Abortion and Animal Rights: Are They Comparable Issues?

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Abortion is a terribly complicated legal and social issue, and so is the issue of animal rights. Indeed, these topics have accounted for a great deal of recent writing in the fields of moral philosophy and applied ethics, social theory, and feminist studies. Although some feminists who support the right to terminate pregnancy have voiced strong support for animal rights, many others have refused to commit themselves or, worse yet, have indicated hostility to animal rights because they believe that recognition of animal rights will be one step down the road toward recognition of fetal rights.

Similarly, although some animal rights advocates are staunch supporters of a woman's right to choose to terminate her pregnancy, many animal rights advocates either are reluctant to express a view on abortion (— my issue is animal rights‖) or, worse yet, are opposed to freedom of choice on the ground that if animal life should be protected, then the argument for fetal protection is even stronger.

The present stand-off between advocates of animal rights and supporters of the right to choose can be traced to the fact that opponents of choice claim that the arguments advanced by animal advocates apply equally to fetuses, and that failing to apply such arguments is simply irrational on the part of animal advocates. For example, Peter Singer argues that nonhumans, like humans, are sentient and, by virtue of that sentience alone, are entitled to have their interests treated equally in the utilitarian balancing process (Singer 1991). Anti-choice advocates claim that if sentience, in and of itself, is sufficient to establish moral consideration for nonhumans, then fetuses (at least some of whom are sentient) are entitled to similar moral consideration. Indeed, opponents of choice view the failure to apply animal protection views to fetuses as demonstrative of misanthropy on the part of animal rights advocates.

In this essay, I want to examine the two primary theories that have been articulated in the literature to advance the cause of animal protection. It is my view that although both theories are properly applied to issues involving nonhuman animals, they cannot automatically be applied to the abortion context without recognizing that there are very significant differences between these two moral situations. When a vivisector seeks to exploit a nonhuman in a biomedical experiment, the situation is much more analogous to one of child abuse, not abortion. The state can regulate vivisection— and child abuse— in a way that does not fundamentally intrude on the basic privacy rights of vivisectors or parents. The

state cannot, however, regulate abortion in the absence of a patriarchal intrusion of the law into a woman's body, and we generally do not tolerate that sort of bodily intrusion anywhere else in the law. [1]

That is, even if we grant that the fetus is sentient (at least at some phases of its existence), or that a fetus is a rightholder in the sense that philosopher Tom Regan (1983) intends, we are still confronted by the question as to who is the appropriate moral agent to resolve any conflict between the primary rightholder (the woman) and the subservient rightholder (the fetus). [2] The only choices are to let the primary rightholder decide, or to relegate the responsibility to a legal system dominated by actors and ideologies that are inherently sexist. In the abortion context, there are no other choices, as there are when the state attempts to regulate animal abuse or the abuse of minor children.

In this essay, I examine briefly the *consequentialist* and *deontological* views advanced by animal advocates[3] and argue that neither framework really can address the moral issue of abortion, because abortion presents a unique moral issue. That is, there is a fundamental difference between the abortion issue and the other moral contexts in which we generally seek to employ these frameworks. This difference does not mean that our discourse about the morality of abortion ends; it means only that our reliance on moral theories of animal protection do not commit us to reject abortion on the same grounds.

I should state at the outset that I anticipate that many feminists will object to my focus on the welfarist or rights structure as being itself patriarchal, both as a matter of history and theory. For example, many feminist theorists reject animal rights because a right is a male-created concept that reflects the hierarchical thinking so typical of the male mind (Glendon 1991). Although I embrace such alternatives as the ethics of care as expressions of the highest form of moral thought, I am concerned that we not reject traditional moral thought on the matter for two reasons.

First, it is my view that the source of a moral concept tells us little, if anything, about the sexist or nonsexist status of that concept. Virtually every intellectual concept used in our culture was formulated originally by white men, who held (and to a very considerable degree still hold) exclusive control over education and publication. That origin, however, does not mean that every concept is itself patriarchal in some way apart from its admittedly patriarchal origin. The concept of rights can be used in a patriarchal way to oppress; but then, so can any other moral concept that seeks political expression, including the ethic of care.

