

November 2020

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### Recommended Citation

Martha Nussbaum, Why Freedom of Speech Is an Important Right and Why Animals Should Have It, 95 Denv. L. Rev. 843 (2018).

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## WHY FREEDOM OF SPEECH IS AN IMPORTANT RIGHT AND WHY ANIMALS SHOULD HAVE IT

MARTHA NUSSBAUM<sup>†</sup>

Well, thank you Dean Smith. I especially want to thank the students and Gabs Baker for all the great arrangements and the warm hospitality. And thank you all for being here. So as the dean says, I have been mainly occupied with developing this capabilities approach and am now in the process of writing a book about the capabilities approach and animal rights. But there's another angle that I've worked on as a philosopher, and that is on the British Utilitarians. I have been in the process of writing a book on them for a long period of time. I think that you all may think of Utilitarianism as a cold, heartless, economic philosophy, but the British Utilitarians were actually radicals in many areas: women's rights, gay rights, and, above all, animal rights. I believe John Stuart Mill is a fore-runner of the capabilities approach.

So I want to talk about that relationship. Now, there's an obvious point where we need to start. No one thinks that freedom of speech is limited to language use, even in today's law. It's long been established that symbolic expression, such as flag burning, is a form of speech. So the scene is set for an extension of speech rights to animals, and I think we should ultimately be taking that step.

The theory of free speech rights was really founded by John Stuart Mill, the great British philosopher and activist. *On Liberty* is the central source for modern arguments regarding why free speech is important.<sup>1</sup> But Mill (1806–1873) was also a radical and a strong defender of animal rights who left all of his money when he died to the Society for the Prevention of Cruelty to Animals.<sup>2</sup> Let's investigate that connection. I want to first look at his mentor and teacher, Jeremy Bentham (1748–1832). Next, I want to examine Mill's views about animals and their entitlements under law. Finally, I want to turn to *On Liberty* and see why those arguments can't really stop at the species barrier. I will claim that Mill's arguments are applicable and that he knew the connection full well, although he did not make that connection explicitly in *On Liberty*. Then, I will make a few tentative remarks about how the speech theory of *On Liberty* can be extended to animal law.

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1. See JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

2. See JOHN STUART MILL, *WILLS AND DEED OF GIFT* (1872), *reprinted in MISCELLANEOUS WRITINGS BY JOHN STUART MILLS* 333 (John M. Robson ed., 1989).

Now, first a word about the British Utilitarians. In general, they were radical outsiders. They couldn't hold academic posts because they were atheists, and you couldn't hold an academic post in Britain at that time unless you were an Anglican. British Utilitarians were outsiders and radical opponents of Christian social convention that privileged elites and marginalized oppressed groups. They were also strong advocates of women's rights. Bentham writes about this and Mill was very involved in this from his youth onward. Mill went to jail when he was a young man for distributing contraceptive information to people in London. And later as a member of Parliament, he introduced the first ever resolution in Britain (there were some earlier resolutions in the United States) for women's suffrage. All of them were defenders, in some ways, of greater political rights for lesbians and gay men. Bentham is the most explicit on that. Although his writings on that topic could not even be published in his own lifetime, the Bentham Project at the University of London published them in 2013.<sup>3</sup>

British Utilitarians were especially radicals about animals. Why was that so? Well, the linchpin of their radicalism was the idea that we must return to the body—pleasures and pains of the body—and we must see the body as the central site of ethical value. The two main types of ethical value are pleasure and pain. They are the same for all rather than some pleasures that are higher and others that are lower. Therefore, the goal of a rational society is to support pleasures and maximize the net balance of pleasure over pain, not just for human beings but for all creatures. Even Henry Sidgwick, who was a little bit later (1838–1900) and was the most conservative of the British Utilitarians, gestures in this direction. Although, again, he couldn't be fully explicit in his lifetime.

