

“Dolphins, Captivity and Cruelty”

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Abstract: Companies like SeaWorld claim that the dolphins in their facilities “thrive.” Relying on Martha Nussbaum’s “capabilities approach,” this essay argues that cetaceans in entertainment facilities are systematically prevented from enjoying the conditions necessary for cetacean “flourishing.” The scientific research over at least the last 50 years show that dolphins have evolved to have sophisticated intellectual and emotional abilities that make them vulnerable to a wide range of pain and suffering. When the life of a captive orca is compared to that of an orca living in its natural habitat, it is clear that hardly any dolphin capacities can be achieved. Instead of a life of close relationships, meaningful activity and *funktionslust*, captive cetaceans live empty, unhealthy lives in conditions, as Nussbaum would say, that are far from what “cetacean dignity” requires. As a result, captivity harms cetaceans so seriously and on so many different fronts, these dolphins should be seen as victims of “cruelty.” In addition, SeaWorld’s ethical failures are compounded by the harm the company also does to its customers, investors and employees in conducting business on such a weak ethical footing.

Singer and suffering

It’s fair to say that Peter Singer’s 1975 seminal work *In Defense of Animals* not only launched the field of animal ethics as a contemporary philosophical enterprise, it provided intellectual legitimacy and a theoretical foundation for the popular animal welfare movement. By illuminating the egregious treatment so many nonhuman animals experience at the hands of humans and placing it in a

philosophical context, Singer gave an incontrovertible answer to Jeremy Bentham's famous question: "The question is not, Can they reason? nor, Can they talk? but, Can they suffer?" [Bentham, 1789, Ch. 17, n. 1].

Singer states that his positions "flow from the principle of *minimizing suffering* alone" [Singer, 2009, p. 21 emphasis added]. His program is straightforward. First, he establishes the fact that animals can feel pain. Next, he details the ways in which they suffer. He then proceeds to document repeatedly—in moving and depressing detail—how the lives of animals used in research and factory farming are essentially a long episode of suffering of one sort or another.

Singer's exposition is uncomplicated and effective. The powerful impact his book has on its audience comes from the stark picture it paints of suffering that is not only severe, but unnecessary. Even if readers are unable to overcome the speciesist idea that humans may do whatever we want to nonhumans, and even if they are unwilling to become vegetarians or look for other ways to reduce their consumption of goods made from animals, it would be the rare individual who would not respond to Singer's account with at least some sympathy for the nonhumans who suffer.

That Singer's book could do this is one of the most important facts about *In Defense of Animals*. Not only is this one of the most popular books on applied ethics ever written, it has been able to fuel popular animal rights, welfare and liberation movements.

Suffering and the other side of the coin.

The powerful impact of Singer's book on readers is testimony to the strength of the visceral response most humans have even to the idea of another being's pain

and suffering. Indeed, humans are so repulsed by the obvious, observable, and unnecessary suffering of animals that we are more troubled by the idea of causing them needless pain than of killing them. This is clear in the so-called “anti-cruelty” laws that govern how animals can be treated. Behaviors regularly proscribed in these statutes include: beating, torture, animal fighting, exposure to extreme heat or cold, failure to provide food, shelter, and the like [Frasch et al. 2016, pp. 21-120]. That is, the laws basically let us do whatever we want with animals, even kill them, *just as long as they don’t suffer*.

Unfortunately, empathy doesn’t stop most humans from drawing unwarranted and illogical conclusions about what makes our treatment of nonhumans wrong. We accept Singer’s argument that the suffering he describes is wrong (if S, then W) because it is intuitively obvious to us. Unfortunately, as reflected in the “anti-cruelty” laws noted above, most humans are also only too willing to commit the logical fallacy of denying the antecedent so that we can misconstrue Singer to mean “if a behavior *doesn’t* inflict tangible harm and observable suffering on an animal—even if we’re talking about killing that animal—then that behavior *isn’t wrong*” (if not-S, then not-W).¹

Our species’ proclivity for drawing such a logically flawed conclusion no doubt stems from a variety of factors—self-interest, dietary preference, species bias, a penchant for remaining in denial about the true costs of so many goods and services that benefit humans, and the like. Whatever the cause, however, the end result is that most average humans would claim that in order to be morally problematic,

¹ Of course, it barely merits mentioning that inflicting obvious and observable pain and suffering on a nonhuman animal is not the only way to “harm” them. And it is certainly not the only way that our actions towards them can be wrong.

behavior towards nonhuman animals must produce tangible harm and inflict needless observable suffering. From this point of view, then, “cruelty” is limited to deliberately inflicting needless pain. If there’s no obvious pain and suffering, the action can’t be “cruel” and wrong.

The other side of the coin, business, cetaceans

Unfortunately, a willingness to define “harm” and “cruelty” in such an unreasonably narrow fashion is regularly exploited by the various industries that use nonhuman animals as their source of profit. This is especially true of companies in the entertainment industry that feature captive cetaceans.² SeaWorld, in particular, has adopted this “no harm, no foul” defense of captivity.

