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This book review was originally published in *Journal of Bioeconomics* in 2023. <https://doi.org/10.1007/s10818-023-09332-y>

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Martha C. Nussbaum, *Justice for Animals: Our Collective Responsibility*

Simon and Schuster, New York., ISBN-13: 978-1982102500

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Accepted: 28 February 2023
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Justice for Animals is a idealistic manifesto for non-human animal rights grounded not in science or economics, but rather in philosophy. The author is Martha Nussbaum who received her Ph.D. in classical philology and now is the Ernst Freund Professor of Law and Ethics at the University of Chicago.

Justice for Animals argues for using the “Capabilities Approach (CA)” to grant species, and individual organisms, additional rights and protections from injustice. The book’s last paragraph summarizes its goal, “I hope that readers will be moved to make a choice for justice and become lovers of animal life” p. 317.

Professor Nussbaum’s goal of love of—and compassion toward—non-human animals is similar to that of various non-profit organizations. For example, PETA’s (People for the Ethical Treatment of Animals) mission statement includes:

PETA opposes speciesism, a human-supremacist worldview, and focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in laboratories, in the food industry, in the clothing trade, and in the entertainment business.

While the goal of *Justice for Animals* is shared with many other organizations, the approach differs from some as it is grounded in philosophy and law. Rather than simply argue for animal rights based on empathy or kindness, Professor Nussbaum addresses questions such as, Do animals have legal standing in courts of law? Should we intercede to improve the outcome of animals in the wild? Should humans protect the rights of plants?

Under the Capabilities Approach, each species—including humans—has a list of “central capabilities,” which serve as a species-specific bill of rights. Humans, for example, according to Professor Nussbaum have ten central capabilities including “not dying prematurely,” and “to be able to imagine the situation of another” pp. 88–89.

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This review is structured as follows. First, it summarizes some of the existing laws and animal protections as described in *Justice for Animals*. (Some of this will be surprising to many people). Second, Professor Nussbaum's CA proposal is presented in brief. Third, and finally, Professor Nussbaum's proposal is placed into a broader bioeconomic context.

1 Animal rights and laws today

There are three central elements to the current status of animal rights. First, laws on the books of various countries, states, and localities. Second, the level of enforcement of these laws. Third, the legal concept of standing—who can sue on behalf of animals to ensure that the laws are enforced.

Consider the following situations and evaluate whether you believe the treatment is legal.

Shoot a goose that is eating grain in an agricultural field.

Euthanize a healthy dog.

Encourage a dog to fight another dog.

Kill a cow by shooting it in the head.

Film a cow being 'ethically' killed.

Maintain a pregnant pig (sow) in a 'gestation crate' — too small to move, no straw, solitary confinement of not being able to interact with any other animals.

Use sonar (by the military) to detect enemy ships.

The summary, before getting to the specific situations, is that there are laws, in some parts of the world, that provide significant protection for animals. In general, the enforcement of these laws is weak. Because people cannot generally sue on the behalf of animals, it is challenging to compel enforcement of the existing laws.

Let us go through each example.

Can a person shoot a goose on an agricultural field? In the US, the answer would appear to be that such shooting is illegal. The first major US legislative protection of animals was the Migratory Bird Treaty Act (MBTA) of 1918 signed with Canada initially and then extended bilaterally to other countries.

The MBTA states, "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" migratory birds.

The MBTA states that it is illegal to hunt or kill migratory birds, and geese are migratory. Nevertheless, because of various legal nuances it is still possible to get licenses to kill geese. There are detailed rules determining the legality of killing geese. For example, depending on the type of crop, and harvesting technique, it is sometimes legal and sometimes illegal to shoot a goose on an agricultural field.

Is it legal to euthanize a healthy dog? Yes.

The second major US law is the Animal Welfare Act (AWA), passed in 1966. The AWA mandates humane treatment for warm-blooded animals including, "feeding, watering, ventilation," (p. 284), temperature control and veterinary care.

However, the AWA permits euthanizing even young, healthy animals including dogs. Under the AWA, it is legal to kill your dog, but there is a “flat ban on practices in which animals are made to fight” p. 284.

So you can kill your young, healthy dog, but you cannot encourage it to fight the neighbor’s dog.

Is it legal to kill a cow by shooting it in the head? Since it is legal to euthanize a dog, it might be reasonable to conclude that killing cows is also legal. The answer is that killing a cow is indeed legal, but the situation is even more clear than that of a dog. The AWA explicitly exempts the food industry so the AWA does not apply to cows being raised for meat.

