The Legal Status of Whales and Dolphins: From Bentham to the Capabilities Approach

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I. From Suffering to Personhood

The 2013 documentary *Blackfish*,
1 whose success ultimately led SeaWorld to discontinue its orca (killer whale) program, revealed the conditions under which orcas are kept in marine parks. One disturbing aspect is that the whales are placed in an alien environment without stimulation. As one trainer interviewed for the film remarked, “It just can’t be good for an animal that is so intelligent to do the same thing every day.”
2 The whales’ frustration led to aggressive behavior against each other. Deprived of the social environment they were used to, one expert claims that the orcas became “mentally disturbed.”
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Our paper addresses the issue of cetaceans (whales and dolphins) and whether they can be accorded legal status in some situations. Some major issues involved here are the situation of cetaceans in captivity and their use in scientific experiments. These cases raise questions of animal welfare and seem to us to involve a broader concept of animal rights or entitlements. Many animal rights activists have opposed both these practices because of the suffering of the animals involved, stating that the rights of particular animals should not be dependent on whether or not they are “like” humans. While we agree that suffering is an important criterion, it cannot be the only one. We argue that intelligence and the ability to be social are qualities that

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1 *Blackfish*, directed by Gabriela Cowperthwaite (New York: Magnolia Home Entertainment, 2013), DVD.
2 Ibid.
3 Ibid. In 2016, after several years of declining attendance, SeaWorld announced that it was discontinuing its orca breeding program; the current generation would be the last to be kept there.
are at least as important. Indeed, there is a strong case for considering cetaceans “non-human persons” and according them legal rights, most importantly standing to sue in their own right.

Why is this focus pertinent to development ethics? First of all, the case of marine mammals is a very good lens through which to examine more generally the treatment of a group of creatures with complex capacities and cultural formations. This focus will help us to pose questions later about the adequacy of different theoretical approaches. But there are also urgent practical issues. Developing countries are homes to most of the world’s wildlife, and almost all of its large mammals. Developing nations control much of the territory that marine mammals, especially dolphins, inhabit. Many developing countries manage theme parks and wildlife preserves that are basically large zoos, where animals are under human domination and are managed, typically, for human entertainment without sufficient ethical deliberation about the effect of this management on animal life opportunities. Moreover, these same countries routinely ship large mammals to zoos in developed countries without adequate ethical thought or quality-of-life safeguards. The global community agrees in opposing poaching and trophy hunting, and developing countries at least try to limit these cruel practices, although not hard enough. The issue of adequate habitat and decent living conditions is the next frontier for the animal

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6 A typical case is the importation of elephants from Swaziland to U.S. zoos, in which both authors of this paper were involved: Friends of Animals, the organization with which Nussbaum Wichert works as a research attorney, sought an injunction against the importation. Nussbaum Wichert helped draft the motion and M. Nussbaum filed an amicus brief. Nonetheless, the elephants were imported in the dead of night, while the motion was still pending in a U.S. federal court. See https://www.theguardian.com/world/2016/mar/09/us-zoos-secretly-fly-elephants-swaziland-dallas-kansas-nebraska. The purported justification for the airlift was a local drought, but evidence of this was scant and financial motives clearly played a part.
movement, and developing countries have not yet adequately faced it. It is time to face it now, with the best theoretical approach we can find. Our argument takes cetaceans as its central example, but its conclusions apply, as well, to those elephants shipped from Swaziland to zoos in Kansas and Nebraska, to the confinement of tigers in tourist theme parks in India, and to the treatment of elephants as tourist attractions (whether at temples or giving rides to tourists) all over South and Southeast Asia—all allegedly to benefit the animals themselves. Development ethics so far has paid far too little attention to animal ethics, and therefore to the important question of choosing an appropriate theoretical approach—while developing countries are daily making a range of choices that have a decisive impact on animal lives.

II. Cetaceans in Captivity

Since our approach will ultimately discuss both suffering and intelligence, we begin by discussing evidence indicating that whales and dolphins suffer in captivity precisely because of their highly developed intelligence and ability to reason.

Aquariums and marine theme parks generally do not have settings that are in any way similar to what cetaceans experience in the wild. It is therefore likely that they are not behaving in a “natural” way in these settings. Thomas White, for example, in his *In Defense of Dolphins*, points out that dolphins have complex intelligence and social abilities, and argues that there is evidence that they have a culture. As he puts it, a dolphin is “a someone who perceives the world and makes decisions in a way similar to how we humans do.” White presents evidence that dolphins, along with many other non-human species, feel pain in a way that scientists have not

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7 See Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford and New York: Oxford University Press, 2011), ch. 6, arguing that we must turn from an exclusive focus on ending cruel practices to a focus on habitat and on the morality of various allegedly “positive interventions” in the lives of wild animals.

understood until recently.\(^9\) He also proposes that cetaceans might have “different rights” owing to the fact that they have intelligence, even if it is not human intelligence.\(^10\) He goes on to discuss several different issues involving dolphins, such as fishing practices that inevitably endanger them. He proposes that dolphins are treated by humans as property, and that this is inconsistent with an ethical position on animals.\(^11\) “Captivity is so controversial,” writes White, “because it provides such a mixed picture of possible benefits and harms.”\(^12\) These facilities feed the animals well and provide them with entertainment, but the question is: who benefits? It is possible that humans are generally the ones who benefit. It may be positive for people to visit theme parks in order to learn more about cetaceans, and this may have an impact on how they regard animals and the environment. However, the animals themselves may not be faring so well. “Perhaps the most important question is whether the social conditions in which captive dolphins live are sufficient to provide a satisfying and appropriate life… significant relationships and meaningful group membership may be as critical to the well-being and development of dolphins as individual liberty and a sense of autonomy are to humans.”\(^13\)