SeaWorld argues that the cetaceans in their facilities are not only well cared for, they actually “*thrive*.”³ Indeed, the company has been so successful at getting audiences to accept the idea that *if there’s no pain, suffering or tangible harm, nothing’s wrong* that this assumption is regularly accepted as a “given” even in scientific discussions about cetacean captivity. These debates then spend most of their time sparring over data connected with only the most observable matters, such as the life span of captive cetaceans.⁴ However, from an ethical perspective, even if cetaceans

² There are currently a total of 60 orcas held in captivity (27 wild-captured plus 33 captive-born) in at least 14 marine parks in 8 different countries. [WDC, 2018.]

³ “SeaWorld has ended its killer whale breeding program, making the orcas in our care the last generation. Our whales are still here, and they will still be here for many years to come, living and thriving under the best veterinary care” [SeaWorld. Last Generation. 2016].

⁴ It is beyond the scope of this essay to participate in the life span debate. For a full account of the claims and counterclaims, see SeaWorld Fact Check [2018]. Even a brief overview of major facts challenges SeaWorld’s claims. Average life expectancy for female orcas in the wild is about 50 years, with a maximum of 80 to 90 years. Average male life expectancy is 30 years, with a maximum of 50 to 60 years [Ford. 2009, p. 655]. The first captive born orca was in 1985, so not enough time has elapsed to establish that orcas can live just as long in captivity. However, the prospects do not look good. For example, in one of the most studied orca populations in the wild, up to 80% reach sexual maturity, but only 45% of captive orcas have [Jett, J. and Ventre, J. 2015]. This is not surprising, given the stresses connected with captivity (see below).

live long lives in captivity free of pain and illness, this does not mean that they are not *suffering*.

The fundamental problem with the claim that as long as the cetaceans in question fail to show any obvious sign of physical harm (such as injury, physical pain or shortened life span) they are not suffering is that this perspective ignores the possibility of emotional pain and shows no regard for the overall quality of a dolphin's life. We know that all nonhuman animals can feel both positive and negative emotions, so any assessment about the state of the well-being of any animal must also take into account how satisfying its life is. However, this is particularly important when it comes to nonhuman animals like dolphins, who have sophisticated intellectual and emotional abilities. Because of their capacity for self-awareness, dolphins have a rich inner life and a vulnerability to emotional pain and suffering similar to our own. Accordingly, the primary markers for whether or not captivity harms cetaceans should not be life span and the absence of injury and illness. Rather, it should be whether captivity allows a dolphin to *flourish*, that is, to achieve the full, healthy growth and development of the traits, skills and dispositions necessary to have a reasonable opportunity to experience even a rudimentarily satisfying and successful life.

A perspective that makes *flourishing* central argues that to treat nonhuman animals in a way that interferes with or makes flourishing impossible constitutes *harm*, and, if extreme enough, sinks to the level of *cruelty*.

Nussbaum, capabilities, flourishing, and suffering

The strongest support for the idea that *flourishing* is the appropriate standard for evaluating the ethical character of human treatment of nonhuman animals

comes from Martha Nussbaum's "capabilities approach" to issues of justice. She introduces this in *Women and Human Development* where she points out that, "The aim of the project as a whole is to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, *as a bare minimum of what respect for human dignity requires*" [Nussbaum, 2000, p. 5, emphasis added]. For the purposes of this essay, it is not inappropriate to regard this as the equivalent of a universal, but practical standard by which we can evaluate the ethical character of actions. Her approach is based on a set of "human capabilities, that is, what people are actually able to do and to be—in a way informed by an intuitive idea of a life that is worthy of the dignity of a human being" [Nussbaum, 2000, p. 5]. She asserts that there is "a *threshold level of each capability*, beneath which it is held that truly human functioning is not available to citizens" [Nussbaum, 2000, p. 6].

She subsequently expands the application of this perspective to include nonhuman animals in *Frontiers of Justice* and "The Capabilities Approach and Animal Entitlements" [Nussbaum, 2006, 2011]. In her explanation, she endorses "the Aristotelian idea that each creature has a characteristic set of capabilities, or capacities for functioning, distinctive of that species, and that those more rudimentary capacities need support from the material and social environment if the animal is to flourish in its characteristic way" [Nussbaum, 2011, p. 237]. That is, animals have evolved *specific abilities or capabilities* that allow members of their species to have successful and satisfying lives. Moreover, in order to develop these abilities and to flourish, an animal's environment must provide it with certain conditions. Combining this with a Kantian idea that "we owe respect to each sentient creature considered as an end," Nussbaum argues that "what we owe to each animal, what

treating an animal as an end would require, is, first, not to obstruct the creature's attempt to flourish by violence or cruelty, and, second, to support animal efforts to flourish in positive ways" [Nussbaum, 2011, p. 238].