Second, and more important, however, is my view that in a diverse and highly populous political system, there must be some mechanism that can be used to resolve the inevitable conflicts that will arise among individuals, irrespective of whether the society in question is matriarchal or patriarchal. Many feminists argue

that the ethics of care should replace what they view as the patriarchal notion of rights; that is, that a collective notion of concern, not based on competition and conflict, is preferable to rights theory. In many ways, this argument is somewhat similar (albeit different in material respects) to Marx's critique of rights. Marx believed that the concept of rights was bourgeois because it reinforced the notion of people as individuals in a society that should (and, if historical materialism is true, will) regard itself collectively.

One day, if we ever achieve a society without sexism, racism, homophobia, and economic injustice, perhaps the whole concept of the individual will, like Marx's state, ―wither away‖ and be an unnecessary component of moral theory. For the foreseeable future, however, individual conflicts are likely to arise in any society, and there must be some set of principles that may be used to evaluate claims and to resolve conflicts. Even in a matriarchal society that employs an ethic of care, there will still be notions of individuality that delimit intrusions on one's body by men or women. The concept of the individual is here to stay; it may find itself conceptually melted into a more communitarian society in which many *individualistic* values are traded away for the sake of the whole, but there will still be some individual left— however meager— whose individuality will in some sense be defined by laws that limit personal intrusion.

In short, something like rights is necessary, and cannot be rejected out of hand. Even if we did achieve a society even more utopian than those being proposed by our few remaining idealists, it is highly improbable that we will eradicate conflict entirely. And when conflict does arise, we will need some mechanism to resolve it. This mechanism may be based on collective consequences without consideration of the individual, or it may be based on individual concerns. If the latter is chosen, it seems that something very much like rights will be needed.

Sentience, Animal Welfare, and Animal Rights

In 1976, Australian philosopher Peter Singer produced *Animal Liberation*, a work that has been credited widely with renewing interest in the topic of animal rights. Although the importance of Singer's work may not be underestimated, it should also not be forgotten that this book had nothing to do with animal rights. That is, Singer presented a consequential moral position; specifically, he presented a utilitarian version of consequentialism that had been espoused by Bentham in the nineteenth century, except that Bentham viewed pleasure as the intrinsic value to be maximized while Singer regards preference-satisfaction as the primary value to be maximized. Bentham argued that it was irrational not to include nonhuman animals in using the utilitarian calculus to determine the morality of various

actions. According to Bentham, the question is not whether animals can reason or talk, but whether they can suffer (Bentham 1789, chap. 17, sec. 1).

Neither Bentham nor Singer argued that animals (or humans) were entitled to moral rights as a matter of consequential theory; rather, both philosophers maintained that because nonhumans were, like humans, sentient, both types of beings should have their interests considered in determining what was the best moral outcome (greatest aggregate pleasure or preference-satisfaction) for the largest number. Humans and nonhumans alike were to be counted as "beings" for purposes of the recognition and respect of these interests. The approach posited by Bentham/ Singer is quite consistent with the philosophical doctrine of animal welfare— that is, that humans may justifiably exploit animals as long as human or animal suffering is considered as part of the utilitarian calculus. [4]

Those who accept the Bentham/ Singer position on the moral significance of sentience often argue that if it is irrational not to include the interests of nonhumans in the utilitarian calculus, it is similarly irrational to exclude human fetuses. There are at least two responses to this argument. It is not clear whether and to what degree human fetuses are sentient. Although there is little doubt that second- and third-trimester fetuses exhibit signs of sentience, the overwhelming number of nontherapeutic abortions are performed during the first trimester, and there is substantial evidence that there is little, if any, sentience during this period. If human fetuses in the first trimester experience little (if any) pain, then there is no sentience about which to be concerned and which must be weighed in the utilitarian calculus. In any event, it would be difficult to compare the sentience of a first-trimester fetus with that of a human being or a dog.