Now, Bentham explicitly applied these ideas to animals. There is a famous footnote in his *Introduction to the Principles of Morals and Legislation* in which he talks about animals:

Under the Gentoo and Mahometan religions, the interests of the rest of the animal creation seem to have met with some attention. Why have they not universally, with as much as those of human creatures, allowance made for the difference in point of sensibility? Because the laws that are have been the work of mutual fear; a sentiment which the less rational animals have not had the same means as man has of turning to account. Why ought they not? No reason can be given. If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have. The death they suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature. If the being killed were all, there is very good reason why we should be suffered to kill such as molest us: we should be the worse

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3. See *About the Bentham Project*, U.C. LONDON, <https://www.ucl.ac.uk/bentham-project/about-bentham-project> (last visited July 23, 2018).

for their living, and they are never the worse for being dead. But is there any reason why we should be suffered to torment them? Not any that I can see. Are there any why we should not be suffered to torment them? Yes, several. See B. I. tit. [Cruelty to animals]. 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 acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor.\* It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But 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, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they reason? nor, Can they talk? but, Can they suffer?

\* See Lewis XIV's Code Noir.<sup>4</sup>

Most people know the famous part of the footnote, where he talks about the importance of asking not “can they reason?” but “can they suffer?” But I think the beginning part is equally as interesting. People usually don't quote this beginning part. He recognizes that other civilizations, namely Hindu and Islamic civilizations, have taken animal interests into account when establishing the law. He then says that European civilizations have not taken animal interests into account because European laws have been the work of mutual fear. In other words, and Mill agrees, people make laws to prevent themselves from being harmed. Law is an instrument of self-protection—a sentiment which the less rational animals have not had the same means to turn to as man does. In other words, it's just the fact that animals haven't had the power of putting what they fear into the law. Their voices have not been heard when law is made. In other writings, some of which are still unpublished, Bentham drew out the consequences of this for the law. There should be outlawing of hunting and fishing for sport. There should be a ban on other cruel practices, such as any cruel practice of raising animals for meat. Bentham's own life showed that he was a friend of animals. He loved to befriend them, even the mice who were in his study. There are anecdotes about him embracing the mice who ran across his lap and taking walks with a companion pig who lived around him. So he lived with animals as a companion.

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4. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310 n.122 (Oxford Univ. Press 1879) (1789).

In contrast to Bentham, Mill was not a total outsider: eventually he became a member of Parliament. He explicitly and forcefully defends Bentham's views on animals in an important but very neglected article called, *Whewell and Moral Philosophy (1852)*.<sup>5</sup> William Whewell was a conservative Christian cleric and a very influential thinker. He was master of Trinity College. Whewell attacked Bentham for a range of Bentham's radical positions. Mill replies to these attacks with scathing wit in a lengthy journal article.<sup>6</sup> The Bentham passage I quoted is quoted in full by Mill in that article, and he refutes Whewell's arguments on a number of points.<sup>7</sup> Among other things, he shows that Whewell's arguments against divorce—that nothing should be terminated once you enter into a contract—would have the consequence of making members of Parliament irremovable and of prohibiting people from changing their profession. Mill is making fun of Whewell by drawing out the real consequences of his arguments. He then draws particular attention to Whewell's mockery of Bentham's stance towards animal rights.<sup>8</sup> Whewell clearly thought it was a *reductio ad absurdum* of Bentham's views that they would require us to consider the pleasures and pains of animals on par with those of humans.<sup>9</sup> Whewell says we should judge any being's pleasure based on the likeness of that being to ourselves.<sup>10</sup> Mill then turns the tables and says you'd have to defend slavery under that principle, because white people were always saying that our pleasures were much more important than the pains we inflicted on black people.<sup>11</sup> In Britain, slavery was already very unpopular, so Mill certainly could make that argument and expect his audience to agree: It would be ridiculous to uphold the slaveholder over the abolitionist. Then he draws this conclusion, saying:

We are perfectly willing to stake the whole question on this one issue. Granted, that any practice causes more pain to animals than it gives pleasure to man, is this practice moral or immoral? And if exactly in proportion as human beings raise their heads out of the slough of selfishness, they do not with one voice answer immoral, let the morality of the principle of utility be forever condemned.<sup>12</sup>

Now, that's a very vague principle and it's certainly not very adequate. It's just what Mill seems to think he can say at this point to refute the arguments of Whewell. Mill often adjusts his arguments to his audience, withholding more radical aspects of his views that he utters in other contexts. The main point I want to get out of this is that Mill thought that the pains of animals count in the Utilitarian calculus just as the pleasures

5. John Stuart Mill, *Whewell on Moral Philosophy*, in *UTILITARIANISM AND OTHER ESSAYS* 228–270 (Alan Ryan ed., Penguin Books 1987) (1852).

6. *See id.*

7. *See id.* at 251–52.

8. *See id.* at 251.

9. *See id.*

10. *See id.* at 252.

11. *See id.* at 252–53.

12. *Id.* at 253.

of humans do. The Utilitarian calculus has to take into account the pains and pleasures of all sentient beings. In other words, animals have interests. Mill puts this in terms of pleasure and pain, but unlike Bentham, Mill actually recognized that pleasure and pain were very broad. His idea of happiness was not just limited to bodily pleasure and physical pain. He thought that the Utilitarian principle should promote a range of valuable life activities for the creature in question.

I think this is very much like my capabilities approach. Mill was not able to hold an academic position, so he wrote journalistically. It's always a little difficult to figure out exactly what the implications of his texts are, but I have tried to argue in things I have written that Mill is really like a capabilities theorist. So he would have supported "happy lives" for animals—meaning flourishing lives with their own characteristic activities—something much like my capabilities approach.<sup>13</sup>

So now to freedom of speech. Mill's *On Liberty* is an extended defense of the tremendous importance of the freedom of speech for a decent society.<sup>14</sup> There are two lines of argument that people usually use today to explain why freedom of speech is really so important.<sup>15</sup> I am going to try to show that Mill really meant those two lines of argument to apply to animals. He didn't say it here because he always knew his audience and sometimes, as I've said, left out the more radical things.

There are two lines of argument in *On Liberty*: the social utility argument and the personal happiness argument.<sup>16</sup> As we will see, they are very closely linked.

First, the social utility argument. Mill says that if we're making laws and policies, we need to be able to figure out what really maximizes happiness.<sup>17</sup> That means that we need to be able to consider all of the available views and information about welfare.<sup>18</sup> Then, continuing this thought, he says: First of all, we should not assume that we have already found the best way of life.<sup>19</sup> That would be ridiculous.<sup>20</sup> (Mill was a believer in progress over time.) And so, we need alternative inputs, including even radical inputs, which some people might be inclined to suppress.<sup>21</sup> And second, even if we were sure that we had the best way, any good principle is

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13. Martha Nussbaum, *Mill Between Bentham and Aristotle*, 133 DAEDALUS 60, 65–68 (2004), reprinted in *ECONOMICS AND HAPPINESS: FRAMING THE ANALYSIS* 178–82 (Luigino Bruni & Pier Luigi Porta eds., Oxford Univ. Press 2005).

14. See generally MILL, *supra* note 1.

15. See *id.*

16. See generally *id.*

17. See *id.* at 87–88.

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.* at 88.

likely to grow lazy and slack if it is not continually challenged by alternative viewpoints.<sup>22</sup> In short, he explicitly defended unpopular and unpleasant speech for the way in which, even if we can refute it in the end, it helps us stay on guard and honest with respect to our own views.<sup>23</sup>