Nussbaum's references to a "species norm" and "species-typical ways of flourishing" make it plain that the conditions that allow for flourishing are *species specific* [Nussbaum, 2006, pp. 179, 364]. Accordingly, to understand and appreciate the moral force of a capabilities approach and to see how *flourishing* can work to identify instances of *harm* and *cruelty* to nonhumans animals that might otherwise be ignored, we will begin by examining how Nussbaum's approach can be used in evaluating our behavior towards members of the species we are most familiar with—*homo sapiens*.

Human capabilities

Nussbaum identifies ten "Central Capabilities" for humans. She believes that we need to experience at least a minimal level of each in order "to pursue a dignified and minimally flourishing life" [Nussbaum, 2011a, p. 33].

Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

Bodily health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

Bodily integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

Senses, imagination, and thought. Being able to use the senses, to imagine, think, and reason—and to do these 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 nonbeneficial pain.

Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

Practical reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

Affiliation. (A) Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political

speech.) (B) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

Other species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

Play. Being able to laugh, to play, to enjoy recreational activities.

Control over one's environment. (A) *Political.* Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. (B) *Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers [Nussbaum, 2011a. pp. 33-34].

The main elements of this list are quite straightforward. *Life, bodily health, bodily integrity, emotions,* and *play* speak to requirements for physical and emotional health. *Affiliation (A)* refers to our need to be able to operate effectively in community with others. And *control over one's environment (Material)* points to our need for tangible goods that advance our material interests. However, Nussbaum also identifies needs that, while decidedly less tangible, are just as crucial for flourishing. *Senses, imagination and thought,* and *practical reason* refer to our need to use our minds to navigate life's

challenges, to express our individuality, and to freely choose what we do. *Control over one's environment (political)* refers to a need for our liberty to be protected. *Affiliation (B)* points to our need to be treated with respect for our dignity. That is, flourishing is possible if and only if we are treated in certain ways by other people. Our freedom of expression, freedom of choice, and liberty of conscience must be respected. We must be treated “as a dignified being whose worth is equal to that of others.”

Human flourishing is made possible not simply by getting our *tangible, material needs* met (the conditions that allow for a physically safe and healthy life). We also require *appropriate treatment* by the people around us. That is, we must be treated in a way that is *consistent with the dignity of the human person*—with fairness, equality, justice, respect, and the like.

It is important to note that a life which allows us to develop our capacities and to flourish is *pleasurable*. The necessary conditions of human flourishing come from how our ancestors met the challenges of the environment we lived in as we adapted and evolved. Broadly speaking, we were rewarded with pleasure when we succeeded in mastering these challenges and enhanced the likelihood of our survival. As a result, we became hard-wired to experience pleasure when we perform them. This is the idea expressed in the German term *funktionslust*, which Jeffrey Masson defines as “pleasure taken in what one can do best ... the enjoyment of one’s abilities” [Masson and McCarthy, 1995, pp. 13, 99]. Accordingly, modern humans take pleasure from such activities as: providing ourselves with physical conditions that are safe and comfortable; being healthy; solving problems; imagining and creating; participating in a variety of supportive and productive relationships (familial and nonfamilial); exercising control over our lives; having a sense of purpose.

Preventing human flourishing: harm, suffering, cruelty

The other side of this coin, however, is that being prevented from developing our capacities extracts a serious toll. In the same way that performing activities and developing capacities that enhance our survival were rewarded with pleasure, failures were punished. Pleasure encouraged us to repeat such behavior; the other half of the process is that physical and emotional pain aimed to encourage us to change our behavior in the future. Accordingly, as Masson points out, *funktionslust* also suggests its opposite, “the feeling of frustration and misery that overtakes an animal when its capacities cannot be expressed” [Masson and McCarthy, 1995, p. 99].

To be treated in ways that deny us the necessary conditions for flourishing, in Nussbaum’s view, brings about grievous harm.

The basic moral intuition [of the capabilities approach] concerns the dignity of a form of life that possesses both abilities and deep needs. Its basic goal is to address the need for a rich plurality of life activities. With Aristotle and Marx, the approach has insisted that there are waste and tragedy when a living creature with the innate or “basic” capability for some functions that are evaluated as important and good never gets the opportunity to perform those functions. Failures to educate women, failures to promote adequate health care, failures to extend the freedoms of speech and conscience to all citizens—all these are treated as causing *a kind of premature death, the death of a form of flourishing* that has been judged to be worthy of respect and wonder [Nussbaum, 2006, pp. 346-347].

At first reading, Nussbaum’s labeling the consequences of failing to develop central capabilities and, hence, failing to flourish, as a kind of *death* might seem an

exaggeration. But let us imagine a life of the sort she's describing, that is, a life in which we're systematically prevented from developing our capabilities.

Life and Bodily health. Our food and shelter are controlled by someone else. We receive enough to stay alive, but the stress and deprivations of our living conditions are such that we will very likely not live a normal life-span.

Bodily integrity. We live in a small space and cannot leave. We are vulnerable to violence at all times. We have no control over reproduction.