Activists have also expressed concerns over the plight of orcas in captivity. The various locations of SeaWorld, for example, have repeatedly claimed that keeping the animals provides an opportunity to do scientific research.\(^14\) Independent orca researchers have questioned this, however, claiming that SeaWorld provides little additional knowledge about orcas and that researchers affiliated with the park have failed to conduct peer-reviewed scientific studies on

\(^9\) Ibid., 11.
\(^10\) Ibid., 13.
\(^11\) Ibid., 195.
\(^12\) Ibid., 200-201.
\(^13\) Ibid., 205.
\(^14\) “SeaWorld Says It Has to Keep Orcas In Captivity To Save Them”, Mother Jones, November/December 2014
captive whales that would support their allegations. Orcas are listed as endangered in both the United States and Canada. In conditions such as those prevailing at SeaWorld, they are forced to live in unnatural conditions and must do tricks for the entertainment of visitors. In addition, they cannot sustain the social networks that are crucial to them.

In fact, a member of the California state assembly, Richard Bloom, has introduced a bill to outlaw orca shows. The Orca Welfare and Safety Act would provide for the rehabilitation of the orcas and return them to the wild where possible. If not, they would be “transferred and held in a sea pen that is open to the public and not used for performance or entertainment purposes.”

While lawmakers in other states have passed similar legislation, these laws are purely symbolic as there are no facilities for captive orcas in their states. The situation in California, by contrast, would send a much more powerful message. Supporters of the bill contend that orcas are a “highly intelligent and social species” and should not be subjected to such treatment. Five countries—India, Croatia, Hungary, Chile, and Costa Rica—have already banned all cetacean captivity.

Many of these efforts were inspired by the success of the documentary “Blackfish” which documents the conditions at SeaWorld and the dangerous conditions for the trainers. The film’s director, Gabriela Cowperthwaite, was inspired by an article that appeared in the magazine Outside in 2010. The article described the circumstances surrounding the death of Dawn Brancheau, an experienced trainer at SeaWorld in Orlando, Florida, who was killed by an orca.

15 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Blackfish.
attack in February 2010. Despite her extensive experience with the animals and commitment to their well-being, it appears Brancheau could not fight the conditions at SeaWorld that led to her death. Principally, the article argues, audiences were attracted by “the sight of one of the ocean’s top predators performing like a circus animal.”

Indeed, until the 1960s, there were no orcas in aquariums and they certainly did not perform in shows. The article credits the owners of the Seattle Aquarium with introducing the idea of capturing orcas in the wild and selling them. They started in Puget Sound, often using brutal methods including air attacks and explosives. SeaWorld managed to net several hundred orcas during the 1960s and early 1970s. The Marine Mammal Protection Act became law in 1972 and forbade these activities, but SeaWorld continued to receive an exception for the purposes of educational display. However, the state of Washington filed suit and prevented SeaWorld from capturing orcas in its waters. The two SeaWorld entrepreneurs continued their activities in Iceland. One of the whales captured there was Tilikum, the male orca responsible for the death of Brancheau.

While SeaWorld’s facilities are probably superior as far as marine parks go, the problems continued. There were continual incidents of attacks on trainers. In the film Blackfish, numerous trainers are interviewed stating that they had not been informed about these incidents and that they were genuinely unaware of the dangers they faced. In addition, most trainers stated that they had little background or experience with marine mammals, and instead got their jobs

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22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
27 Blackfish.
because they had pleasant personalities and could swim well.\textsuperscript{28} While working at SeaWorld they repeated information about such subjects as the life spans of orcas in the wild that was patently incorrect.\textsuperscript{29} While even opponents of SeaWorld concede that their activities may have a legitimate educational function, whale researchers such as Naomi Rose question just how effective this education is. She states, “After they’ve just had a great day, most people are going to say, ‘Sure, you guys are great. You betcha I learned a lot.’ But what do they know after a visit? What do they do afterward? Public display doesn’t actually teach people much. It just makes them feel good, which actually leads to less conservation action rather than more.”\textsuperscript{30}

Thus, while there may be some educational benefit, this brings me back to my original inquiry: is it ethical to keep animals of such high intelligence in captivity? Furthermore, this practice has resulted in the deaths of humans.

Brancheau’s death led to a suit against SeaWorld by the Occupational Safety and Health Administration. An initial ruling in May 2012 mandated that in future the orcas would have to be separated from trainers.\textsuperscript{31} SeaWorld appealed and the Court of Appeals for the District of Columbia Circuit ruled in favor of OSHA on April 11, 2014.\textsuperscript{32} This decision, however, was fairly limited. Judge Judith W. Rogers stated that “The remedy imposed for SeaWorld’s violations does not change the essential nature of its business… There will still be human interactions and performances with killer whales; the remedy will simply require that they continue with increased safety measures.”\textsuperscript{33} The animal welfare issues thus remained largely

\begin{footnotes}
\item Ibid.
\item Ibid. See also David Kirby, \textit{Death at SeaWorld: Shamu and the Dark Side of Killer Whales in Captivity} (New York: St. Martin’s Press, 2012), 95.
\item Quoted in Kirby, 350.
\item Ibid.
\item Ibid.
\end{footnotes}
unaddressed, but the case and the film undoubtedly brought greater publicity to the situation of orcas.