Now to personal happiness. Mill draws heavily on German Romantic views of self-development in *On Liberty*.<sup>24</sup> Basically, his view is that all people should have the opportunity to find what suits them—what makes them happy—in life through what he calls “experiments in living.”<sup>25</sup> The Utilitarians clearly meant to apply this idea to radical forms of sexual life. Mill was famous for having had a very intimate relationship with a married woman for many years. It probably wasn’t a sexual relationship because Mill was kind of a cautious guy. Anyway, it was a love relationship. Then, when the husband died, they actually got married. That was one radical experiment. Mill was clearly defending gay rights as well. So experiments in living are very important to help society find its way. In the end, his argument for this idea is linked to social utility because his view is that the human species learns things over time—we make progress—and human happiness can increase through the testing of alternatives. But that can never happen if people don’t get to lead these lives. Certainly, people won’t get to lead these lives unless the speech that recommends these lives is permitted. In both cases, we do best by protecting speech very broadly. Mill’s principle is basically like the one that currently dominates in U.S. law, that is, unless there’s an imminent threat of violence, there’s no call at all for the suppression of any kind of speech.

Needless to say, in *On Liberty*, which is addressed to people like those who later became his fellow Parliamentarians, Mill doesn’t talk about animals. But Mill clearly was going to do that at some point in his own thinking. Animals are on par with humans because we know that the community whose happiness good laws promote includes all sentient beings. We can now say on his behalf what he couldn’t say in a discourse that was meant to persuade in the England of his day.

How would we apply the insights of *On Liberty* to thinking about animal rights and animal speech? First, I think the obvious thing is to recognize that animals have standing. Mill’s arguments clearly imply that all harms are cognizable under the law. Under the law, in a Millian state, animals have standing because their harms are harms, just as human harms are harms. Of course, animals have to be represented by a lawyer or a guardian to go to court, but they can do that, just as human beings with cognitive disabilities can now go to court.

But then what about humans’ speech about animals? Well, once again, there’s going to be a very radical principle here, which is that there

22. See *id.*

23. See *id.* at 87–88.

24. See *id.* at 122.

25. *Id.* at 122.

should be no suppression of any kind of human speech purporting to give information about the well-being of animals. All of the discussion of “ag-gag” laws are very pertinent here. Any law limiting that kind of information would be a bad law.

But then what about speech by animals? Animals provide information about their welfare in many ways. Some really do have some form of quasi-linguistic communication. For instance, whales have song and elephants have patterns of trumpeting. But that isn’t really the whole issue because in many ways—through their behavior and evidence of their delight, fear, and pain—animals are giving us information all the time even without anything like speech if we would stop, look, and interact with them. So here I’m very much in agreement with Will Kymlicka and Sue Donaldson. In their book, *Zoopolis*, they say very plausibly that the many ways in which domesticated animals give evidence of their preferences, satisfactions, dissatisfactions, fears, and longings should be taken into account through an established system of surrogacy when making law and policy.<sup>26</sup> This surrogacy occurs when humans would then represent those interests under the law. But where I disagree with Kymlicka and Donaldson is that I really don’t see any reason to draw any sharp line between domesticated animals and wild animals. They somehow suggest that wild animals are living in a condition that’s not managed by human beings, but that’s just not the world that we live in. Wild animals can’t just go off and decide to lead the lives they want on their own, because human beings are interfering with those lives all the time, usually for the worse.

Of course, we need to learn a lot to do this well. We’re learning more all the time and we need to do what Kymlicka and Donaldson so rightly recommend: we must have a kind of sensitive interaction with these animals where we listen to them, look at them, absorb what they’re saying to us, and then try to figure this out. This is more complicated by the fact, which I think Kymlicka and Donaldson don’t take into account enough, that animals can have what economists call “adaptive preferences.” That is, if they’re living a very deprived life, let’s say they’re getting cut off from the very social group that’s characteristic for them, they may not register that by showing pain. Yet, we can figure out by studying the species more generally that there is an inadequate form of life for them. Anyway, combining what we know about an animal’s form of life with the information that animals are giving us all the time, we can conclude a lot of different things and then act on these conclusions.