Senses, imagination, thought and Practical reason. We are prevented from acquiring even the most basic education. We cannot read, write, calculate or think critically. We believe what we are told to believe. We do not control the shape of our life. The conditions in which we live are bland, an aesthetic desert.

Emotions and Affiliation. The number and type of our relationships are controlled by others. We typically have little, if any, contact with family members. Our relationships are almost exclusively with members of our own sex.

Control over one's environment. We have no control over our life. We have no property. We engage in no purposeful work.

In short, a life that makes flourishing impossible is barren and purposeless. We have depressed intellectual abilities. Every facet of our life—including what we eat and when—is under the control of others. Our social life and relationships are few and limited in their satisfaction.

Even if we did not experience physical pain, illness or injury in such a life, it is fair to say that our intellectual and emotional capacities mean that we would

understand our situation and we would experience things negatively. The history of our species is one of activity, not passivity. The kind of life described above—absent any of the gratifications connected with human *funktionslust*—would produce a dangerous combination: an overpowering sense of our own weakness plus the prospect of an endless string of empty, hopeless, and meaningless days. It is fair to say that such a life goes so much against the grain of fundamental human impulses that the pain it would produce could easily drive some of us to suicide. To use Nussbaum’s phrasing, this is not “a life that is worthy of the dignity of a human being.” In terms of the distinctive characteristics of our species, a life empty of *funktionslust* is not a *human* life at all.

If we imagine living such a life, it is clear that the main feature of our days would be *suffering*. And if someone deliberately subjected us to such a life, the harm they would be doing to us would be so considerable, we would surely see ourselves as the victims of *cruelty*.

Unhappiness, evolution, and adaptation

It is important to underscore *why* the kind of life we just described would be so painful. Being prevented from exercising and developing our capacities is deeply and fundamentally unsatisfying because it does not allow for the gratifications we can experience *only from those activities*. As adaptable as our species is, we do not take pleasure from a physically uncomfortable or barren environment, feelings of powerlessness, lack of freedom, and no sense of purpose. (Indeed, failure to experience the conditions we need produces levels of stress that can lead to compulsive behaviors and self-mutilation). In the most extreme cases, humans even risk our lives—*unnecessarily*—to obtain key conditions of flourishing for ourselves, our

children, or other members of our community. Consider the number of times that humans living in servitude ultimately rebelled against their masters—risking their lives when obeisance would have at least allowed them to live. The pain of the yoke and the drive to cast it off are so powerful we are willing to risk our lives to achieve it—not just for ourselves, our children, and our family, but even for members of our community whom we do not know. Violating our sense of ourselves as free, autonomous beings offends human dignity so much, we are willing to die to protect it.

Cetacean capabilities and flourishing

Applying a capabilities approach to cetaceans is obviously much more problematic than applying it to humans. We lack the immediate, intuitive understanding of the internal experience of a member of our own species. We also have no vehicle, like language, by which we can learn directly about a dolphin's internal experience. And without a list of what we can conclude with some confidence are “cetacean capabilities” and the necessary conditions for “cetacean flourishing,” we're unable to make a judgment about whether or not life in captivity is, to use Nussbaum's phrasing, a life that is worthy of the dignity of a dolphin.

Fortunately, over the last 50 years, marine mammal scientists have discovered a great deal about the cognitive and affective capacities of dolphins and the shape of their societies in natural conditions. And there is much that we can reasonably infer from their behavior.

To summarize just the most important findings, discoveries about cetacean cognitive abilities include: a sophisticated brain that includes spindle cells and a considerable amount of association cortex, that is, the same kind of cortex that

makes up the human prefrontal cortex; self-awareness, as evidence in dolphins' performance on the mirror self-recognition test; the ability to understand artificial human languages, "representations of reality" and human "pointing" and "gazing" behavior; and the ability to plan problem-solving strategies before executing them. The fact that they have a significant inner life is suggested by the range of emotions they appear to display (anger, grief, fear, affiliation, happiness). Impressive levels of social intelligence are suggested by how they navigate their societies and manage a variety of long term familial and nonfamilial relationships.⁵ Two particularly interesting features of cetacean societies are that: dolphins can handle disputes so they do not escalate to killing each another; and cetacean societies have *culture*—as Hal Whitehead defines it: the "flow of information—both ideas and behaviors—between the members of a population, which happens because they learn from each other" [Rendell and Whitehead, 2001, pp. 360-373]. Of special note is Whitehead's claim that there appear to be moral norms in whale cultures—as seen in rules among whales that prohibit using one's sonar against another [Whitehead, 2011].

In short, in the natural environment in which they evolved, dolphins developed the following key capacities: to be aware of themselves as individuals and as members of a group, to think, to feel, to make choices, to plan, to form significant relationships, to participate in a culture, to learn and to engage in the important activities that promote their own welfare and that of the group to which they belong.