III. Legal Interventions and the Problem of Standing

Considerations such as these animated members of People for the Ethical Treatment of Animals when they sued SeaWorld’s facilities in Orlando and San Diego over their treatment of orcas in captivity. Notably, this case involved Tilikum, the subject of the controversy. The group Next Friends, composed of members of PETA, filed a complaint for declaratory and injunctive relief, “seeking a declaration that the named wild-captured orcas are being ‘held by the Defendants in violation of Section One of the Thirteenth Amendment to the Constitution of the United States, which prohibits slavery and involuntary servitude.’” 34 Next Friends emphasized that “…the confinement of the orcas in barren concrete tanks negatively impacts them in many ways, including the suppression of Plaintiffs’ cultural traditions and deprives them of the ability to make conscious choices and of the environmental enrichment required to stimulate Plaintiffs mentally and physically for their well-being.” 35 While the orcas were born free, Next Friends argued that they were equivalent to slaves because they were“(1) held physically and psychologically captive; (2) without the means of escape; (3) separated from their homes and families; (4) unable to engage in natural behaviors and determine their own course of action or way of life; (5) subjugated to the will and desires of SeaWorld; (6) confined in unnatural, stressful and inadequate conditions; and (7) subject to artificial insemination or sperm collection for the purposes of involuntary breeding.” 36

35 Ibid. at 1261.
36 Ibid.
SeaWorld argued that the plaintiffs lacked Article III standing to bring the action. This was a case of first impression because there were no authorities applying the Thirteenth Amendment to non-persons.\textsuperscript{37} The court agreed and explained its reasoning as follows: “The only reasonable interpretation of the Thirteenth Amendment’s plain language is that it applies to persons, and not to non-persons such as orcas.”\textsuperscript{38} The claim was therefore dismissed under Rule 12 (b) (1) for lack of subject matter jurisdiction.\textsuperscript{39} However, the court emphasized that “Even though Plaintiffs lack standing to bring a Thirteenth Amendment claim, that is not to say that animals have no legal rights…”\textsuperscript{40}

The court in \textit{Tilikum} concluded that orcas do not have standing to sue under Article III. The court in \textit{Cetacean Community v. Bush} reached a similar conclusion.\textsuperscript{41} This was a case in which an invented group, “the world’s cetaceans” sought to bring suit under the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the National Environmental Protection Act (NEPA), and the Administrative Procedure Act (APA).\textsuperscript{42} The impetus for the suit was the United States Navy’s use of sonar to detect submarines. This has been proven to have negative effects on marine mammals: the practice “harms them by causing tissue damage and other serious injuries, and by disrupting biologically important behaviors including feeding and mating.”\textsuperscript{43} The Ninth Circuit ruled, however, that the cetaceans did not have standing to sue under any of these statutes, and that the district court was correct to dismiss the case under Rule 12 (b) (6) for failure to state a claim.\textsuperscript{44}

\textsuperscript{37} \textit{Ibid.} at 1262.
\textsuperscript{38} \textit{Ibid.} at 1263.
\textsuperscript{39} \textit{Ibid.}
\textsuperscript{40} \textit{Ibid.} at 1264.
\textsuperscript{41} \textit{Cetacean Community v. Bush}, 386 F. 3d 1169 (9th Cir. 2004).
\textsuperscript{42} \textit{Ibid.} at 1171.
\textsuperscript{43} \textit{Ibid.} at 1172
\textsuperscript{44} \textit{Ibid.} at 1173
Here the Court considered some previous cases involving animals that appeared to hold that an endangered species has standing to sue. However, it concluded that the relevant statements in these cases are nonbinding dicta.\footnote{Ibid.} In the case of a suit to enforce the ESA, \textit{Palila v. Hawaii Department of Land and Natural Resources}, the Ninth Circuit stated that the Hawaiian Palila bird had legal standing.\footnote{Palila v. Hawaii Department of Land and Natural Resources, 852 F. 2d 1106, 1107 (9th Cir. 1988)} However, in the case of the cetaceans, the court concluded that these statements “were little more than rhetorical flourishes. They were certainly not intended to be a statement of law, binding on future panels, that animals have standing to bring suit in their own name under the ESA.”\footnote{Cetacean Community v. Bush at 1174.}

However, the court in \textit{Cetacean Community} also stated that “nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans.”\footnote{Ibid. at 1175.} There are many federal and state laws that protect animals, but these generally concern more obvious abuses of animals and are already prohibited by statute.\footnote{Ibid.} Instead, the concern seems to be that Congress has never authorized a suit in the name of an animal.\footnote{Ibid.} None of the several statues mentioned—the ESA, the MMPA, NEPA, and the APA—explicitly authorize lawsuits. Associational standing is also not adequate, because “A generic requirement for associational standing is that an association’s ‘members would otherwise have standing to sue in their own right.’”\footnote{Ibid.} at 1179, citing \textit{Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.}, 528 U.S. 167 (2000). The Cetacean Community could therefore not prevail in this case, because its members did not have standing to sue.
The major problem here is that no court has decided that animals have standing comparable to that of persons. In the absence of any such decision, animals are not considered to have any sort of legal status comparable to “personhood.” In this situation, it does not matter whether their legal disadvantage is based on the principle of reason or is instead based on suffering. Until these statutory issues are resolved, there cannot even be any discussion.

IV. Non-Human Personhood: Bentham and the Rationale of Suffering

How might cetaceans be able to demonstrate a status as “non-human persons”? We now consider three possibilities: a Utilitarian approach based on suffering, an anthropomorphic approach based on reason and intelligence, and finally, a capabilities approach based upon the striving of these creatures to live a flourishing life characteristic of their species.

Jeremy Bentham departed from the conventional Judeo-Christian view of animals when he discussed their plight in his *Introduction to the Principles of Morals and Legislation*. In discussing the criminal branch of legislation, Bentham argued that ethics is “the art of directing men’s actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.” Men can direct either their own actions or those of other agents, a group that includes “Other animals, which, on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things.” While some religions have addressed the situation of animals, Bentham argues that the law of his day has completely neglected them. He does not see any justification for this. In his day, public

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53 Ibid.
discourse had evolved considerably on the topic of slavery, and there is no reason why animals should not receive the same consideration: “The day has been, I grieve to say in many places it is not yet past; in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing as, in England for example, the inferior races of animals are still. The day may come, when the rest of the animal creation may secure those rights which never could have been withheld from them but for the hand of tyranny.”

