ANIMALS: MORAL RIGHTS AND LEGAL RIGHTS

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I would like to organize my comments on the moral and legal issues having to do with animals by asking two fundamental questions:

Should animals have moral standing, and
Should animals have legal standing?

Since most of my research has been in the area of moral philosophy and very little in the philosophy of law, I will have more to say in regard to the first question than in relation to the second.

Let us consider the first question: Should animals have moral standing? What would it be for an animal not to have moral standing, not to count for anything morally whatsoever? Consider an example: Joe gets his kicks out of clubbing calves. He just loves to smash the heads of calves. To say that the calves have no moral standing would be to say that they count for nothing morally. It would mean that Joe does nothing wrong as far as the calves themselves are concerned; although physically damaged, the calves could not be morally harmed, they could not be morally injured. The calves would not be the subjects of interests which could in any way be violated. And if Joe did all of his head smashing on a deserted island with no other human beings around to either see or hear about these clubbings, Joe's actions would, from the moral standpoint, be completely neutral. They would be what we might call "amoral," that is, without any moral significance whatsoever.

The history of Western culture and philosophy reveals a very persistent tendency to say "no" to the question: Should animals have moral standing? The Greeks, including Plato and especially Aristotle, said "no": on the basis of the criterion of rationality. Only rational beings are to count for something morally. Only humans are rational. Animals are not rational. Therefore, animals should count for nothing morally, and animals should be used as instruments to serve the interest of rational humans. Aristotle him-

self was quite rational, but he was also convinced that many humans were not rational or, at least, not very rational, especially female humans and slave humans. so, he rationally drew the conclusion that both sexism and slavery were justified.

Not only within the Greek philosophical tradition but also within orthodox Christianity, there has been a persistent denial of the moral standing of animals. The most prominent and clear example was in the thirteenth century: St. Thomas Aquinas. Blending Aristotelianism with the dominion theory of the Bible, Aquinas claimed that by divine providence the animals are intended for human use, and, therefore, it is not wrong for humans to make use of animals, either by killing or in any other way whatever. True, St. Thomas was against cruelty to animals. But the only reason, or at least the basic reason, he was against cruelty was that if humans are cruel to animals, then they will, he thought, as a matter of fact, tend to be cruel to other human beings. Given that Joe smashes calves' heads on a deserted island, Aquinas would be committed to the view that nothing wrong is done to the calves. The action would be morally indifferent as far as the calves are concerned.

In the seventeenth century, the influential French philosopher Rene Descartes categorically denied that animals should have any moral standing. Since animals are soulless, are mindless machines, as mechanical as

PHILOSOPHY

clocks, it is impossible that animals could be hurt. When Joe clubs calves, they feel no more pain than does a clock when it is smashed. Calves have no awareness, no consciousness, no ability to experience either pain or pleasure. It follows, then, that it is impossible that an animal could be morally harmed or benefitted.

Another Western philosopher of enormous influence was the eighteenth century German, Immanuel Kant. His philosophy has been especially important in developing the foundation for human rights. For example, the human right to life, the human right not to be harmed, the human right to freedom. Kant claimed that only rational, self-conscious human beings counted for anything morally. Kant is famous for his Categorical Imperative, which goes something like this: rational self-conscious human beings should always be treated as ends in themselves and never as mere means, never as mere instrumental resources. All other beings, including all animals, could and should be used as mere means to serve the interest of the self-conscious, rational humans. To be sure, Kant was against cruelty to animals—but for exactly the same reasons given by St. Thomas. Cruelty to animals, he thought, would have a tendency to result in humans being cruel to humans. For example, the clubbed calves counted for nothing whatever morally in and of themselves. And on a deserted island, Joe's head-smashing activities would be completely amoral as far as the calves are concerned, without any moral significance whatsoever.

There are other theories which have answered "no" to our first question, but we do not have time to explore them. Let us take a look at the theories which say "yes" to the question: Should animals have moral standing? These two theories are utilitarianism and the moral right theory. These two theories are both negative and positive. They are negative in that they criticize the former theories which deny any moral standing to animals, and they are positive in that they attempt to provide theories which will serve as a basis for giving moral standing to animals.

Let us first briefly consider criticisms of the past "no-sayers." Aristotle's rationality criterion is both too narrow and too broad. It is too narrow in that human infants and severely retarded humans are not

rational, but we are convinced that human infants and the severely retarded should count for something morally. It is too broad in that behavioral and ecological studies are leading to the conclusion that many animals have some rational capacity.

