Animal Capabilities, Ethics, and Law: New Directions

Martha C. Nussbaum

2022 Balzan Prize for Moral Philosophy

Balzan GPC Advisers: Peter Kuon
Deputy Director: Jeremy Bendik-Keymer
Affiliated Institution: University of Chicago
Period: 2022-2025

Martha C. Nussbaum is the Ernst Freund Distinguished Service Professor of Law and Ethics, appointed in the Law School and Philosophy Department, Chicago University.

Background: Nussbaum's Capabilities Approach

Animals are in trouble all over the world, and yet the study of ethical approaches to animal rights as well as the study of connections between ethics and law is still in its infancy. The aim of this project is to fund the production of new scholarship from younger scholars, in both law and philosophy, generating new refinements and new solutions. Selected on the basis of a detailed article outline, these scholars will work with Martha C. Nussbaum and a group of younger, mid-career scholars to develop their articles, and subsequently present them at a conference for further work and criticism.

The Capabilities Approach was first developed jointly by Nussbaum and economist Amartya Sen as a metric for global development. It proposed that the progress of nations and regions be measured not by utility or by GDP per capita, but by what opportunities people actually have to choose things they value in a number of areas deemed central. Capabilities are not internal skills; they are actual opportunities for choice within one's situation. By now, this approach has become a central one in the development economics world. It is also the subject of the annual Human Development Reports of the UN Development Programme and of countless research projects, not to mention an international association, the Human Development and Capability Association, now twenty years old (Sen and Nussbaum are Founding Presidents), and a related journal, the *Journal of Human Development and Capabilities*. The topic of how capabilities are measured and assessed is a primary research program within the Association.

Although Nussbaum and Sen shared in the development of the Capabilities Approach, their theories differ. Sen's use of the idea of capabilities has always been simply comparative, with no specific account of which capabilities ought to be deemed central. From the late 1990s onwards, Nussbaum's approach has diverged from his in that it is a way of assessing the justice of political arrangements. In her view, a nation is even minimally just only if it secures to all its citizens a specific list

of Central Capabilities, up to a reasonable threshold level. This list is an abstract template for constitution-making (or the making of basic statutes in nations without a written constitution). Each nation will flesh out the abstract rubrics of the list in different ways, reflecting their own history and situation. More recently and in *Justice for Animals: Our Collective Responsibility* (2023), Nussbaum proposes that her version of the Capabilities Approach is the best theory to direct law and policy regarding the ethics of animal treatment and is superior to the three other approaches currently in use, anthropocentric thinkers, Utilitarians, and Kantians.

The first, or "So Like Us" approach, is used by the worldwide Nonhuman Rights Project. It seeks legal personhood status and various other protections for a group of animals (great apes, elephants, and whales) on the grounds of their alleged likeness to humans, which is wrong in several ways. First, this likeness is the wrong reason to treat an animal well – reasons should focus on them, not on humans. Second, it leaves most animals utterly at the mercy of human neglect and cruelty. Third, it is wrong about nature, assuming that life forms are lined up like the rungs of a ladder, with humans securely at the top, without considering the fact that animals have some abilities that humans utterly lack (birds' ability to navigate by magnetic fields, for example, or echolocation, dolphins' ability to perceive what is inside an object through reverberations). Finally, humans are not exemplary in all ways and are excelled by many animals in their ability to live cooperatively together and to make peace in situations of conflict. Each form of animal life should be investigated in all its beauty and strangeness, rather than assuming, smugly, that human beings are at the top.

Second is the Utilitarian Approach to animal ethics, first proposed by Jeremy Bentham in the eighteenth century, refined by J. S. Mill, and championed today by the great animal activist Peter Singer. Utilitarianism does much better than the "So Like Us" approach, because it focuses on pain, which is certainly relevant to the just treatment of animals. It holds that pain is the single bad thing and pleasure the single good thing: all other 'goods and bads' can be reduced to quantities of pleasure and pain, which vary not qualitatively, but only in amount and duration. Animals, like humans, want freedom from pain, but they also want many other things: free movement, a social life among others of their kind, recreation, sensory stimulation, and the ability to direct their own lives. These things are qualitatively distinct, and not reducible to amounts of pleasure, as J. S. Mill already saw. Furthermore, the Utilitarian approach is an aggregate, seeking the greatest total or average pleasure; it sets no social minimum. Thus, the exceedingly great pleasure of some can counterbalance the pain of those at the bottom. This fact has long made Utilitarianism problematic as an approach to basic justice. A third issue is that both humans and other animals can become habituated to defective treatment and thus do not feel pained when they lack some good things that they are brought up to feel they have no right to have. This problem, known in the economics literature as "adaptive preferences," frequently makes Utilitarianism the ally of an unjust status quo.