Utilitarians were of course people of their time and place, and it was a really bad era in Britain, where, for the most part, animals just didn’t count at all. European traditions at the time were much worse than other

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26. SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* (Oxford Univ. Press 2011).



world traditions, as Bentham notes in the passage I quoted. The Utilitarians were radicals and they challenged the idea that animals didn't count at all. But Mill was also a pragmatist, so he did not always state the full implications of his thought. But if we put the pieces together, the implications are absolutely clear: *On Liberty* does apply to human speech on behalf of animals and also to the speech of animals about their own welfare. Now is the time where, unlike Mill, we can seize the radical implications of his insights for the law. Thank you. Now I will take questions.

#### QUESTION AND ANSWER

**Question:** *You talked about how speech on behalf of animals should be protected. Could you talk about United States v. Stevens<sup>27</sup> and a person's free speech rights to depict cruelty to animals?*

Of course, there are going to be tragic dilemmas. That's a whole issue on which I think the Utilitarians were not very good. But what's really bad about the whole way that case was treated was that the speech of animals conveying their pain and torment was not really taken into account at all. So what we really should do is say that there two kinds of speech. If we see that a kind of human speech is heavily implicated in the promoting in a kind of cruelty, which the animal speech records in no uncertain terms, then there would be a very strong case for the limiting of that kind of human speech. I think all of those cases are hard cases and we must acknowledge that they are hard cases, but that conclusion, here, seems obvious to me. It's not as hard as some other cases because the imminent danger of violence is there. It's just that the *Brandenburg v. Ohio*<sup>28</sup> principle has been understood in too narrow a way. It's been understood as violence by humans against other humans, but violence by humans against animals is now part of the picture too. Well, that kind of snuff film pornography does constitute an imminent threat of violence, and I think it was just badly framed and badly understood. I think we need to completely reformulate that by taking the speech of animals about violence and their pain into account.

**Question:** *My question is on your point about adaptive preferences regarding wild animals, but I wanted to ask it more broadly in terms of the violence that really underscores humanity's relationship to nonhuman animals historically. Even if we think about what we call domesticated animals, you can see it as a long history of adaptive preferences that have been shaped by selective breeding by human, etcetera.*

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27. *United States v. Stevens*, 599 U.S. 460, 482 (2010) (holding that a statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was "substantially overbroad," and therefore invalid under First Amendment free speech protections).

28. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (holding that First Amendment protections do not extend to speech aimed at inciting or producing "imminent lawless actions").

*So what does it even mean to think about free speech for animals in a context in which the very subjectivity of the other has been so deeply shaped by a violent context?*

Thank you. I am actually in pretty full agreement with Kymlicka and Donaldson there. In some recent articles, which you've probably seen—there's one in the *Oxford Journal of Legal Studies*<sup>29</sup>—they take up this question: Should we really think back to the pre-domestication scenario and thereby think that it's just unjustified to live symbiotically at all with dogs, cats, and so on? Therefore, we should just let them be free? Now, they argue, I think rather persuasively, that we have to start with where we are and with the creatures of the world that we're living in.<sup>30</sup> Sometimes you can't fix the history, and the dogs and the cats are there. They are living in a symbiotic relationship with humans, and there's no good reason to think that they would be better off just being let go, free from human guidance and interaction. Indeed, there's reason to think, and again I agree with them, that domesticated animals often derive great satisfaction and pleasure from the skills they deploy and the work that they do in an inter-relationship with humans. Let's take the border collie or the sheep dog as examples. There's this display of trained skill which is pleasing to the animal. The animal gives speech about this as it were. It gives evidence of its own pleasure in that interactive relationship.