Bentham does not base his advocacy for animals on the idea that some species can reason in ways that are at least close to humans. The focus of his inquiry is different. He points out that even if the correct standard were the possession of reason, this standard would not defend the species line: “[A] full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day.” But in fact reason is not the correct standard: “…the question is not, Can they reason? nor, can they talk? but, can they suffer?” This is an approach currently followed by many prominent animal rights activists, notably Peter Singer, who also bases his arguments on suffering. And this is what Bentham believes to be relevant in thinking about human action as well. Throughout his philosophical work, he consistently argues that pleasure and pain are simple sensations, varying in (a) intensity, (b) duration, (c) certainty or uncertainty, and (d) propinquity or remoteness. Pleasures and pains have many different sources, but pleasure itself contains no qualitative variations.

Bentham was especially eager to reject the familiar Christian view that there are “higher pleasures” and “lower pleasures” and that the pleasures of the body were inferior to the pleasures

54 Ibid., 311, fn.1. For a full examination of all known texts of Bentham relating to animals, see Jadran Lee, Bentham on the Moral and Legal Status of Animals, dissertation, University of Chicago, 2003.
55 Ibid.
of the mind. In work that was not published during his lifetime, but has only very recently become available from the Bentham Project at University College London, he argues strongly for the decriminalization of homosexual relations, using the view of pleasure to argue that the source of a pleasure makes no difference at all to its quality as pleasure, and that there is no rational argument for restrictions on consensual sexual expression.57

Thus we can now see that Bentham’s insistence on the similarity between animals and humans in respect of pain and pleasure is part of a far-reaching program of repudiating puritanical British attitudes to the body, which surely underlay Victorian views of the human-animal divide.58 But the interest in animals was very genuine: numerous remarks of Bentham himself and his devoted editor John Bowring testify to his fondness for a wide range of animals, including cats, donkeys, pigs, and mice. He cultivated a friendship with a pig who used to follow him around on his walks. A cat whom he named Reverend John Langborn used to eat macaroni at the table with him. He loved to have mice play in his study and eat crumbs from his lap. “I love everything that has four legs,” he wrote. He used to recall with dismay the cruelties that he himself had inflicted on animals as a child, and the salutary effect that his uncle’s reproaches had on him.59

Bentham’s position was not radical in our contemporary terms. While he opposed the gratuitous infliction of pain on animals, and hence rejected hunting and fishing for sport, he did not oppose all killing and eating of animals. He reasoned that a painless death was not a harm to

59 For the sources of these and other anecdotes, see Lea Campus Boralevi, Bentham and the Oppressed (Walter de Gruyter, 1984), p. 166.
an animal, since such a death was less painful than the death that animals would meet in the
course of nature.\textsuperscript{60} But the position had radical potential: had he known of factory farming, he
surely would have rejected it as a form of torture. And his position was certainly radical for his
day, as Gary Francione explains: “Bentham’s position marked a sharp departure from a cultural
tradition that had never before regarded animals as other than things devoid of morally
significant interests… For Bentham, our treatment of animals matters because of its effect on
beings that can suffer, and our duties are owed directly to them. Bentham urged the enactment of
laws to prevent animals from suffering.”\textsuperscript{61} Indeed, many early animal welfare acts were inspired
by Bentham’s views.\textsuperscript{62} However, Bentham did not question the traditional view of animals as
property, something that limited the force of his argument.\textsuperscript{63} No doubt the failure to raise this
issue is explained by the fact that the defense of animals is in a lengthy footnote in what is
otherwise a treatise on the criminal law, not on property law.

It can be argued, however, that this avoidance of the property issue undermines the cause of
animal welfare as well as animal rights. As Francione concludes: “The property status of animals
renders meaningless any balancing that is supposedly required under the humane treatment
principle or animal welfare laws, because what they really balance are the interests of property
owners against the interests of their animal property… We are allowed to impose any suffering
required to use our animal property for a particular purpose even if that purpose is our mere

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\textsuperscript{60} See Bentham, \textit{Principles}, 311.
\textsuperscript{61} Gary L. Francione, “Animals: Property or Persons?” in Cass R. Sunstein and Martha C. Nussbaum, \textit{Animal
Rights: Current Debates and New Directions} (Oxford University Press, 2004), 113. Francione’s “never before” is
incorrect, it omits the much higher valuation of animal capacities and their ethical worth in most ancient Greek and
Roman philosophical schools, particularly Neo-Platonism. See Richard Sorabji, \textit{Animal Minds and Human Morals:
\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid., 116.
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amusement or pleasure.” Bentham’s comparisons to slavery highlight the problem, for in order to make the case for slavery as a moral wrong, it is necessary not to be swayed by arguments that some slaveholders treated their slaves well. While Bentham regarded the concept of rights as “metaphysical nonsense,” he did recognize that people had the right not to be treated as property. His arguments regarding animals were primarily based on the idea that animals did not have self-awareness, and no significant interest in their own existence beyond avoiding suffering. It is unclear whether his simple form of hedonism can even deal adequately with the wrongfulness of slavery; subsequent Utilitarians have struggled with this problem. Putting that question to one side, we argue here that simple hedonism is not an adequate basis for an account of animal entitlements, if these include not just the right not to be tortured but also the right not to be used as property.