Moreover, the sentience argument neglects an important aspect of modern animal protection theory: rights advocates do not regard sentience as playing the same theoretical role. For example, philosopher Tom Regan uses sentience only as a starting point in his theory. Regan claims that a being must have a psychological status sufficiently complex so that we may say that the being has preferences, fears, hopes, mood changes, etc. Regan calls such an individual the "subject-of-a-life" and claims that such attributes constitute a sufficient but not necessary condition for a being to be said to have moral rights. If we rely on the rights response, however, we may be able to avoid some of the difficulties raised by exclusive reliance on the sentience argument. That is, it is at least arguable that even if some fetuses are sentient, at least some of those lack in salient respects the very characteristics that rights theorists see as sufficient for status as a subject-of-a-life or as a rightholder. Under a rights view, a fetus arguably cannot be analogized to a primate that is to be used in experimentation or to a cow that is to be consumed by human beings, because the fetus does not possess the qualities normally associated with personhood. [5] Of course, the rights theorist can argue (as

Regan does) that fetuses may have moral rights even if they are not subjects-of-a-life because that criterion is only a sufficient and not a necessary one for having rights.

It should be noted that neither Regan nor Singer uses his respective theory to condemn abortion. Singer openly endorses choice and, when justified by the consequences, even infanticide (Singer and Kuhse 1985). Regan argues that the subject-of-a-life criterion is inexact and that in the case of newborn infants and fetuses of mature gestation, we should probably err in favor of granting rights. But that would only mean that there was a conflict of rights between the mother and fetus. Moreover, Regan makes it clear that fetuses in early term do not have moral rights.

The Problems of the Prevailing Theories and the Politics of Abortion

Whether one chooses a consequentialist approach such as Singer's, or a deontological approach, such as Regan's, it must be understood that these theoretical frameworks have been developed largely in contexts in which there are conflicts between separate entities. In particular, these viewpoints address what we should do when we are confronted with a conflict between, for example, a chimpanzee who is to be used in experimentation and the vivisector who seeks to use the chimpanzee. Alternatively, these moral frameworks may help us to determine whether and when the state may intervene to protect a child from an abusive parent.

As such, both Singer's and Regan's approaches may help us to find our way out of the moral thicket when we are confronted with a conflict between two separate and independent entities. Abortion, however, presents us with a completely unique moral issue that is replicated nowhere else in nature. That is, in the abortion context, the conflict is between a woman and a being who resides in her body. Vivisection should not be viewed as analogous to abortion; it should be viewed as similar to infanticide or murder. In my view, this feature of abortion makes it very different from the normal moral conflicts that we may try to resolve by recourse to moral theories concerning our treatment of animals.

A critic may respond that this seemingly peculiar feature of abortion is morally irrelevant to the ultimate determination of the abortion issue. That is, if the fetus is sentient (in Singer's view) or is the subject-of-a-life (in Regan's view), then its sentience or inherent value should matter as much as the sentience or inherent value of any other being ought to matter. But this criticism fails to

understand the politics of abortion, the morality of privacy, and the mechanisms that are required to vindicate fetal life.

Even before *Roe v. Wade* (1973), American law recognized— correctly in my view— that there were areas of privacy that were simply off limits to governmental control. For example, basic principles of criminal liability have generally rejected imposing culpability on human thought. The privacy principle in this situation arguably derives from a combination of the First Amendment protection of people's right to think (and say) what they choose, as well as from a general revulsion to punishing people for what goes on in their heads alone. Similarly, in *Griswold v. Connecticut* (1965), the Supreme Court held that marital privacy was violated by a state law that forbade the use of contraceptives. In *Stanley v. Georgia* (1969), the Court, relying on the right to receive information and to be free of governmental intrusions into one's privacy, forbade criminalizing the possession of obscene material for private use.

The underlying theory present in all of these decisions is the notion that it is sometimes impossible to enforce certain laws without committing heinous (and morally unacceptable) intrusions into the realm of personal privacy. If the state is going to criminalize possession of obscene materials for private use, or the use of contraceptives, these laws can be enforced only by having the constable stand in the bedroom— an intrusion that I would hope most of us would see as completely inconsistent with the existence of a free society.

