE CAPABILITIES APPROACH

1. See Nussbaum (2004a), discussing psychological research on disgust.
2. Nussbaum (2000a), chap. 3.
3. Batson (1991); see discussion in Nussbaum (2001a), chap. 6.
4. *Capabilities and Compassion*, under contract to Cambridge University Press.
5. Here I consciously imitate the end of Rawls's introduction to the paperback edition of *PL*.

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