How far this extends is very unclear. I think they focus on dogs and cats for good reason, because those species have been so thoroughly evolved in a domesticated situation that they wouldn't do very well if they were just let to roam. Songbirds are much less clear. And horses are a little bit less clear. Now, they think that the horse probably shouldn't be ridden, but I actually don't see this. I've been involved with horseback riders a lot. I think that although cruel practices are very dominant in that world and unfortunately are still there, even though they are becoming less so, the pleasure that a trained jumper gets from jumping and bonding with the rider is something that we ought to consider. I'm with Kymlicka and Donaldson in thinking that the idea of just turning back the clock and thinking that we could undo evolution is not a good idea.

It's really quite different for wild animals though. Although they are living in a human-dominated context, they haven't evolved in any way that responds to that domination. Again, the line is hard to draw here because elephants have performed work with humans—Asian Elephants in particular, ever since World War II where they were a major part of the victory over the Japanese in Asia. There they were trained very sensitively by only positive reinforcement from a person in the British army who had innovative ideas about this. So we have to look and see, and look at each species

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29. See Will Kymlicka & Sue Donaldson, *Animals and the Frontiers of Citizenship*, 34 OXFORD J. LEGAL STUD. 201, 201 (2014) (discussing how animal citizenship would both promote justice for animals and deepen fundamental democratic values).

30. *Id.* at 204–05.

one by one. But for the most part, we should be taking the evidence of each animal for its form of life—what makes it happy—and try and give it those conditions by responsible stewardship of the environment, which is becoming more and more difficult because of human overpopulation. Responsible stewardship very much includes limiting human population.

*Question: If we extended this not only to include the past but also the future, what utility would the Utilitarian way of thinking have to say, for example, the agribusiness corporate companies who might want to engineer a pig incapable of feeling pain?*

That example always gets pulled out to suggest that we can fix things so that there's no problem. Well, of course, my Utilitarianism is not just talking about pain; it's talking about a whole form of life. That's why I prefer Mill to Bentham. I think Bentham was just too narrow, although he had reasons for that in his own context. I think we have to think: Here's a creature who has a complicated form of life, is it getting to lead that form of life? We should be striving for simulated forms of animal protein that may satisfy meat eaters because they taste like meat, but they don't involve the exploitation of animals—of any kind of living sentient being—at all. I've long said this about animal experimentation: we can do so many things now by computer simulation that there's a future where we don't have to use animals at all to see the implications of a new surgical technique or a new form of drug treatment. That seems to me a future that we should strive for.

*Question: I just want to pause over the question of what freedom of speech animals currently have, and your focus, which is more on why they should have it. You've given us the reasons that we all know animals express themselves and that there's adaptation, in which case their expression may be constrained and not natural. I guess the question is, are we talking about a special case where it becomes our duty to create the best conditions in which expression can be most honest, which is quite different from freedom of speech for humans, in which case we don't typically impose that duty upon ourselves? If that's the case, where does it go? Does it go towards imposing some duty upon us to listen and pay attention? Does it go down a copyright path? What are all of the different dimensions that a more robust freedom of speech might take us?*

First, there's the issue of standing. Now, even though there may be distorted preferences, at least humans get to express their preferences. The animals can do it only when some human cares enough to try to make the law come out that way. But if the law is not enforced, let's say laws against cruelty, then there is no animal that has standing to go to court. Humans

acting as animal advocates don't usually have standing either. Fixing that goes a long way.

But the adaptation problem actually came up in my work in connection with humans. I've spent about twenty years of my career working with women in developing countries. You poll them and ask if they want to have more education, and they'll often say no. They've been brought up to be afraid of more education. They've been told that more education makes them unmarriageable or is bad for them and so on. Even if you tell them about all the things that education opens up for women, then they don't respond to that particularly well because they're living in these conditions all the time. Now, one of the things that we've talked about a lot in the development context is creating conditions under which women would then, first of all, be free to express preferences without fear. But then, too, their preferences gradually shift and, as they grow to understand their possibilities, their dignity, and their agency, they form more adequate preferences. Women's groups in India largely have that function. Women, whether they've left their husbands or whether they haven't, band together in solidarity and talk with other women about their life conditions. They then learn very quickly that there are actually possibilities that they have in a group of other women that they didn't actually think that they had at all. My book, *Women and Human Development*, is all about transcending the adaptive in that way.<sup>31</sup>