The Benthamite conception of animal welfare has obvious appeal in U. S. law, where it has long been recognized that a—if not the—major obstacle to legal progress in this area is the doctrine of standing. In order to have standing to go to court, a creature needs to be directly affected by the conduct in question. And suffering is remarkably direct! For this reason legal theorist Cass R. Sunstein has argued that suffering provides the best basis for making progress on the thorny issue of standing for animals, and that it is a sufficient basis, without resolving the property issue. The relatively small number of cases brought on behalf on animals might seem to suggest that the standing issue cannot be resolved without first resolving the property issue. And the image of animals as human property is one that many animal advocates have historically found difficult to overcome. However, Sunstein argues that the conflict of property with the

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64 Ibid., 117.
65 Ibid., 126.
66 Ibid.
standing issue is not necessarily an insuperable obstacle. In a well-known article, he questions the idea that regarding animals as property is an automatic bar to according them legal standing: “If the status of property means the status of mere means to the ends of others, or a status of human domination and control, animals should not have the status of property. But even inanimate objects can be, and are, protected against full domination and control... I do not believe that it is necessary to consider animals to be persons, or to insist on certain cognitive powers in order to say that, by virtue of their capacity to suffer, they deserve legal rights against cruelty, abuse and neglect.”

Theoretically, then, it should not matter whether animals are entitled to a status comparable to that of humans. Suffering should be enough. However, as Sunstein goes on to say, “…the rhetoric does matter. In the long term, it would indeed make sense to think of animals as something other than property, partly in order to clarify their status as beings with rights of their own.” And in practice the appeal to suffering has clearly not proved to be adequate. A response to Sunstein’s article written by Elizabeth DeCoux reveals more about why the rationale of suffering will not be successful in courts. DeCoux rightly states that courts’ treatment of animal standing has been extremely inconsistent. Federal statutes have failed to resolve this problem. She suggests that more humane means of keeping animals in captivity, or experimenting on them, are an illusion, and that the laws established for these purposes are essentially an excuse for further abuse of animals. Thus she suggests that an approach focusing on suffering—even if

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it did resolve the standing issue—would be insufficiently radical to effect productive change.

Even when courts have recognized standing, they did not explain the reasoning for their decision, “…thus leaving the law regarding the standing of animals sufficiently unclear so as to allow room for equally unexplained decisions reaching the opposite result.”

Bentham’s hedonism has one big appealing feature: its universal concern for bodies and for bodies in pain. Bentham really did see the world as populated by a wide range of sentient beings, all deserving a happy existence. His opposition to qualitative distinctions between pleasures was motivated by a concern to return ethics to the body, and this concern embraced all animal bodies. In the end, however, the theoretical apparatus of the position has grave limits. We have pointed to some of the practical limits, in terms of the law. We now turn to the theoretical limits.

V. The Rationale of Intelligence

John Stuart Mill, Bentham’s great Utilitarian pupil and partial follower, argued that Bentham’s hedonism was too simple: for pleasures differ in quality as well as in quantity. In this important critique, Mill unfortunately blurs two completely different issues: (a) do pleasures differ in quality as well as quantity? and (b) are some pleasures “higher” or “lower” than others? Mill might have said “yes” to the first question while saying “no” to the second. In other words, he might have said, plausibly and truly, that the pleasure of eating a peach is different from the pleasure of chatting with a friend, but that there is no sensible reason to rank one above or below the other. In that way, Mill would have kept Bentham’s radical assault on puritanical British

73 Ibid., 732.
prudery about the body while making his doctrine more subtle. But, being a product of the Victorian era, he blurred the two questions together. He suggests that it is only by showing that mental pleasures are superior to bodily pleasures that one can show that pleasures differ in quality.

Mill ignores an important option of great interest to the theorist of animal entitlements, then, when he insists on the primacy of mental pleasures. He was intensely concerned with animal suffering, leaving the bulk of his estate at his death to the Society for the Prevention of Cruelty to Animals. And in his “Reply to Whewell,” he effectively assails the Christian conservative’s position that the human being is made in God’s image and therefore properly dominates the entirety of creation. Nonetheless, he retains an important part of Whewell’s conservative position when he asserts that mental pleasures (which he thinks peculiar to human beings) are “higher.” He retains the traditional image of a “ladder of nature” that demotes animals.

Mill’s position is inadequate as a basis for animal entitlements. Still, it must be admitted that the Victorian era has not really ended in this regard: most people do think that humans are superior to animals on account of their mental powers. Having already ranked the mental above the bodily, they then deny that animals partake in the mental. This is probably the most common type of position in contemporary ethical thought, and it has been used in just the way Bentham would have predicted, to rank all animals below all humans.

There are two errors in this position: the ranking of the mental above the bodily, and the denial that animals partake in the mental. Since the first error is very difficult to dislodge, and

75 See ibid., 228-71.
since lawyers need to deal with real judges, who (in our post-Victorian Judeo-Christian culture) are almost certain to agree with Mill and disagree with Bentham, it might make sense to focus on the second error, the denial of intelligence and cognitive capacity to animals.77

The fact that animals of many types exhibit intelligence and cognitive capacity of many types has been known for a long time. Aristotle’s keen observations of animals led him to recognize many types of commonality between humans and animals with respect to goal-directed practical reasoning and cognitively rich emotions.78 But the intervening ascendancy of the Judeo-Christian tradition in the West (abetted by Greco-Roman Stoicism, which asserted that non-human animals were mere “brutes” without intelligence) caused the eclipse of these promising insights in Europe and North America.79 Recently, however, a flood of new research on the cognitive capacities of animals has made Aristotle’s insights impossible to deny. Animals as allegedly “low” as rats and mice exhibit complicated forms of practical reasoning, as well as the beginnings of complex emotions.80 Even in Kantian moral philosophy, which has traditionally split the world into rational beings, who have a “dignity,” and sub-rational beings, who have a “price,” the insight that animals are our “fellow creatures,” sharing many commonalities with us and partaking in goal-directed behavior, has now become firmly entrenched thanks to the

77 Such is the approach of Whitehead and Rendell with marine mammals (above); similar conclusions are reached by Joshua Horwitz in War of the Whales (New York: Simon and Schuster, 2015). A magisterial account of what we currently know about animal intelligence is Frans de Waal, Are We Smart Enough to Know How Smart Animals Are? (New York: W. W. Norton, 2016). See also Jennifer Ackerman, The Genius of Birds (New York: Penguin, 2016).