That is precisely why the Court decided *Roe* in the way that it did; in order to enforce abortion laws (especially in the first trimester of pregnancy), the state would have to intrude in a way that is arguably as repulsive as the intrusion in *Griswold* or *Stanley* would be; the state would have to ―invade‖ and manipulate the body of the woman in order to vindicate any interest it had in the protection of fetal life. In *Roe*, the Court drew the line at various trimesters and held that at certain points relative to the line the state's interest in protecting fetal life could justify a violation of the woman's privacy (at least in certain circumstances). [6]

The same invasions of personal privacy are not involved, however, when the state seeks to protect the well-being of a minor. That is, if a parent is abusing a minor, the state can come in and remove the child from the hazardous situation without literally entering the parent's body or otherwise mandating the odious manipulation of the woman's body in order to protect the well-being of the child. Similarly, if the state seeks to protect nonhuman animals, it can do so without crossing the privacy line that is crossed in the abortion context. [7]

Those who seek to argue that issues of animal exploitation are no different from abortion not only neglect the clearly empirically different nature of the issues involved; they also fail to understand how moral decisions are played out in the context of other moral principles that are often ignored. To put it another way:

questions about abortion are not decided in a philosophical vacuum, and careful consideration of the consequences of political oppression of the disenfranchised is morally necessary in order to resolve these conflicts.

This is not to deny that there are important political dimensions that accompany our attempts to apply philosophical theories to "balance" animal interests against human interests. The philosophical "balancing" apparatus may be theoretically correct, but the process can almost never work fairly because of the political status of nonhumans. Animals are regarded as the property of humans and incapable of having rights because they are property; similarly, humans have rights— and most notably, they have the right to own and use private property. In human/ animal conflicts, the human is usually seeking to exercise property rights over the animal. In any "balancing" situation, the animal will almost always be the loser. So the philosophy looks great, but the results are less than desirable. Nevertheless, should the state choose to do so, it could protect at least some animal interests over at least some human interests simply by removing animals from abusive situations. Such action would arguably violate the human's property interest in the animal, but the regulatory action would not require that the state invade the privacy of the human in the way it does when it prohibits or restricts abortion.

The application of utilitarian or deontological theories cannot ignore the reality that when a conflict is presented between a woman and a fetus, there are, as a practical matter, only two ways in which the issue may be resolved. One of the two parties involved in the conflict may make the decision, and since it is difficult for fetuses to make decisions, the woman is the only other available decision maker. Alternatively, we may have the state make the decision through laws that prohibit (or permit) abortions. Many opponents of abortion appear to think that this second resolution is acceptable: that the state, through the political process, should be able to make the decision as to whether the woman can terminate the pregnancy.

If the decision-making power is relegated to the state, the state will probably enforce that power by literally entering the body of the woman and dictating what she can and cannot do with her body and her reproductive processes. The state can act only by invading that woman's privacy in a most basic way, and the state must proceed in this manner given the patriarchal nature of our legal system. This is very different from the state removing a minor child from an abusive situation where, although family disruption may result, the level of state intrusion is qualitatively different and the insidious effects of patriarchy are at least ostensibly less apparent.

Moreover, the current political climate surrounding abortion demonstrates more than ever that even when we accord reproductive rights to women, those rights, which are interpreted within the strictures of a patriarchal legal system, are

precarious at best. It must be remembered, for example, that irrespective of the progressive nature of *Roe*, the Supreme Court was careful to articulate that the right to terminate pregnancy belonged to a woman *and her doctor*. Similarly, the abortion litigation of the recent decade has continually encroached on the right to choose through the adoption of the ―undue burden" test. That is, the Court has generally upheld state prohibitions on the right to choose as long as those restrictions do not impose ―undue burdens" on the freedom to choose. The problem is that this standard has been used to justify everything from parental and spousal notification to waiting periods. We have absolutely no reason to believe that women will ever enjoy privacy over their reproductive systems if the legitimacy of abortion is left to the political or legal systems.