⁵ Gory and Kuczaj, 1999; Herman, 1984; Herman et al. 1984; Herman et al.,1993; Herman et al., 1989; Herman, Pack et al., 1999; Herzing, 2000, pp. 138-139; Herzing, 2011; Kuczaj and Thames, 2009; Mann et al., 2000; Marino, 1995, p.173; Marino, 2002; Marino et al., 2007; Morgane et al., 1986; Reiss and Marino, 2001; Norris, 1991; Norris et al, 1994; Pryor and Norris, 1991; Reynolds et al., 2000; Ridgway, 1984; Smolker, 2001.

When looked at through a philosophical lens, the abilities revealed by this body of research match even the strictest criteria that a being must meet in order to qualify as a “person”—that is, a being, no matter what its species, who possesses the advanced cognitive and affective capabilities that were traditionally assumed to be present only in humans.⁶ The scientific findings over the last few decades strongly support the assertion that whales and dolphins are, then, *nonhuman persons*—a *who*, not a *what*.

Since dolphins are equivalent to humans in this regard, the following is a reasonable candidate for a list of “cetacean capabilities.”

Life. Being able to live to the end of a cetacean life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

Bodily health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

Bodily integrity. Being able to move freely from place to place and to reside in a natural environment; to be secure against violent assault, including assault by humans; having opportunities for sexual satisfaction and for choice in matters of reproduction.

Senses, imagination, and thought. Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly cetacean” way. Being able to

⁶ For a full explanation, see White, 2007. The set of criteria I use sets the bar quite high: being alive; aware; the ability to experience positive and negative sensations (pleasure and pain); emotions; self-consciousness and a personality; self-controlled behavior; recognizes and treats other persons appropriately; and a series of higher order intellectual abilities (abstract thought, learning, solves complex problems and communicates in a way that suggests thought). The most recent philosophical discussion of personhood and nonhumans is Varner, 2012. Because Varner labels dolphins as “near persons,” it should be no surprise that I disagree with his analysis. However, it is beyond the scope of this essay to detail my reservations.

learn the skills needed for survival in a natural environment: how to hunt, travel, identify threats and react appropriately; how to behave with other dolphins (small groups and large). Being able to have pleasurable experiences and to avoid nonbeneficial pain.

Emotions. Being able to have attachments to individuals outside themselves; to love those who love and care for them, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger.

Practical reason. Being able to plan and control one's life.

Affiliation. Being able to live with and toward others consistent with cetacean societies in natural environments. Being able to be treated as a dignified being whose worth is equal to that of others.

Play. Being able to play, to enjoy recreational activities.

Control over one's environment. Being free from another species governing one's life. Having humans respect the areas in which cetaceans reside and refrain from depriving them of necessary resources and disrupting their cultures. In work, being able to work as a dolphin.

Cetacean capabilities and flourishing in a natural environment.

In the same way that, as was pointed out above, humans developed our characteristic capacities in the environment in which we evolved, the same is true for cetaceans. Accordingly, in order to identify what it takes for cetaceans to flourish, the model case is their life in a natural habitat. This will then allow us to examine

the lives of captive cetaceans and make an informed judgment about how satisfying or unsatisfying their lives are.

At present, approximately 3,000 cetaceans of various species are held in captivity in different countries. Sixty of those are orcas. Because the Southern Resident population of orcas in Washington's Puget Sound are among the most well-researched dolphins living in their natural habitat, this essay will limit its focus to this species of dolphin (*Orcinus orca*) and these particular orcas. Forty-five members of this community were captured for facilities between 1965 and 1973. In many ways, they served as the basis for this segment of the entertainment industry. By comparing the lives of captive orcas to the lives of these wild orcas, we can make a reasonable judgment about the extent to which flourishing is possible for orcas living in captivity.

Orcas are the largest species of dolphin.⁷ Males are usually 20 to 26 feet (6 to 8 m) long, weighing 8,000-12,000 pounds (3,600 to 5,400 kg). Females are slightly smaller. They average 16 to 23 feet (5-7 m) and weigh between 3,000-6,000 pounds (1,300 to 2,700 kg). Males typically live about 30 years, although a maximum of 50 to 60 years is possible. Females live longer. Fifty years is average, with 80 to 100 being possible. Female usually begin giving birth around age 15. They will usually have three to five calves during their lives. They stop giving birth around age 40. Orcas are considered to be the ocean's top predator. They have no natural enemies. Humans are their greatest threat.

⁷ For an overview of orcas, see Ford, 2009. The best sources of information on the Southern Resident Killer Whales are the Center for Whale Research (whaleresearch.com) and the Whale Museum (whalemuseum.org). See also Naomi Rose and Ingrid Visser's website, seaworldfactcheck.org.

Currently, 78 orcas make up the Southern Resident population. They are officially labeled “Endangered” by the Canadian and U.S. governments. Two main factors account for this. Nearly 60 members of the group were removed or killed during captures in the late 60s and early 70s. Although the community appeared to recover after captures ceased, it has struggled during the last 20 years. In addition, their food source (Chinook salmon) has become less abundant.