78 See his treatise On the Motion of Animals, which offers a “common explanation” for the goal-directed movements of human and non-human animals. See Martha Nussbaum, Aristotle’s De Motu Animalium (Princeton: Princeton University Press, 1978), an edition and commentary.

79 See Sorabji. Such insights were present continuously in Indian traditions, both Buddhist and Hindu, although Buddhist traditions are more consistent in showing concern for all animals, not just a few favored species.

pioneering work of philosopher Christine Korsgaard.\textsuperscript{81} These new/old insights seem potentially productive for law.

For some time, legal scholar and animal advocate Stephen Wise has urged that lawyers pursuing animal rights focus their attention on the obvious attributes of personhood that a few animal species, such as chimps and other apes, can be seen to share, and use these evident commonalities as a wedge in order to get the law to recognize some species of animals as persons for legal purposes.\textsuperscript{82} It would be easy, in the light of recent research, to broaden Wise’s approach, admitting quite a few more species into the category of “persons.”

Back, now, to the standing debate: DeCoux alleges that Sunstein is incorrect when he concludes that the words “person” and “individual” as expressed in statutes, necessarily exclude animals.\textsuperscript{83} It is also likely, as she alleges, that federal judges are unwilling to examine their own prejudices in such a way as to reconsider the situation of animals. But perhaps they can be led to do so through judicious use of evidence and example. Activists can stress the “person” aspect of this debate, using appeals to cognition, intelligence, and even culture. Such an approach can provide a much more solid basis to standing for animals. One court in India, the High Court of Kerala, has already recognized a wide range of animals as persons within the meaning of the term “person” in the Indian Constitution. “Though not homo sapiens,” the court concludes, “they are also beings entitled to dignified existence and humane treatment…” Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognize and

\begin{thebibliography}{99}
\bibitem{Decoux} DeCoux, 740.
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protect their rights… If humans are entitled to fundamental rights, why not animals?” It is not surprising that an Indian court would take this step before courts in Europe and North America, where the Judeo-Christian tradition has long impeded recognition of common personhood. Still, the knowledge we currently have is undeniable, and it strongly supports this recognition.

A modified Millean proposal, then, could retain the focus on intelligence and cognitive capacity as hallmarks of legal personhood, but insist that some species of animals possess these characteristics. This approach seems particularly well suited to winning legal rights for marine mammals, since dolphins have long been recognized as a species extremely high in intelligence. They are able to pass the “mirror test” and exhibit resourceful goal-directed behavior to at least as high a degree as chimps and bonobos. Whales too, though more mysterious to humans and difficult to study, have long been recognized as having an extremely high level of intelligence, including a signaling system that lies close to language and complex forms of socially learned interaction that amount to culture. Whales and dolphins cannot be said to be “like” humans in terms of DNA, but they have their own form of intelligence and deserve protection under the law.

We do not wish to deny that this approach is legally promising, and perhaps it is the most legally promising approach to the treatment of marine mammals under current conditions. Recognizing these creatures’ intelligence and social capacity, the law would also recognize that they are entitled not to be deprived of conditions necessary to the unfolding of these capacities.

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84 Nair v. Union of India, Kerala High Court, no. 15/1999, June 2000.
85 The mirror test is a test to ascertain whether an animal recognizes its own image in a mirror. Typically, a black mark is applied to the back of the animal’s head, visible in the mirror and not to the animal without the mirror. Then, to make sure that the tactile sensation of applying the mark is not driving the result, a sham invisible mark is applied to the other side of the head. The animal looks in the mirror. If he or she scrubs the mark off of his or her own head, after seeing the mark in the mirror, the animal is understood to have recognized that the image is an image of itself.
86 See Whitehead and Rendell.
This approach moves beyond Bentham in the sense that not only manifest physical suffering, but also deprivation of free movement and community, would count as deprivations of which the law could take cognizance. Judges could, we believe, be persuaded of this without large-level cultural changes.

Nonetheless, we believe that this approach has two related defects that make it ultimately inadequate. First is the defect identified by Bentham in the moralities of his time: the exaltation of mental life to “higher” status and the demotion of bodily feeling to “lower” status. In the end, it is difficult to craft an adequate theoretical approach to the situation of animals as long as we permit anxiety and disgust about the body to influence our legal judgments. Theorists who study the influence of disgust in society and law have concluded that the roots of disgust toward marginalized groups (whether lower castes in India or racial minorities in the United States) lie in the dominant group’s anxiety about its own animality and mortality. The characteristics that are rejected and imputed to disfavored groups are precisely those characteristics that humans tend to associate with animal bodies (smells, fluids, excretion, blood, etc.). And they hold that it is because humans shrink from acknowledging their own animality that they create groups of disfavored humans who are characterized as “mere animals,” and potential contaminants to “higher” humans. See the research of Paul Rozin, discussed in chapter 3 of Martha Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2006).
The second related problem with the “intelligence” approach is that it values animals because and only insofar as they are similar to us: it thus fails to respect them in their own right. It takes no interest in their distinctive forms of life and intelligence. And of course it will end up giving adequate protections only to those who can demonstrate quasi-humanness, thus not to a wide range of animal species. This may be the best we can do in the law right now, pragmatically. But the downside of this strategy is that it could set back efforts to protect all but a few chosen species.