What about filming a cow being killed? Such filming is illegal in some US states under what are called ‘ag-gag’ laws. These statutes arose in response to animal rights groups infiltrating and documenting animal treatment in food production. So it is legal, in most places, to kill animals for meat, but illegal, in some places, to film such killing.

Is it legal to cage a pig, even a pregnant sow, in a very small cage and force it to live its life without social contact or movement? The answer is that such gestation crates are legal in large parts of US, but other parts of the world, including the European Union, mandate minimize enclosure sizes that preclude the use of such crates.

Finally, can the US military use sonar to detect enemy vessels? According to the US 9th circuit court, the sonar (at least in the form that was being used) is illegal.

The third major piece of US legislation is the Marine Mammals Protection Act (MMPA). The MMPA states that not only is it illegal to kill or hunt marine mammals but it is also illegal to injure a marine mammal in the wild. The court ruled that because the sonar interrupts the behavior of whales, it could not be used (the situation is ongoing).

In summary, there are three major US federal laws covering animal welfare. The Migratory Bird Treaty Act (MBTA), the Animal Welfare Act (AWA), and the Marine Mammals Protection Act (MMPA). There are hundreds of other laws governing animal care including the Endangered Species Act.

In theory, animals have considerable legal protection, notwithstanding apparent inconsistencies and omissions. “The federal and state laws we currently have offer a surprising amount of protection to at least some animals” p. 288.

The trouble, from the perspective of animal rights activists, comes not so much from the law as from enforcement. Professor Nussbaum states, “A huge problem with existing law is that they are relatively rarely enforced” p. 288. Simply having a law on the books does not guarantee that police, courts, and jails will be set up to compel compliance.

The lack of enforcement is compounded by the issue of standing. Standing is the legal right to bring a case to court to compel enforcement. In most cases, animals do not have standing, therefore people can not bring cases to court on behalf of animals.

The exceptions to standing prove the rule. The Natural Resources Defence Council and other organizations were able to sue the US military over the impact of sonar on whales and other marine mammals. Each case requires detailed maneuvering to attempt to find a way for humans to sue on behalf of animals. Sometimes, as with military sonar, this argument for standing is successful and, more frequently, it is not.

2 Professor Nussbaum's proposal

Professor Nussbaum proposes a bill of rights or a constitution for each species. Just as the US Declaration of Independence argues for the right to the pursuit of happiness, not happiness itself, the Capabilities Approach focuses on opportunities, not outcomes. “The goal of policy should be to protect and enhance the capabilities of each and every one” p. 86.

Nobel Laureate Amartya Sen is the creator of the Capabilities Approach (Sen, 1985; Alkire, 2005). Since the Capabilities Approach is about the abilities, injustice is defined broadly as interfering with capabilities. “Injustice centrally involves significant *striving* blocked by not just *harm* but also *wrongful thwarting*, whether negligent or deliberate” pp. 7–8.

What does Professor Nussbaum's proposal mean in more concrete terms? A first step is to develop a specific set of ‘central capabilities’ for each species. Professor Nussbaum provides her suggestion of this list for one species—humans. For some other species, such as dogs, she provides general categories of capabilities.

For other non-human species, Professor Nussbaum writes, “Ideally we should learn enough to make a separate list for each type of creature, putting on the list the things that matter most when it comes to survival and flourishing” p. 101.

What species should be included? Professor Nussbaum's key criteria is “Who are these sentient creatures? ... This boils down to the question: Which creatures are capable of significant striving? ... They possess that elusive property known as *sentience*. The world looks like something to them, and they strive for the good as they see it” pp. 118–9.

Professor Nussbaum does not provide a definitive list, but includes mammals, birds, and most fish as sentient and deserving rights. She is less clear about reptiles, cephalopods, crustaceans, and insects. However, “plants are not proper objects of ethical concern in a theory of justice” p. 51.

What is the path forward? Each species needs a list of central capabilities developed by some collection of human experts. Eventually, a set of laws with courts and jails need to be developed to protect animal rights. Presumably the set of laws for each species will be as complex as for human rights—and possibly more complex because our ability to understand other species is limited.

Crucially important to the application of animal protection laws is the notion of standing. “It matters that animals have a political say, which means, I believe, legal standing (the right to go to court as the plaintiff of an action)” p. 104.

Professor Nussbaum explicitly eschews detailed step-by-step instructions for how to transition the world from where we are today to the final state where sentient species are protected.