Now, we have that in the "Me Too" movement as well.<sup>32</sup> We now see that women were living in conditions of fear for years and years. They didn't come forward with reports of sexual harassment and sexual violence. Sometimes they didn't even recognize what happened to them as abuse. We see this with the girls who were the victims of Dr. Nassar.<sup>33</sup> Their parent didn't even recognize that what was happening to them was abuse because of the adaptation of preferences that says whatever a doctor tells you is okay. This whole movement is about undoing adaptation and creating conditions of freedom in which women can come forward and be believed. It's still very incomplete, but at least it's happening. I think we have to figure out what else we can do to make it happen more. We shouldn't have to wait twenty years to have a woman come forward and say that she has been sexually violated.

I think it's not a different problem at all. For example, you take animals in zoos who may not be yelling in pain, and yet they're deprived of

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31. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 111–66 (Cambridge Univ. Press 2000) (discussing adaptive preferences and women's options).

32. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>, for a discussion of the history and origins of the "Me Too" movement.

33. See Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html>, for an overview of the Larry Nassar investigation, trial, and sentencing.

the company of other creatures of their kind. We can study such animals when they do exist in what I'll call "greater freedom." I won't say "freedom absolute" because there is no such thing in this world, but let's say elephants that live in a big wildlife preserve instead of a zoo. They give us evidence that we can then use to say that this is not so good for animals to live in a zoo and not have any other animals of their type around. We would then gradually try to undo the confinement of elephants in zoos and forbid the trafficking of elephants into new zoos, just as Friends of Animals has been working on very heroically for some time.<sup>34</sup> Then we would create for elephants the conditions in which they could express and gravitate toward the form of life that they would actually choose. That would be the basic idea.

*Question: When talking about animal speech, as with humans with significant cognitive limitations and/or children, we're always talking about a certain degree of paternalism. Do you have any cautions for us in thinking about the problems inherent in representational speech?*

Yes, there are big problems. Eva Kittay, who I think is the philosopher who has done the best work on humans with disabilities within the field of philosophy,<sup>35</sup> spent years heroically pursuing these things in the name of, and using the example of, her own daughter Sesha, who has multiple and very severe cognitive disabilities. However, she later recognized that she had been guilty of paternalism because she thought Sesha was indicating that she wanted to be with the parents all the time, to be sheltered and taken care of. Well, a mother can easily feel that way, especially with a child who is so vulnerable. But then, at one point, Sesha ended up briefly living in a group home and Eva recognized that she had been flourishing there in a way that she had not flourished in their own home. That made her backtrack and recognize that we really have great dangers when we read the preferences of even our own children.

I think there are all the same issues with animals, but maybe a little less so because parents have all kinds of reasons for misreading. They are so personally invested in their children and they see the child as another "them." They impose on the child all kinds of hopes and fears for themselves. Maybe, just maybe, we're a little bit more honest with respect to other animals because we don't project ourselves onto them in the same way. Anyway, that doesn't mean that we aren't prone to error, but it might be a different kind of error. With anything like that, we just need to realize what the possibilities for error are and then try to work around it. But in the case of studying animals, we're lucky enough to be able to observe

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34. See Marielle Grenade-Willis, *Keeping Elephants in Zoos Is Not a Right to Ethical Consideration*, FRIENDS OF ANIMALS (Oct. 4, 2017), <https://friendsofanimals.org/keeping-elephants-in-zoos-is-not-a-right-to-ethical-consideration>.

35. See generally EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (Routledge 1999).

how they live when we minimally interfere, in the case of many wild animals. That gives us a lot of help.