Psychologist David Premack has given serious consideration to the hypothesis that primates have the concept of causality and that they make inferences on the basis of this concept.[1] St. Thomas Aquinas' theory, being a theological theory, has all the weaknesses that theological theories, finally based on faith, have. They can produce no rational grounds for accepting the theory. Other religions have recognized the moral standing of animals, for example, Buddhism and Hinduism. Which religion is correct? And even if one were to accept the theological dominion theory, the view that humans were given rule over the animals, there are two opposed interpretations of the concept "dominion." Does "dominion" mean rule over the animals for the sake of humans? We might call this "the tyrannical interpretation" of dominion. Or does the concept "dominion" mean rule over the animals for the sake of the animals? We might call this "the stewardship interpretation." St. Thomas gave the tyrannical interpretation, but there are contemporary theologians who argue that the stewardship interpretation is more correct.

Or, consider Immanuel Kant's theory based on rationality and self-consciousness. This has also been criticized as being both too narrow and too broad. His theory would result in two-week old human infants and severely retarded humans counting for nothing morally. This criterion is too broad—from the perspective of anthropocentric tradition—in that it would give moral standing to many animals.

The philosophers Peter Singer[2] and Tom Regan[3] have effectively argued that many animals are capable of intentional behavior and that intentional behavior necessitates some self-consciousness, at least an awareness of oneself as being distinct from other things in the environment, and also awareness of oneself as enduring through time, past, present, and future.

Descartes' machine theory of animals has been heavily and decisively, I believe, criticized by both scientists and philosophers. Given the similarities of the nerve and brain

structures and in behaviors of animals and humans, there is strong evidence to reject the Cartesian theory. Evolutionists emphasize the survival value implicit in the capacity to experience pleasure and pain. How could pain and pleasure have survival value if the animals experience no pain or pleasure?

Having briefly considered the criticisms of the "no-saying" theories, let us now take a look at the two kinds of theories held by those who say "yes" to the question: Should animals have moral standing?

First, utilitarianism: Jeremy Bentham (eighteenth and nineteenth century, English) and John Stuart Mill (nineteenth century, English, and a follower of Bentham) systematically developed the classical utilitarian theory. The fundamental themes of utilitarianism include the following:

All and only pleasure is good in and of itself.

All and only pain is bad or evil in and of itself;

In all their actions, moral agents should act in such a way as to maximize the net balance of pleasure over pain for all sentient beings in any way affected by the action.

Using these fundamental utilitarian principles, Jeremy Bentham wrote the often-quoted sentence:

The question is not can animals reason, not can they talk or use language, but can they suffer?, can they enjoy?

Bentham answered these last questions, can they suffer?, can they enjoy?, affirmatively. John Stuart Mill agreed with him, and Peter Singer, the internationally respected philosopher and author of Animal Liberation[4], is in fundamental agreement with Bentham and Mill.

The moral theory underpinning Peter Singer's argument in his very influential Animal Liberation is utilitarianism. All animals are equal, argues Singer; that is, equal pains in animals and humans should count equally morally. And equal pleasures in animals and humans should also count equally morally. Therefore, all sentient animals (by "sentient animals," I mean animals having the capacity to experience pain and pleasure) do have moral standing.

Singer concludes that the net balance of

pleasure over pain for all sentient beings--human and nonhuman--affected on this planet would be maximized if the factory farming of food animals were discontinued and if humans switched from a factory farmed animal diet to a vegetarian diet. Singer also concludes that the elimination of most of the current experimentation on animals would maximize the net balance of pleasure over pain for all sentient beings--once again, human and nonhuman--affected. For the utilitarian, Joe's activity of smashing calves' heads on a deserted island would be an action with moral significance, or perhaps better, immoral significance. All calves and all sentient animals count for something morally, have moral standing, according to utilitarian theory.

A moral rights theory is a still stronger theory answering "yes" to the question: Should animals have moral standing? The concept of moral rights is a fairly modern concept, performing some of the functions of the older "natural rights" concept, but with an attempt to eliminate some of the historical and conceptual connection between natural right and early Greek and Roman metaphysical views. Also, an attempt is made to stay away from a theological foundation which has been stressed as a basis for natural rights.

There is much controversy currently over the question of moral rights, not only at the level of animal moral rights but also in regard to human moral rights. The following examples are frequently presented as being strong candidates for moral rights:

the right to life,
the right not to be harmed, and
the right to freedom.

Moral rights theorists call our attention to the famous passage in the Declaration of Independence:

All men are created equal. They are endowed by their creator with certain inalienable rights. Among these rights are life, liberty, and the pursuit of happiness.

In this passage, we can detect three themes in relation to moral rights:

Moral rights are universal; that is, they apply to all humans, regardless of time or place.

Moral rights are equal; that is, if any two beings have moral rights, they possess them equally--you cannot have more or less of a moral right to life than I do.

Moral rights are inalienable; that is,

they cannot be transferred from or sold or given away.