VI. From Bentham to the Capabilities Approach

Our study of Bentham and Mill has given us some parameters for a truly adequate legal approach. Like Bentham, such an approach should take suffering extremely seriously. Like Mill, however, it should recognize a wide range of activities and experiences, differing in quality and not reducible to simple pains and pleasures. Like Bentham, it should refuse a ranking of lives and experiences, and should be especially skeptical of any ranking that encodes conventional anxieties about the body. Like Mill, however, it should refuse to reduce all value to pleasure and pain, simply understood, and should recognize the dignity of a wide range of forms of life. In short, the approach should have Mill’s inclusiveness and his sensitivity to qualitative differences without Mill’s Victorian prejudices. It should have Bentham’s radical edge without Bentham’s reductivism.

And there is one more thing such an approach must contain: a concept, or rather concepts, of animal agency: the idea, that is, that animals are not merely passive recipients of experience

88 For Mill’s appeal to dignity, see *Utilitarianism.*
but shapers of lives.⁸⁹ To be adequate to the complexity and variety of animal lives, the notion of agency must be developed in a flexible and species-specific way, and this will require intimate and detailed knowledge of each animal species. But for all, there is something that is it to be a maker of a life. And in political terms, although animals will not be democratic citizens along lines of familiar human models of democracy, there is something that it is to respect animals as democratic agents, participants in the shaping of the world we share with them.⁹⁰ Respect for agency is lacking in Utilitarian approaches and underdeveloped in approaches that focus on intelligence. Rights-based approaches do better.⁹¹ And the Capabilities Approach is one species of a rights-based approach, in that it argues for fundamental entitlements grounded in justice. But the challenge for such an approach is to develop a notion, or notions of agency in terms of an Aristotelian notion of a form of life actively striving for its characteristic end.⁹²

The Capabilities Approach is able to take on this challenge. Like Bentham, it values all sentient beings and their lives: animals for us, as for Bentham, are “friends,” not servants or property. Lives are not ranked in a vertical hierarchy: instead, there is curiosity and respect for the lives of all, as they are, exhibiting in each case the distinctive capacities and activities of

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⁹⁰ See particularly Donaldson and Kymlicka.


⁹² Crocker argues for Sen’s comprehensive notion of agency, basically a notion of autonomy, as preferable to Nussbaum’s thinner concept of practical reason, but he should recognize that Nussbaum’s reason for preferring the thinner notion is its suitability for a society in which many reasonable citizens reject autonomy and prefer authoritarian religion. Nonetheless, Nussbaum claims, a political “overlapping consensus,” though it should avoid the thicker notion of autonomy can still include the thinner notion in its political principles. Nussbaum’s reasons for rejecting a comprehensive doctrine of autonomy such as that of Joseph Raz are given in her “Perfectionist Liberalism and Political Liberalism,” *Philosophy and Public Affairs* 39 (2011): 3-45, reprinted in *Capabilities, Gender, Equality*, edited by Flavio Comim and Martha C. Nussbaum (Cambridge: Cambridge University Press, 2014), 19-56. Crocker’s book precedes this statement, so he does not state whether he accepts these arguments of Nussbaum’s. In any case, we believe that where non-human animals are concerned he could accept the flexible and multi-species notion of agency that we propose.
each. Bentham never spoke of wonder, and he might have made fun of that idea, but he did exhibit what we regard as morally inflected wonder when he valued the complexity—and the dignity—of animal lives and formed respectful friendships with animals of many types.93

This approach has Bentham’s radicalism, but it rejects his reductivism. Sentience is important, pain is very important, but so too are a wide range of other opportunities for functioning: free and characteristic movement, access to relationships with other species members, opportunities for cognitive stimulation, variety, and delight, protection of bodily integrity. In each case, we need to learn enough to form a normative picture of the flourishing life of a creature of the appropriate type, and then to see clearly what real-world conditions unjustly impede flourishing. Nussbaum’s capabilities list gives abstract guidance, but in each case the capabilities to which animals are entitled must be fleshed out in terms of species-specific ideas of opportunities for active functioning.

The Capabilities Approach does not hold that every capacity a creature has must be developed. Instead, it operates with a normative picture of flourishing for each type, trying to figure out, as well as possible, what opportunities for active functioning are essential. Thus it is a likely result of such an approach that chimps do not need to be taught sign language: they can learn it and that fact is of scientific interest—to humans, but it does not form part of a chimpanzee form of flourishing life. Other communicative modalities are favored by chimps in their own community.

93 We do not have space here to expand on the relevant notions of dignity and wonder, but we agree with Jeremy Bendik-Keymer, in “From Human to All of Life: Nussbaum’s Transformation of Dignity,” in Comim and Nussbaum, 175-92.
The Capabilities Approach recognizes that animals may not suffer consciously when deprived of an opportunity for some type of valued functioning and agency. Like humans, they can exhibit “adaptive preferences,” going along with a deprivation of movement, or society, without forming a clear picture of what is missing. So the Capabilities Approach in that way goes beyond even Mill’s Utilitarianism, recognizing that suffering is not the only thing to be avoided, even once we adopt a variegated and expanded notion of suffering. Once again, the idea of animals as intelligent agents is crucial: not just receptacles of experience, they are, and should be seen to be, makers of their own lives.