Conclusion

Contrary to what the Reagan/ Bush administrations would have had us believe, virtually all progressives— women and men alike— recognize that abortion raises serious moral issues. It was not my intention in this essay to argue that abortion should be treated as a nonissue. Rather, I have argued that a commitment to animal rights does not necessarily lead to a rejection of freedom to choose abortion, because animal exploitation and abortion present different moral dilemmas. In the former, there is a conflict between two discrete individuals: a human being and an animal that the human seeks to exploit. I argue that the state can protect the animal's interest without invading the privacy of the human in a manner that we would see as repulsive or as inimical to our basic liberties.

I also argue that abortion presents a unique moral dilemma, in that even if we accept that fetuses have rights, the conflict is between the primary rightholder— the woman— and the subservient rightholder, who resides in her body. In these circumstances, someone must resolve the conflict, and if that task is relegated to the state, the task of fetal protection can be accomplished only through the state's literal entry into the body of the primary rightholder.

Notes

I am deeply indebted to suggestions that I received from my colleague and partner, Professor Anna Charlton, codirector of the Rutgers Animal Rights Law Clinic.

1. I am aware that some feminists do not accept privacy as a legitimate ground for reproductive freedom. See, e.g., MacKinnon (1989, 184– 94). Although I think MacKinnon's arguments are interesting, I do not agree that the right to privacy necessarily means that no social change is required, nor do I accept her argument that a right of privacy means that ―women are guaranteed by the public no more than what they can get in private— what they can extract through their intimate associations with men‖ (1989, 191). I do agree, however, that at present, our legal concept of privacy is impoverished for many of the reasons that MacKinnon states. It is at least conceivable to have a legal system that recognizes certain privacy rights and certain other rights that guarantee the exercise of those privacy rights. That is, the right of privacy could protect the right to terminate pregnancy at the same time that the legal system recognized that if privacy rights are to be meaningful, then public resources should be used to ensure that all women could meaningfully exercise those rights.

2. My distinction between the woman as primary rightholder and the fetus as subservient rightholder finds historic support throughout legal doctrine. For example, abortions have almost always been permitted when the life of the mother is at stake.

3. Consequentialism is the doctrine that says that the moral quality of actions is dependent in some way on the consequences of particular actions or actions of a general type. For example, one version of consequentialism is utilitarianism, which, although formulated in various ways, holds that the morally right act is that which maximizes happiness (or pleasure, liberty, wealth, etc.) for the greatest number. Act utilitarianism states that the principle of utility is to be applied directly to individual acts. Rule utilitarianism states that the principle of utility is to be applied to acts of a type. That is, an act utilitarian might be inclined to tell a lie if the consequences of telling the truth in that particular situation were disastrous. A rule utilitarian might argue that lying as a general matter will destabilize society and have even worse consequences than telling the truth in the particular situation; so a lie would not be required, or justified, under rule utilitarianism.

Deontological thinking formulates criteria for the moral quality of acts on considerations other than consequences. For example, many rights theorists argue that people (or animals) have rights because of their inherent value as individuals and not because of consequential considerations.

4. The fact that utilitarian theory may be used to justify animal exploitation is demonstrated by the work of R. G. Frey (1983).

5. Regan does argue, however, that being the subject-of-a-life is a sufficient but not necessary condition of possessing inherent value, and he argues that fetuses are entitled to moral consideration (1983, 319–20).

6. Of course, this is not to say that *Roe* was an ideal decision; indeed, there are many grounds upon which to criticize *Roe*. In my judgment, the most serious problem with the decision is that it dealt more with the right of physicians to perform abortions rather than the right of women to get them. Moreover, the Court provided protection to the decision made by the woman and her doctor.

7. I recognize that certain religions recognize the right to inflict serious corporeal punishment on children, and resent any state interference aimed at preventing abuse to the children. Putting aside the rather unusual views held by this relatively small group of persons, the state interference involved is still not as intrusive as state-mandated manipulation of the body.

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