
OF ABORTION AND ANIMALS: THE PROMISE AND PERIL OF LEGAL RIGHTS

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It is my pleasure to participate in a conversation about Sherry Colb and Michael Dorf's *Beating Hearts: Abortion and Animal Rights*. Among its many virtues, the book beautifully delivers on a central premise: namely, that given the moral centrality of sentience, we can learn a great deal about animal rights by thinking about abortion, and vice versa. This is difficult, fraught terrain, a reality that Colb and Dorf candidly acknowledge. They treat their subjects with rigor, care and compassion.

I want to focus my remarks on the law side of the legality/morality divide that Colb and Dorf so deftly probe. On the one hand, the book tells a limits-of-law story, one that I find quite compelling. But the abortion/animal rights juxtaposition also helps us to think about the promise of law—and legal rights in particular—to promote social change under sub-optimal circumstances; that is, under circumstances involving a backdrop of deeply entrenched social hierarchies.

Let us first consider abortion. Briefly summarizing the thrust of Colb and Dorf's argument: Sentience is a sufficient condition for moral consideration. Under certain circumstances, therefore, a woman may have a moral duty not to abort a sentient fetus. Nonetheless, there are sound reasons to believe that the law ought not to prohibit that choice. The most compelling, it seems to me, are those steeped in norms of sex equality. "After all," the authors note, "laws criminalizing abortion convert moral duties of women into legal duties without converting comparable moral duties of men into legal duties." On this view, a woman's reasons for wanting to terminate her pregnancy may matter less than her interest in opting not to carry the fetus to term.

One of many helpful interventions by Professors Colb and Dorf is to observe that, should technology someday progress to the point where a woman can terminate a pregnancy safely without killing the sentient fetus, we might think differently about the "right" of the sentient fetus to live. Until then, a fetus's continuing existence depends entirely on the pregnant woman. This thought experiment surfaces a theme that runs throughout the book. Rights—and, again, focusing here on *legal* rights—possess a relational quality, one that is too often obscured by dominant discourses. Recognizing a fetus as a being with legal rights, for instance (or as a "person"), has profound implications for the woman

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carrying it—not just for relations between women and their fetuses,¹ but also for relations between women and men.

Colb and Dorf powerfully illustrate how a woman forced to continue a pregnancy endures a form of *conscriptio*, and they show how the sexual servitude of women—much like the sexual servitude of farmed animals—inevitably undermines sex equality. I would also observe that affording legal status to a fetus has effects outside the abortion context. The legal severing of a fetus from the pregnant woman has generally resulted in a pitting of her interests against those of the fetus: in essence, the relationship has been constructed, within law, as adversarial. Over time, this move has increased the state’s power to interfere in the lives of pregnant women. Pregnant women—disproportionately low income and African American²—have been prosecuted for using drugs, refusing a Cesarean section, having sex outside a doctor’s recommendation and attempting suicide.

Fetal rights, in short, have pervasive equality implications that ought to be considered in assessing the proper role of law in regulating abortion. As Colb and Dorf explain, this recognition suggests that, even where a woman’s decision to abort is immoral, the law should perhaps not intrude because only women bear the consequences of state intervention. Relatedly, it seems to me that our judgments about the rightness or wrongness of particular decisions to terminate a pregnancy need also be embedded in an awareness of this same social context. Even granting that a sentient fetus deserves moral consideration, I am skeptical that we should condemn a woman who chooses to abort. And I say this not just with regard to rape and incest, but to less sympathetic cases like those involving economic constraints, family circumstances, or even work-related considerations.

Today, women individually and collectively are resisting stigmatizing moves—in part to counter opponents’ legal strategies premised on “abortion regret,” to be sure, but also, it seems to me, to alter the social conditions under which abortion is accessed. For just one example, consider #shoutyourabortion, the social media movement aimed at breaking the silence surrounding abortion in this country. According to the woman who created the hashtag, “a shout is not a celebration or a value judgment; it’s the opposite of a whisper, of silence. Even women who support abortion rights have been silent, and told they were supposed to feel bad about having an abortion.”³ Professors Colb and Dorf have given us a wonderfully rich framework for evaluating this movement on the part of activists, outside of law, to transform the meaning of abortion.

¹ See Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 *Ind. L.J.* 667, 700-08 (2006).

² See Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 *J. HEALTH POL., POL’Y & L.* 299 (2013).

³ Tamar Lewin, *#ShoutYourAbortion Gets Angry Shouts Back*, *N.Y. TIMES* (Oct. 1, 2015).

With regard to animals, Colb and Dorf's case for recognizing not just moral, but legal rights, is a strong one: "While a woman seeking an abortion seeks to vindicate her interest in terminating a physically demanding occupation and use of her body and organ systems," a person seeking to consume animal products "seeks only to vindicate an interest in consuming the flesh and secretions of sentient beings. In other words, the interest of the pregnant woman is in terminating her own exploitation, and the interest of the consumer is in perpetrating the exploitation of another." However, having mounted a powerful argument for applying the sentience criterion to members of reasonably complex animal species, and having effectively dismantled necessity-based rationales for consuming animal products (with the possible exception of certain medicines), Colb and Dorf ultimately reject the idea that most exploitation of animals should be legally banned.

A primary reason is feasibility: upwards of 98% of the U.S. population consumes animal products. One can hardly overstate the cognitive dissonance involved in accepting that a practice that most of us have engaged in throughout our lives—and that those around us engage in without compunction—is morally wrong. In short, our reliance on animal consumption is exceedingly difficult to dislodge.

The law can advance change, to be sure, but it may be of limited utility where widespread social norms lag too far behind the desired end point. With this insight front and center, Colb and Dorf offer a provocative analysis of tactical considerations confronting the movement for animal rights: how do we get from here to there? This is a familiar dilemma: can partial measures bring about real progress, or do they simply reify existing arrangements of power? More specifically, is the "abolitionist" approach to animal use compatible with support for welfarist measures aimed at reducing suffering?

In the end, Colb and Dorf conclude that reforms aimed at animal welfare are misguided. Their reasoning beautifully captures how tactics and principles are intertwined. The problem with animal welfare laws—for instance, laws regulating cage sizes and access to fresh air for farmed animals—is that such laws "reinforce the pro-animal exploitation narrative." Measures aimed at reducing suffering, in other words, are fully consistent with a regime that tolerates massive animal death and utilization.

Must the law remain sidelined, then, while widely practiced patterns of immoral conduct rage rampant? The answer given is no—but, here again, the reach of law ought to be limited. In Colb and Dorf's view, incremental reforms *not* grounded in a pro-exploitation framework are the best way forward. We might, for example, adopt regulations that facilitate veganism (prisons and public schools could offer vegan options); we might also reduce governmental support for animal exploitation, including farm and industry subsidies. All of this seems like an eminently sensible, even wise, agenda for reform.

Still, one might seek the influence of more law. To mitigate suffering, why not create legal rights to be free of cruelty? Directly to Colb and Dorf's concern, might this movement change our very relationship to animals such that, if the

day comes that we have alleviated animal suffering—if we see animals as beings with a set of meaningful moral interests—most of us would no longer want to eat animals? After all, the promise of legal rights is that they alter relations between those who have newly been given rights and those who have long possessed them. Even so, Colb and Dorf persuasively maintain, at least for now, that the greatest push for animal rights will come from outside the law, from education and consciousness raising, and in the choices each of us make in order to live as best we can.

The book emphasizes that decision-making about animal rights, like decision-making about abortion, is imperfect, for it occurs in a damaged world. While this is undoubtedly true, Colb and Dorf inspire us to newly conceive the work of mending.