Rather than a roadmap, Professor Nussbaum articulates an ‘ideal’ end state. “Ideal theory directs our practical efforts. The ideal must be attainable and realistic; but I have tried to portray the ideal embodied in my Capabilities Approach in such a way as to show that they satisfy that demand” p. 282.

In summary, *Justice for Animals* argues that all sentient animals ought have a set of rights protected by the law and enforced. Furthermore, non-human animals should have legal standing so that people can bring court cases on their behalf. The book

advocates the development of a species-specific set of central capabilities. Professor Nussbaum illuminates the goal of such an endeavor without describing a process to achieve the goal.

Justice for Animals is complete in a way. It proposes an endpoint where a vast set of animals have explicit rights and the legal ability to have those rights protected. It is explicitly a philosophical work imagining an idealized goal many decades away.

3 Comments on *Justice for Animals*

From the perspective of the *Journal of Bioeconomics*, I make three comments/suggestions. First, the foundation for protecting animals might be improved with a biological, not purely philosophical foundation. Second, some discussion of economics in both positive and normative senses might be helpful. Third, and finally, would a less grandiose, more limited approach be more productive?

3.1 Biology and *Justice For Animals*

Justice for Animals is grounded in philosophy not biology. Consider the following.

Professor Christine Korsgaard “draws an understanding of how sentient creatures of all sorts strive to achieve their ends. ... These are insights missing in Kant, and Korsgaard uses an Aristotelian understanding of how animals (including humans) strive to achieve their end to open up space in Kant’s relentlessly anthropocentric ethics. ... Korsgaard and I combine the Aristotelian and Kantian elements in significantly different ways” pp. 59–60.

The section continues to detail the divergence between Professors Nussbaum and Korsgaard’s infusion of Aristotle into Kant. Approximately half the text is devoted to discussion of various philosopher’s views and contradictions. This type of discussion is common to philosophy papers (for example, see Watene, 2013 for a critique of Professor Nussbaum’s treatment of John Rawl’s view of intergenerational issues.)

An alternative is to ground such concerns in biology. Consider a philosophical and biological approach to the question of why humans fear death.

Philosophical approach to humans’ fear of death:

“Epicurus believed that there is no good reason for fearing death: death does not harm us” p156. Professor Nussbaum summarizes key steps in Epicurus’s argument including. After death a person does not exist, hence the condition of being dead is not bad, it is irrational to fear a not bad event therefore, “it is irrational to fear death” p. 157.

Professor Nussbaum states, “Epicurus’s argument is extremely powerful” p. 158. Why do we fear death? Is fear of death a puzzle? Thousands of years after Epicurus, philosophers have no answer.

In contrast, biology has a short and clear answer. Let us start with a different puzzle about the behavior of a mammal, the elephant seal, and then return to the human fear of death.

Male elephant seals spend months each year fighting to hold territory on beaches in the North America. During these competitions, the males do not eat, and many become severely injured and die from wounds. Why do male elephant seals fight each other in bloody battles for beach territory? Here is an explanation.

Elephant seal males that win the beach control battle get exclusive mating access to the females in that section. Still a philosopher might puzzle about why mating is worth a chance for death. Biologists address the issue as follows.

“Imagine a bull elephant that has no stomach for the dominance battles of the breeding beach. Very well. He can opt out: remain at sea, never endure the debilitating months of feast and battle, outlive his brothers. But mere survival is no criterion of success. Eventually he will die, and his genes will die with him. The bull seals of the future will be the sons of males that found the ordeal to be worth the price” (Daly & Wilson, 1983, p. 92).

Why do male elephants seals fight? The answer is evolution by natural selection. Elephant seals who fight leave more offspring, and more copies of their genes, in the next generation. The elephant seals alive today descended from elephants seals who fought. Thus, seals today contain genes that lead them to find fighting worthwhile, maybe even fun.

Why do humans fear death? Humans who fear death take steps to increase lifespan. We are descended from people who lived and had unsurpassed reproductive success.

Why do humans fear death?’

Philosopher: We do not know. Perhaps such fear is irrational.

Biologist: Fear of death is a biological adaptation causing higher reproductive success.

The philosopher’s approach to understanding the world permeates the manuscript. For example, “All animals seek types of control over their material and social environment” p. 102. And, “Treating another person as an end always involves *respect for that person’s form of life*” p. 258. Even without knowing precisely what is meant by such statements, I doubt their universal validity.