The basic social unit of these orcas is the *matriline*—a female, her sons and daughters, and any daughters’ offspring. This means that a matriline can consist of as many of four generations. The bonds among these orcas are extremely strong. They spend their entire lives together, and they’re usually apart for no more than a few hours. A group of matrilines who share a maternal ancestor is called a *pod*. This is typically about 20 orcas. Pods with similar dialects comprise a *clan*.

Like all dolphins, orcas use sound—echolocation clicks, whistles and pulsed calls—in hunting, navigating, communicating and socializing. Worldwide, different groups of orcas use a variety of specialized tactics to hunt. These typically call for a good deal of coordination. The Southern Residents feed solely on fish. Other orcas feed on fish or marine mammals.

The Southern Resident orcas, like virtually every animal in the ocean, are constantly moving—feeding, traveling, socializing, or resting. They live in the Salish Sea, a body of water in the North American Northwest that abuts the state of Washington and Canada. Their habitat is approximately 5,600 square miles (9,000 km). Maximum depth at different points ranges from 920 feet (280 m) to 2165 feet (660 m). The Southern Residents travel an average of 75 miles (120 km) per day and regularly dive to 800 feet. Other orcas travel significantly more (124 miles [200 km]). When not hunting or traveling, they spend about 30-40% of their day

socializing or resting. Unlike humans, their days are more active at night and less active during the sunlight. Their activities are determined by the availability of food, so it's not unusual for them to hunt at night and rest during the day.

In short, a typical day in the life of a Southern Resident orca is characterized by close ties in a matriline of family members, with whom they'll spend not only virtually the entire day, but most of their lives. Foraging and traveling together, they cover considerable distances, cooperating and socializing with other pods. Considering that we're talking about self-aware mammals with significant cognitive and affective capacities, it's reasonable to imagine that their days include dealing with such ongoing issues as finding fish, teaching younger orcas what they need to know to survive, managing relationships with other orcas, playing, and resting.

When we look at our list of "cetacean capabilities," we can see how their living conditions make flourishing possible.

Life and Bodily health. They have no natural enemies and a food source that allows for their survival.

Bodily integrity. They are free to hunt and travel in the Salish Sea. They control their own mating.

Senses, imagination, and thought. Young orcas are able to learn the necessary skills to survive, the details of their community's culture and any social norms. Physically, they learn how to swim to depths that have a pressure more than 20 times that of the surface. They also learn how to use their echolocation to swim in darkness and to detect prey. They experience cetacean *funktionslust*.

Emotions. They have strong, very long-term attachments to family members.

They express and manage emotions in a way consistent with the norms of cetacean communities living in a natural environment. For example, the size of the ocean allows them to retreat from disagreeable situations.

Practical reason. Matriline, pods and clans are able to plan and control their lives.

Affiliation. The Southern Residents are able to live peacefully with the Northern Residents and the Transient Orcas of the area.

Play. The Southern Residents may spend up to 40% of their days socializing, playing and resting.

Control over one's environment. While humans present a threat to this community in a variety of ways (environmental pollutants, competition for food, large and small boats, noise pollution, and military activities), the danger is not as grave as it once was. In addition, many humans are working to reduce the threat and to respect with the orcas need in order to flourish. Overall, they are able to spend their days doing what they need to do to promote the wellbeing of themselves, their matriline, pod, clan, and community.

Cetacean capabilities and flourishing in a captive environment.

Having seen that an orca living in a natural environment likely experiences a wide range of satisfactions in developing its capacities and in living its life, we are in a position to make a judgment about the kind of life captive orcas live. Let us return, then, to our list of “cetacean capabilities” and see how they are able to be developed in captivity.

Life. As noted above, leading marine mammal scientists make a persuasive case

that life in captivity is shorter than in a natural environment.

Bodily health. Lori Marino argues that there are “physical and behavioral abnormalities stemming from chronic stress, including ulcerative gastritis, perforating ulcer, cardiogenic shock and psychogenic shock as ‘cause of death’ along with immunodeficiency-based infections, repetitive purposeless behaviors, self-mutilation and self-inflicted trauma, as well as excessive aggressiveness towards other cetaceans and humans” [Marino, 2018, p. 218].

Bodily integrity. As noted above, the Southern Resident orcas live in a large area (5,600 square miles) and with significant maximum depths (920 to 2165 feet). The Southern Residents regularly dive to 800 feet. Members of this community travel an average of 75 miles (120 km) per day. The largest orca show tank (SeaWorld San Antonio) is 228 feet (70 m) long and only 40 feet (12 m) deep. Even to call it ‘miniscule’ in comparison to the Southern Resident’s habitat would be a gross exaggeration of its size. The most it would take an orca to travel 228 feet is probably 30 seconds. Imagining what our lives would be like if we were limited to the distance we can travel in this amount of time suggests how small the enclosures are that orcas live in. Moreover, the tank is concrete, with its water filtered so the orcas are always visible to visitors. There is little point for an orca to use echolocation in these conditions. Another problem with small tanks is that, if there’s a dispute between orcas, none can defuse the situation by leaving. Captive orcas have no choice in matters of reproduction and limited options for sexual satisfaction.