For example, if women do not imagine that university education is for them, then they will not feel pained when it is denied them, and yet that absence of pain is itself the result of injustice. Similarly in the animal world: if a captive dolphin is familiar only with life in a small pen, without the company of a large group of other dolphins, it may not feel pain, and yet it is being deprived of its characteristic form of life, which it would prefer if it knew it. Finally, the Utilitarian approach aims at a state:

pleasure (or, in Singer's version, satisfaction of preferences). It does not give sufficient weight to the importance of agency. People and other animals do not seek a tranquil state alone: they want to be authors of their own lives. For all these reasons, Utilitarianism gives bad advice for people seeking to advance the well-being of animals.

In the third approach, philosopher Christine Korsgaard, author of *Fellow Creatures*, departs from the views of the historical Kant (who thought that humans might use animals in any way they please so long as it would not lead to harming other humans), but uses Kantian materials to approach issues of animal well-being. To a great extent a hybrid, Korsgaard's approach uses Aristotelian materials and overlaps with Nussbaum's (Korsgaard was Nussbaum's PhD student). However, the dominant Kantian flavor of her approach leads her to argue that other animals, lacking the capacity for deliberation and self-criticism, can never take an active role in their own well-being, but must remain "passive citizens," rescued from bad situations by humans but not supported in their efforts to be active participants, charting their own course in the world. Nussbaum's criticisms of this approach are empirical and normative. Empirically, it greatly exaggerates the differences between humans and other animals; deliberation is not a heavenly ability, it is part of our evolved natural equipment, and many animals use thought and social communication to solve problems. Normatively, there are many forms of life that animals seek to lead – lives that involve elaborate forms of intellectual deliberation, while they may suit us, may not be the right ways for other creatures to attain their ends. Much can be learned from Korsgaard's subtle philosophical arguments without accepting her pessimistic conclusion that animals cannot be active participants in their own well-being.

Nussbaum's Capabilities Approach holds that the aim of all humans should be to allow each animal to live an active life characteristic of its species, up to some reasonable threshold level. All animals count, and all deserve to live as the animals they are. Her approach cannot straightforwardly be the basis for a national constitution, as it can in the human case, because many animals range across national boundaries. But it can supply a template for virtual constitution toward which both national and international legal and practical efforts should aim. Each animal is entitled to attain a key group of opportunities involved in living its own characteristic form of life. Unlike the "So Like Us' approach, Nussbaum's attends to all sentient animals – all, that is, who have an inner perspective on their own experience. Unlike Utilitarianism, this approach holds that there are many things that animals need, not just one: free movement, play, the society of others of their kind, and so on. Unlike the Kantian approach, Nussbaum's sees animals as virtual citizens whose agency and striving set goals that human representatives should implement. At present, most nations adopt this approach to the citizenship of human beings with severe cognitive disabilities, and there is no reason why, similarly, animals cannot be viewed as active citizens, although they will need human representation to have their day in court and in international institutions.

This compressed summary leaves out many questions, for example: What about meat-eating? What about medical experimentation? What legal institutions does the new approach suggest? What are the difficulties with current institutions? Nevertheless, it should convey an idea of what the Capabilities Approach is and what terrain it attempts to cover, in alliance with the best scientific research on animals.