In summary, all organisms evolved by natural selection. Grounding our understanding of organisms in biology and evolutionary theory provides valuable insight.

3.2 Economics and *Justice for Animals*

Justice for Animals does not interact with economics in any meaningful manner.

There are two branches of economics. Positive economics describes what will happen, and normative economics judges what should happen. The progress of animal protection would be aided by some work on each of these two aspects.

What would justice for animals cost? Professor Nussbaum argues from first principles that economics are secondary. For example, “the Americans with Disabilities act was driven by a moral imperative” p282. Professor Nussbaum argues that animal protection is also a moral imperative, and therefore the costs are not relevant.

So *Justice for Animals* does not address positive economics in the form of cost to implement. Furthermore, Professor Nussbaum does not engage with the other branch

of economics: normative economics. To an economist at least, such notions may be interesting.

In standard welfare economics, where do we find concern for non-human animals? The answer is only in the minds of humans alive today.

Although some early work by Bentham and others discusses animals, welfare economics, in its mainstream form today, only values human happiness. Consider an orangutan that might be born in 150 years. Where does that animal's welfare impact economic analysis? The answer is only in the brains of people alive today, and their willingness to pay to protect such future creatures.

In summary, animal protection involves economic decisions. Engaging with both positive and normative economics seems like an important part of ensuring justice for animals.

3.3 The "perfect" is the enemy of the good

Justice for Animals describes an idealistic, costly outcome decades or centuries from now. An alternative approach is to make immediate progress on some limited set of goals. These two approaches can of course be complementary, but let us first consider the magnitude of Professor Nussbaum's proposal.

The list of central capabilities seems quite long and detailed. Professor Nussbaum lists 10 central capabilities for *Homo sapiens*, and states that this list "can be further specified in accordance with the particular needs and situation of each nation" p. 90.

Here is one of the ten central capabilities for humans as detailed in *Justice for Animals*.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason—and to do those things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain p. 88.

As compared with some other approaches, this is a long and detailed description of a capability. Consider, in contrast, the 19th amendment to the US constitution:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Recall further that Professor Nussbaum argues for a species-specific list of central capabilities for at least every species of mammal, bird, and bony fish. "The CA aims to supply a *virtual constitution* to which nations, states, and regions may look in trying to improve their animal-protective laws" p. 100.

How many species deserve protection? There are estimated to be at least 6000 mammal species, 9000 bird species and 10,000 fish species meeting Professor Nussbaum's sentience criteria (Pimm et al., 2014; Burgin et al., 2018).

So at least 25,000 species-specific lists with lengthy sets of central capabilities. Then country-specific versions of these central capabilities. Finally, instantiation of these capabilities in a body of law, and granting of legal standing for non-human animals.

The risk is that while the world works on the idealized solution of Professor Nussbaum, the great extinction will progress.

Consider an alternative approach. The Great Ape Project seeks to grant rights to all the great apes: human beings, chimpanzees, bonobos, gorillas and orangutans. Three rights are listed, "1. The right to life. 2. Individual freedom protection, and 3. Freedom from torture."

In a sense, the Great Ape Project is the opposite approach of Professor Nussbaum. It selects just four non-human species. The selection of the species is biological in using our knowledge of phylogeny (not philosophy) to select the species.

The Great Ape Project seeks three succinct rights which line up fairly well with life, liberty, and the pursuit of happiness.

At one extreme, a prodigious bill of rights for every sentient being. A multi-century project with unknown cost. Or, provide immediate and concrete improvement to the four extant species phylogenetically closest to humans.

4 Concluding thoughts on *Justice for Animals*

Professor Martha Nussbaum plants an ideological flag in the ground for non-human animal protection. Every sentient being deserves, she argues, an ability to have a life of striving protected from 'wrongful thwarting.' Tens of thousands of species deserve a constitution protecting these rights with the legal standing to sue for enforcement.

Justice for Animals grounds its arguments in philosophy. It analyzes Epicurus, Aristotle, and Rawls, but does not engage with the work of Darwin, Mendel or Adam Smith. Finally, the book specifically eschews discussion of practical steps and the costs of expanding animal rights, sticking instead to a moralistic, cost-is-not-relevant approach.

Justice for Animals serves as an idealistic dream for animal rights unconnected to either biology or economics. As such, it serves a purpose, not as a guide to current action, but as an aspirational, inspirational endpoint for those who want to improve the lives of non-human animals.

Funding Open access funding provided by SCELC, Statewide California Electronic Library Consortium.

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