Senses, imagination, and thought. Captive orcas do not forage or learn any of the

skills that orcas use to survive in a natural environment. They mainly learn behaviors that entertain humans or participate in research designed to satisfy human curiosity. They experience few, if any, of the pleasures connected with cetacean *funktionslust*.

Emotions, Affiliation, Practical reason and Control over one's environment. Captive orcas live in artificially constructed social units, not matriline, pods and clans. (The solitary orcas in Miami Seaquarium, Mundo Marino and Marineland Canada are not even allowed that.) Most will never have contact with more than a handful of orcas with whom they are not related. They may develop relationships with the humans who work in the facilities, but this is not a relationship between equals. The humans control access to food, run their lives, and treat the orcas as property, not beings with a dignity. Basically, the only choice captive cetaceans can exercise is whether or not to participate in the human designed activities. Knowing that their food is controlled by humans likely exerts pressure in this direction. It is difficult to imagine that the activities in which they engage allow for a sense of meaningful work and having a sense of purpose.

Play. Perhaps the only capacity captive orcas are able to exercise is to play. However, in the absence of meaningful work in one's life, play has no purpose.

Denise Herzing has remarked that the smaller dolphins in captivity are merely “a shadow of a fully actuated dolphin in the wild.”⁸ The same can be said of captive orcas. In comparison to the Southern Resident orcas, captive cetaceans are probably:

⁸ Denise Herzing, private communication.

poor divers, weak at knowing how to use echolocation, socially inept, and incompetent when it comes to foraging and navigating, especially in the dark. They are probably also bored and unstimulated to a level that is damaging.

It is well known that humans react to conditions that seriously undermine emotional health (e.g., trauma, social isolation, dysfunctional environments, attacks on self-esteem, extreme frustration, hopelessness, lack of purpose, depression, etc.) with physical symptoms that range from a compromised immune system to self-soothing repetitive behaviors, addiction, self-mutilation and even psychosis. This vulnerability from harm produced by insufficient support of our defining capabilities seems to be one of the consequences of being as socially and intellectually sophisticated as we are.

It's reasonable to think that since orcas have similarly complex brains that give them the capacities for a sophisticated inner world, they share our vulnerabilities for being harmed by not being given the opportunity to develop essential capacities [Jett and Ventre, 2011]. The most obvious examples of such harm are stereotypical behaviors (repetitive behaviors with no goal or function) such as biting on gates and bars that compromise the orcas' teeth and increase the chance of infection.

However, the most dramatic example of serious damage that can result from living in conditions so inappropriate for cetaceans is that of Tilikum, the orca involved in the deaths of three humans, including SeaWorld trainer Dawn Brancheau. Ken Balcomb, executive director of the Center for Whale Research, believes that the stresses of captivity were so severe, Tilikum became "psychotic" [Rogers, 2016].

Final thoughts on captivity and cruelty

Despite what corporations like SeaWorld claim, no matter how long the cetaceans in their facilities survive, they do not “thrive.” When examined through the lens of Nussbaum’s “capabilities approach” and the concept of “flourishing,” captivity inflicts such considerable harm on orcas that they are clearly the victims of human *cruelty*.

Research on these cetaceans has been conducted for more than 50 years and has clearly established which conditions they need in order to flourish. That is, the entertainment industry cannot argue that the issue is debatable. When captive facilities subject cetaceans to conditions that prevent them from growing and developing in a full and healthy fashion, these actions can be viewed only one way. They are intentional actions that flow from a decision to ignore evidence that these actions will not only violate the dignity of a person by treating him or her merely as a commodity in order to generate profit, they subject that individual to serious harm.

A commonsense definition of “cruelty” in a business setting surely includes actions that demonstrate not simply a callous indifference to the suffering a company’s actions inflict on others, but a refusal even to recognize it as suffering because doing so would cost that firm profits. On the basis of this essay’s analysis, then, it is impossible to look at the actions of companies like SeaWorld and label their actions as anything other than *cruel* and morally indefensible.

A post-script on business ethics: SeaWorld and the other mammal

While the central focus of this essay has been on the grievous harm experienced by captive cetaceans in entertainment facilities, it should not be

overlooked that another mammal—*homo sapiens*—has also been victimized in a variety of ways—as customers, investors, and employees.

First, SeaWorld has consistently misrepresented the nature of its enterprise to customers. It is important to remember that, as a business, SeaWorld has profit as its main goal. However, the image the company presents is that it is more of a combination of a scientific research, conservation, and educational organization than a profit-driven business. For example, the company describes its mission as “providing experiences that matter and inspiring guests to protect animals and the wild wonders of our world” [SeaWorld, 2018, About Us]. Its website trumpets its number of animal rescues and its commitment to conservation and research. And while some “marketing spin” is understandable, the company surely crosses a line in its attempt to present itself as having a scientific respectability doubtless as a way to make customers think their dollars support a quasi-environmental organization.