Implementation of the Project

Basis: The Capabilities Approach

The project would be unified by the theoretical approach mapped out in Nussbaum's work while also subjecting that approach to critique and challenge throughout, as participants work to find a way forward philosophically and practically. There is no mandatory orthodoxy – they may even defend the inclusion of elements from other approaches (Utilitarian or Kantian) to improve and broaden Nussbaum's version. In fact, some are highly likely to contest Nussbaum's major conclusions (for example, the restriction of duties of justice to animals rather than plants, or the idea that these duties are owed to individual sentient beings rather than to ecosystems). All of this contestation is welcome as part of the project. Its aim is philosophical excellence, and its use in charting new directions for law, both within varied nations and in the international domain. Nusbaum's book provides a menu of topics and opportunities for further development. It is expected and wished that the articles will differ with one another and provide a menu of different options within the broad capabilities framework.

Core: The Young Mid-Career Scholars

For some years Nussbaum has been working within the Human Development and Capability Association to develop approaches to animal rights within the capabilities framework. Two journal symposia have been published in the *Journal of Human Development and Capabilities*. This small group will be the selection group for the younger scholars and the planners of the ensuing conference and volume.

The Deputy Director of the project will be Jeremy Bendik-Keymer, Beamer-Schneider Professor of Ethics at Case Western Reserve University. Bendik-Keymer has published widely on environmental philosophy and on the emotions that support human concern for the environment, as well as a great deal on the Capabilities Approach. An experienced editor, including a first-rate collection on ethical responses to climate change, he also has wide international experience, including teaching at the University of the Sharjah in the United Arab Emirates.

There will be three additional members of the team. The first, Nicolas Delon, is Associate Professor of Philosophy and Environmental Studies at the New College of Florida. He is a prolific writer on the moral status of animals, on animal captivity, and on the ethical issues surrounding "liminal animals" – non-domesticated animals who now live in human-made cities. He has taken part in a symposium at the Human Development and Capabilities Association and is familiar with the Capabilities Approach.

Breena Holland, Associate Professor of Political Science and the Environmental Initiative at Lehigh University, writes widely on issues collecting political theory to environmental policy. Her major book, *Allocating the Earth: A Distributional Framework for Protecting Capabilities in Environmental Law and Policy*, was published by Oxford University Press in 2014. She is currently writing on climate justice. Over the years she has participated in several symposia on animal issues at

meetings of the Human Development and Capability Association, with papers published in the *Journal of Human Development and Capabilities*. Among her interests is the tension between protecting animal capabilities and the claims of Indigenous groups who say that hunting wild animals is part of their endangered culture.

Amy Linch, Teaching Professor of Political Science at Pennsylvania State University, has published widely in many areas of Western political theory, including environmental thought. In recent years, through collaboration with Holland, she has become a member of a working group on animal capabilities at the Human Development and Capability Association. The two have co-authored a paper on Indigenous groups and animals. More recently, Linch has contributed a single-authored paper on friendship between human beings and animals.

Because the Human Development and Capability Association meets in a different country each year, these scholars have presented their work in South Africa, Japan, and the United Kingdom. It is hoped that each of the four would write a paper for the Balzan research project volume, and that together with Nussbaum they would jointly write the Introduction.

The Balzan Scholars

A call for submissions was issued in early 2023 to current or recent Philosophy PhD and law students of the University of Chicago. Although USA-based, the university's philosophy PhD students come from many nations. The law student group is equally heterogeneous, since the JD program includes numerous foreign students and there is also a special LLM program entirely for foreign students. The core group examined these proposals and selected ten early-career scholars to develop their papers. The chosen scholars submitted their drafts at the end of January 2025 and were assigned a mentor.

In February 2025, a conference was held at the University of Chicago Law School. Papers were circulated in advance, with the main aim of engaging in rigorous debate about each one. The conference program can be found at this link: https://www.law.uchicago.edu/events/balzan-conference-2025.

Dissemination of Project Results

Following the conference, the core group will advise the younger scholars on their papers. The due date for all paper writers is August 2025, when the core group will review the papers, write the Introduction, and proceed with submitting the manuscript to Oxford University Press-New York. The Balzan Foundation will be prominently acknowledged in the volume, as it was at the conference.

Any funds remaining will be deposited in the Rachel Nussbaum Memorial Animal Law fund at The University of Chicago Law School, which supports young law students just beginning in this field.