It is controversial how best to define a moral right. I would like to suggest, preliminarily, the following definition:

to say that a being S has a moral right to x means that S has a valid claim to x, a claim which is enforceable against others in virtue of moral sanctions and principles.[5]

Ronald Dworkin, in his book Taking Rights Seriously,[6] emphasizes that moral rights serve as a trump card over and against the collective utilitarian interests of the group. If this is so, then we can easily see that if animals have moral rights, then it would follow that animals have moral standing in a significantly stronger sense than would be the case under utilitarianism.

In 1983, the University of California Press released The Case for Animal Rights by Tom Regan, Professor of Philosophy at North Carolina State University.[7] This book is by far the most extensive, systematic, and sophisticated argument for animal rights to appear thus far.

Regan claims that humans do have moral rights, including the right to life, the right to freedom, and the right not to be harmed. The most plausible criterion for moral rights possession by humans is a criterion also met by most animals. Therefore, he draws the conclusion that most animals, all mammals, perhaps all birds, have moral rights. That's the structure of his argument.

Regan's arguments are both negative and positive. He has negative arguments criticizing past and competing criteria for the possession of moral rights. His positive arguments are presented in defense of the criterion which he accepts. In answer to those who claim that rights are based on a divine gift, Regan shows that such a claim can have no rational evidence, since it is ultimately based only on faith. In answer to those who attempt to base rights on the capacity to use language, Regan argues that this criterion will exclude many humans from rights (infants and the severely retarded) and will include some animals (chimpanzees, orangutans, gorillas, porpoises, etc.). In answer to those who attempt to base rights on the capacity to reason, Regan again argues

that this will leave out many humans and will include some animals. In answer to those who try to ground rights on the ability to choose freely, Regan concludes that this, too, will exclude many humans and include many animals. And in answer to those who use the criterion of self-consciousness, Regan argues that this, too, excludes many humans and includes many animals. Regan's general negative conclusion is that it is impossible to develop a rational, consistent criterion for moral rights which will include all humans but exclude all animals.

In his positive argument, Regan develops what he considers to be the most adequate criterion to serve as a basis for possessing moral rights. In summary form, this criterion is as follows:

a being which has inherent value has moral rights. and any being has inherent value if it satisfies the following three conditions:

- such a being has interests;
- such a being can be benefitted or harmed; and
- such a being is the subject of a life which can be better or worse for it, independently of any other being valuing it or finding it to be useful.

Regan comes to the conclusion that this most satisfactory basis for moral rights will include virtually all humans (the status of a permanently comatose individual, like Karen Ann Quinlan, is left an open question) but it will also include most animals: all normal, mature mammals, probably all normal, mature birds, and probably still others. And as far as human treatment of animals is concerned, Regan concludes that vegetarianism is morally obligatory, and that the elimination of experimentation which harms animals is also morally obligatory. Therefore, it follows that Joe's smashing calves' heads on the deserted island would be violating the calves' moral rights: the right to life, the right not to be harmed, and the right to freedom.

Given that I am not a specialist in the philosophy of law, my comments will, necessarily, be brief in regard to the second basic question posed at the beginning of this discussion; Should animals have legal standing?

First, it is important to consider two preliminary questions:

Do animals already have legal rights?

Do animals already have legal standing?

The Animal Welfare Institute in Washington, D.C., has recently published a book entitled Animals and Their Legal Rights.^[8] This title seems to presume that animals already do have legal rights. Considered in this book are anti-cruelty laws and laws governing transportation, caging, slaughter, etc. These laws do give animals some protection, but just from the fact that laws protect something, it does not follow that that which is protected has any legal rights. For example, there are laws protecting the Golden Gate Bridge, but it does not follow that this bridge has any legal rights, that this bridge has interests which can be represented in legal actions. I think we must conclude that animals do not have any legal rights in current American law. Nor do they have legal standing.

Is legal standing for animals ever thinkable? Does it even make conceptual sense to try to talk about legal standing for animals, or is such talk pure nonsense? Joel Feinberg, a philosopher at the University of Arizona, has effectively argued that such talk is thinkable.^[9] If legal rights are to be essentially connected with interests and if it makes sense to say that a squirrel has interests, then why isn't it at least thinkable that a squirrel could have legal rights and that the interests of the squirrel could be represented by an agent or a guardian in a court of law? True, squirrels do not have the ability to make their own claims, but neither do human infants, and human infants do have legal rights.

Christopher Stone's important book, Should Trees Have Standing?, is relevant here.^[10] Stone wrestles with the question: Is it thinkable that a forest or wilderness could have legal rights? Stone concludes that it is thinkable, because a forest could meet the three criteria which Stone emphasizes as being sufficient for legal standing:

a forest could institute legal action in its behest through a guardian;

a court could take injury to the forest into account in determining the granting of legal relief; and

the relief granted by the court could run to the benefit of the forest.