For example, SeaWorld posts on its website a bibliography of 350 scientific articles published by its employees [SeaWorld, 2018a, Killer Whale Studies]. And while this list is surely accurate, the company fails to disclose that this is not the traditional scientific bibliography that it appears to be. That is, it does not aim to be comprehensive and include all perspectives. Setting aside that the page is mislabeled, that it, it is entitled “Killer Whale Studies” but includes research on a variety of both marine and terrestrial animals, limiting the citations to SeaWorld employees makes it easy to exclude studies from scientists who question the appropriateness of SeaWorld’s practices. In other words, while the bibliography may represent credible scientific research, the editing is surely done to misrepresent the company’s scientific credentials and to suggest that the company’s critics lack scientific standing—when,

in fact, some of the top marine mammal scientists in the field challenge the company's practices.

Similarly misleading is the announcement SeaWorld made in 2016 that the orcas currently in its possession would be the last generation it would use in its business and that it was discontinuing captive breeding [PRNewswire, 2016]. However, the following year the company announced that 21% of the firm had been acquired by the Zhonghong Zhuoye Group, a Chinese theme park and entertainment company, and that SeaWorld had agreed “to advise Zhonghong Holding exclusively on the concept development and design of theme parks, water parks, and family entertainment centers to be developed and operated by Zhonghong Holding, including exclusive rights in China, Taiwan, Hong Kong and Macau” [SeaWorld, 2017]. While cetacean captivity is in decline in the entertainment in most countries, it is growing in China. While the deal with Zhonghong Zhuoye failed dramatically in 2018, and SeaWorld reversed itself on its plans to open in China, it's not impossible to rule this out in the future [Storey, 2018].

However, more narrowly focused unethical behavior towards investors is apparent in the ongoing controversy—a shareholder lawsuit, federal criminal fraud investigation, and SEC complaint—over whether the company misled investors in its 2013 initial public offering. Despite the release of the documentary “Blackfish,” the company never warned potential investors before the IPO that the film could have a negative impact on the business, and it continued denying that it was responsible for the theme park's drop in attendance until August, 2014. When the company finally admitted how much business was off, SeaWorld stock lost 33% in value in one day. Investors argued that the company had repeatedly concealed risks and made

deceptive reassurances, and they filed suit. The Department of Justice's Fraud section subsequently launched an investigation to determine whether the company's actions were criminal [Swenson, 2017]. In September of 2018, the Securities and Exchange Commission fined SeaWorld \$5 million for failing to disclose the Blackfish effect on investors [Gardner, 2018]. And aside from the issue of fraud, management's failed corporate strategy cost investors a substantial amount of money. In terms of market capitalization, the company saw a \$2.2 billion decline from 2011 to 2017 from \$3.42b to \$1.25b. This represents a 63% decline. To say that management failed its fiduciary duty to investors would be a dramatic understatement.

And if such poor discharge of management's fiduciary's duty weren't bad enough, the above-mentioned agreement with the Zhonghong Zhuoye Group reveals an astonishingly poor job at due diligence. A little more than a year after the deal, Zhonghong's financial weaknesses forced them to sell off the island complex where the SeaWorld park was to be located. And in the middle of a storm of even more financial bad news, the CEO of Zhonghong (now SeaWorld's largest shareholder) fled to Hong Kong [Storey, 2018].

Tragically, SeaWorld's most serious ethical failures are captured in the series of citations and fines leveled against the company by the Occupational Safety and Health Administration, when OSHA charged SeaWorld with failing to protect its employees properly when working with killer whales [Miller, 2015]. The most unsettling of these charges followed the death of trainer Dawn Brancheau in 2010, when OSHA found that at least one violation was "willful," that is, "committed with plain indifference to or intentional disregard for employee safety and health" [OSHA 2010].

Sadly, the SeaWorld case will remain one of the more heartbreaking in American business ethics. Neither the harm to the hundreds of cetaceans involved nor to Dawn Brancheau nor to the company ever had to happen. Even if we were to excuse the founders of the first captive facilities because of their ignorance of the capacities of these cetaceans—a difficult thing to imagine given the thousands of years of stories about the remarkable traits of these beings—once humans began interacting closely with dolphins and orcas, and as modern marine mammal science revealed just how intellectually and emotionally sophisticated they were, it should have been obvious that they could not flourish in captivity. And as knowledge about cetaceans became more widespread in society, it should have been plain that the SeaWorld business model was inherently flawed. The company was approached repeatedly by cetacean advocates who offered to work with the firm to find a profitable way to transition out of captivity and fashion a successful long-term business model. But it continued to dig in its heels. Regrettably, there is every reason to believe that the panic connected with SeaWorld's unstoppable financial slide and their fixation on a failed business strategy blinded management to the ethical issues that became all too clear to the market.

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