Can such an approach guide law? Obviously it is slippery and complicated, but it has the advantage of being the way scientists think about the complexity of animal lives, and the way that ethically sensitive people think too, once they begin to think. Animal lives are unfolding stories of striving, and it is very intuitive to think this way. When people think about marine mammals, big abstractions such as “personhood” and “suffering” are difficult to think with, but the story of a life-form that seeks certain types of activity and strives for a variegated interactive social life is intuitively compelling. So we believe that courts could ultimately think this way, infusing the legal notion of “personhood” with rich species-specific content. This in effect is what the Indian court did, when it ruled that confining circus animals in a tiny space and making them perform silly tricks was an infringement of the personhood and dignity of beings who are not human and have their own form of life. Another apt example of such an approach, with potential implications for law, is the work of Thomas White on dolphins, which we have already discussed in Section II. Although White is not a theorist, his approach dovetails well with the Capabilities Approach, and shows how such an approach can be adapted to the needs of law.
What this approach means in general is that orcas, other whales, and dolphins are entitled to opportunities to exercise their major capabilities, social and physical, which means at least: to move freely in a large space, to interact regularly and in an unforced way with other species members, to be free from intrusions into their bodily integrity. Confinement makes the fulfillment of these conditions difficulty, but perhaps not impossible if the facility is, for example, a large wildlife park with ample free space. Zoos almost never afford sufficient protection for the capabilities of large mammals. But for marine mammals, White’s work with dolphins suggests that captivity is particularly objectionable because of the capability deprivation it involves. Many criticisms of captivity focus only on substandard facilities. White raises the question “…whether even the best facilities operate in a way that is ethically defensible. That is…it should be apparent that dolphins are sophisticated beings with a complex set of needs. Can captive facilities provide the conditions that would have to be met so that dolphins who inhabit them are able to meet the fundamental needs of their species?”

Defenders of captivity point out that it provides benefits to both cetaceans and humans. These arguments are not utterly pointless, but they are not sufficient. Cetaceans in captivity are not able to engage in the social networks they create in the wild. The Capabilities Approach helps us see what is wrong with such facilities. Agency, not just passive welfare, is at issue.

Furthermore, the main purpose of captive facilities is human entertainment. White concludes that “The idea of treating a species of self-aware beings with a sophisticated consciousness as ‘property’, not ‘persons’, and breeding them with an eye toward the traits that will make them most useful commercially has chilling similarities with the practice of human

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94 White, 199-200.
95 We are also sympathetic to the term “wildlife sovereignty,” as used by Donaldson and Kymlicka.
slavery.” Both in this case and in others, the most difficult question our approach will face in the area of marine mammals in confinement is the one the Indian court faced: teaching tricks that amuse humans. With symbiotic species such as dogs and horses, some of the characteristic functions of the species are interactive, and some involve learned forms of athletic excellence. There is nothing wrong with training, and a horse humanely trained to jump over fences may achieve a type of flourishing unavailable to a horse that is let out to pasture its entire life. But with non-symbiotic species, the question is far more difficult. An elephant wearing a pink tutu seems clearly objectionable, a way of amusing humans by offending against the dignity of the animal. But what about an elephant elaborately body-painted and taught to greet visitors to a Hindu temple? An elephant that uses its strength to roll logs, and is lovingly trained and kept in excellent conditions?

Marine mammals pose many such difficult questions. Are dolphins more like horses, exhibiting athletic excellences with delight and alacrity? Or are these tricks more like putting an elephant into a pink tutu? Should we be delighted that dolphins form interactive cultures with humans in some fishing communities, or should we see these cultures as unjustified interventions into animal lives? Should orcas be kept from all symbiotic contact with humans, or should friendship be encouraged? These questions can only be answered well once we have a comprehensive understanding of the forms of life of these creatures, which we do not yet have.

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96 White, 211.
97 See Vicki Croke, *Elephant Company: The Inspiring Story of an Unlikely Hero and the Animals Who Helped Him Save Lives in World War II* (New York: Random House, 2015). Croke narrates the story of Billy Williams, who worked for a British teak company in Burma, training elephants for that industry, but then joined with them to form a fighting brigade in the war. He was so respectful of elephant agency and intelligence that he used only positive reinforcement to train them.
99 See the documentary film *The Whale* (2011), a fascinating study of the dilemma created by the behavior of Luna, an unusually friendly young orca in Puget Sound.
But the Capabilities Approach shows us the right questions to ask. Once we have a normative account of orca and dolphin lives, we can assess the damages done by SeaWorld and other related organizations, damages that include suffering, but go well beyond that. And then, some day, we can ask judges to use their moral imaginations to consider the entirety of these forms of life and to hold human beings accountable for protecting animal capabilities.

**Postscript, July 15, 2016**

We have happy confirmation today of our contention that U. S. courts are able to move in the direction of the approach we recommend. In *Natural Resources Defense Council v. Pritzker*, the U. S. Court of Appeals for the Ninth Circuit ruled that the U. S. Navy violated the law in seeking to continue a sonar program that impacted the behavior of whales. To some extent the opinion is a technical exercise in statutory interpretation of the Marine Mammals Protection Act: the court says that the fact that a program has “negligible impact” on Marine Mammals does not exempt it from a separate statutory requirement, namely that it establish means of “effecting the least practicable adverse impact on” marine mammal species. What is significant, and fascinating, is that the argument relies heavily on a consideration of whale capabilities that the program disrupts:

> Effects from exposures below 180 dB can cause short-term disruption of abandonment of natural behavior patterns. These behavioral disruptions can cause affected marine mammals to stop communicating with each other, to flee or avoid an ensonified area, to cease foraging for food, to separate from their calves, and to interrupt mating. LFA sonar can also cause heightened stress responses from marine mammals. Such behavioral disruptions can force marine mammals to make trade-offs like delaying migration, delaying reproduction, reducing growth, or migrating with reduced energy reserves.101

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The opinion does not give whales standing; no such radical move is necessary to reach the clear result that the program is unacceptable. But it does recognize whales as beings with a complex and active form of life that includes emotional well-being, affiliation, and free movement: in short, a variety of species-specific forms of agency. The opinion goes well beyond Bentham, and it also eschews the anthropocentric approach. It is a harbinger, we believe, of a new era in the law of animal welfare.
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