If corporations and ships can have legal standing--and they do--then why could not forests? If legal standing is thinkable for a forest, then surely legal standing is

thinkable for squirrels and dolphins.

What is the relationship between morals and laws? More specifically, we could ask: What is the relationship between moral rights and legal rights? Between moral standing and legal standing? There is a popular saying: it is impossible to legislate morality. I'm not sure exactly what this statement means, but I do think there is a sense in which this is a false claim. Not only do morals have a significant influence on law, but law also has a significant influence on morals. For example, consider the strong Minnesota law prohibiting smoking in public areas. I suspect that the moral right not to be harmed by others played a significant role in the passage of this law. Once the law was passed, there was much criticism and grumbling on the part of the smokers and employers and restaurant owners, but this law is having a very noticeable effect on the moral attitudes and beliefs of the general public. There is a sense in which morals can be legislated. As already indicated, the Declaration of Independence emphasized three moral rights:

the right to life,

the right to liberty,

the right to the pursuit of happiness.

These moral rights have had a profound influence on American law.

Ronald Dworkin, again in Taking Rights Seriously, argues that it is impossible to separate law from morality. Part of his argument consists of his claim that it is impossible for judges to decide hard cases without appealing to moral principle, which are not explicit, within the laws themselves. The principle of justice or fairness, for example, is a moral principle which is often used to overturn certain rules that were explicitly adopted by law-making bodies. In denying the possibility of separating morals from law, Dworkin is attacking the position called "legal positivism:" the view which claims that there is no such thing as moral rights, that the only rights which exist are legal rights, those rights specifically adopted by legislatures and that can be found in statutes.

How similar is the legal position of animals to the legal position of human slaves? I am currently doing preliminary research on a book to be entitled Human Slavery and Animal Slavery. One chapter would deal with slavery law, the law governing human slaves and the law governing animal

slaves. Most people have never thought of the concept of "animal slavery." At first hearing it seems puzzling, but I am convinced that the parallel between the two types of slavery is very enlightening.

Slaves, be they human or animal, are property. The human slave, being property, can make no contract; neither can animal slaves. All animals, according to the Western tradition, are owned; even the wild animals are owned by the public. A human slave cannot own property. How could property own property? Neither can animal slaves own property. A human slave cannot testify in court against a non-slave. How could property testify? Neither can an animal slave testify. A human slave cannot sue the slaveholder. How could property sue its owner? Neither can animal slaves sue their owners. In general, we can conclude that human slaves have no legal standing, since they are essentially property. The same conclusions hold for animal slaves.

There are also important, illuminating parallels between the abolition of human slavery and the anticipated abolition of animal slavery: "animal liberation." Major shifts in classical philosophical and theological views were required before human slaves could achieve moral standing. Philosophers are now exploring further shifts which recognize the moral standing of animals. Theologians and clergy will find it necessary to re-examine and re-interpret doctrines affecting the relation between humans and animals. Public attitudes toward animals must—and will—change to the point where animal liberation can become a viable political issue, the final result being the recognition of the legal standing of individual animals.

Notes

1. Premack, David, "Language and Intelligence in Chimpanzee and Child," a paper read at a symposium on "The Question of Animal Consciousness: Philosophical and Biological Perspectives," held at Michigan State University, April 5, 1980.

2. Singer, Peter, "Animals and the Value of Life," in Matters of Life and Death, ed. Tom Regan (Philadelphia: Temple University Press, 1980), pp. 218-59. Singer presents arguments for some animals being self-

conscious, being persons, and being capable of intentional actions.

3. Regan, Tom, The Case for Animal Rights (Berkeley: University of California Press, 1983). See, especially, Chapter 2: "The Complexity of Animal Awareness," pp. 34-81.

4. Singer, Peter, Animal Liberation: A New Ethic for our Treatment of Animals (New York: Avon Books, 1975).

5. I am essentially using Joel Feinberg's definition of a moral right. See his "The Nature and Value of Rights," pp. 143-58, and "The Rights of Animals and Unborn Generations," pp. 159-84, in his Rights, Justice, and the Bounds of Liberty (Princeton: Princeton University Press, 1980).

6. Dworkin, Ronald, Taking Rights Seriously (Cambridge: Harvard University Press, 1977):

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them. (p. xi)

7. See note 3.

8. Leavitt, Emily S., Animals and Their Legal Rights (Washington, D.C.: Animal Welfare Institute, 1978).

9. See note 5.

10. Stone, Christopher D., Should Trees Have Standing? Toward Legal Rights for Natural Objects (Los Altos, California: William Kaufmann, Inc., 1974).