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The Case for Revising Our Laws on Animal Experimentation

David L. Markell*

Introduction

The current laws regarding experimentation upon animals should be drastically revised. These laws permit virtually unrestricted experimentation on animals without regard to the benefits to be obtained from such experimentation, and without regard to the consequences of such experimentation upon the subject animal. Legislation constituting a two-step jump from the current laws is needed: laws sanctioning and requiring animal experimentation should be repealed; and laws significantly restricting acceptable experimentation should be enacted. The principle underlying this proposal for change is straightforward: Nonhuman animals, like human animals, have interests in the integrity of their bodies which deserve legal protection. Only by repealing the present laws and enacting new legislation can these interests be protected.

In *Animal Liberation*, Peter Singer (1975) stated why an animal's interest, like a person's interest, in the integrity of its body deserves legal protection: "If a being suffers there can be no moral justification for refusing to take that suffering into consideration." However, while the law regarding experimentation on humans reflects the need to consider the subject's sentience (the capacity to suffer and/or experience enjoyment), the law regarding experimentation on animals ignores the experiment's likely impact upon the subject animal.

Animal and Human Rights

The basic premise of this paper is that the absolute distinction the law makes between animal and human rights in the context of experimentation is unjustifiable. The rationale underlying this premise is that humans and nonhumans are not absolutely distinguishable and that the law should recognize the existence of similarities and require that a subject's treatment in a specific context be governed by whether it has certain relevant characteristics. For example, in an election, competence to vote is the key characteristic on the basis of which a distinction among creatures is permitted. Only those creatures judged competent to vote are permitted to vote. Election commissioners should not be permitted to consider any other arbitrary factors, such as race, in deciding who can vote.

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Similarly, in the experimentation context, sentience is the characteristic which should control how a creature may be treated. A sentient creature has rights and interests in the integrity of its body which are deserving of legal protection, while a nonsentient entity lacks these rights and interests. Thus scientists' authority to make distinctions among various prospective subjects for their experiments should be limited: distinctions should be permitted only if they are based upon the "sentience" of the subject, sentience being the relevant characteristic in the particular context of experimentation. While a scientist should be permitted to drop a rock from a height of 50 feet without regard to the likely consequences to the rock in order to study gravity, he or she should not be able to drop *any sentient* being from such a height without first considering the impact upon the being's sentience. Factors such as the race of the sentient being, or its species, are irrelevant with regard to the question of whether it will suffer by being dropped from the height of 50 feet.

Among the justifications which have been articulated for treating non-humans in a way fundamentally different from humans are the following two arguments: First, there is the traditional view that humans possess some characteristic which makes them superior to all other animals. Second, there is the notion that might makes right. These arguments will be examined individually in the following sections.

Superiority

In the Judeo-Christian tradition, the alleged superiority of humans arose from the belief that only they had been created in God's image. For Plato it was the belief that only humans possess a soul; for Aristotle, it was the belief that only humans reason (Regan and Singer, 1976). Aquinas thought that humans were superior because they possessed soul and reason; Descartes thought human language was the key (Descartes, 1637); and Kant thought that the unique characteristic was moral autonomy (Regan and Singer, 1976).

The ethical dilemma we face today results from the fact that while our scientists and philosophers are developing a new sensitivity toward the animal world, the law has failed to adapt adequately to this changed reality. It has been observed that "...the gap between men (sic) and other animals now appears smaller than ever, although, indeed, scientists have agreed since the days of Darwin in principle that there is no essential difference biologically" (Godlovitch et al., 1972).

In *Speciesism: The Ethics of Vivisection* (1974), Richard Ryder notes that interbreeding among different primate species can occur and produce viable offspring. He asks the question: What should be done with hybrid beings or with beings between humans and other primates on the evolutionary continuum? With regard to the hybrid being, he asks: "When a professor of Genetics fathers an orangutan hybrid, what will he do with it — send it to Eton? — or perhaps just vivisect it?" As to beings that are hard to place on the evolutionary spectrum, he asks:

"How about those abominable snowmen? Well, maybe there are only 300 of them left now, living well above 20,000 feet, somewhere in the million square miles of the Himalayas, in the conditions which most simulate the Ice Ages in which they flourished — a pocket of our own scarcely evolved paleolithic ancestors still tenuously surviving. Well, they could be. Suppose they are — do we have the right to vivisect them?" (Ryder, 1974).

Vance Packard, in his recent book, *The People Shapers* (1977) suggests a few other potential scenarios for the future which similarly show the indefensibility of distinguishing along strictly speciesist lines as to rights of and duties owed to others. One hypothetical is: How would "subhumans" created for manual labor (à la *Brave New World*), for example, be treated? What about creatures who are kept going by replacement of certain of their natural organs with artificial substitutes? At what point does such a creature cease to be a person? Finally, the Artificial Insemination with Donor (AID) program may be, as Packard notes, "only the first breach of what until recently had been understood to be human parenthood as a basic form of humanity" (Packard, 1977).

As Singer notes, the *mere desire* to use sentient nonhumans as experimental subjects reflects the paradoxical nature of our present laws: "(E)ither the animal is not like us, in which case there is no reason for performing the experiment; or else the animal is like us, in which case we ought not to perform an experiment on the animal which would be considered outrageous if performed on one of us" (Singer, 1975).

In light of these similarities between species, we must reconsider the propriety of sacrificing animals at the altar of unrestrained experimentation when no such sacrifice of humans is contemplated under the law.

Experimentation and sentience

The election and experimentation examples discussed above suggest that there is a characteristic requirement in every context which provides a justifiable basis for distinguishing between beings. To take the election situation again, only beings deemed competent to vote may do so. Thus there is a 'floor', a minimum level of competence; beings below it do not enjoy the same rights as those above it. It should be noted that beings who satisfy this minimum standard have equal rights under the law; both a person who is barely competent and an expert are permitted to cast just one vote.

A floor also exists in the experimentation context. If an entity is not sentient, its unrestricted use for experimental purposes should be permitted. Once a being satisfies the sentience floor, its use should be conditioned upon consideration of its sentient nature. The prospective subject's other characteristics, such as intelligence, race, or species, should not be considered. As Thomas Jefferson has argued, "(W)hatever (a person's) degree of talent, it is no measure of (his) rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore Lord of the property or person of others" (Singer, 1975). As this statement indicates, "a-value-to-society-of-the-being-experimented-upon" test is not applied in an intraspecies (human) context; thus no logically defensible reason exists for making such a distinction in an interspecies context.

In practical terms, such an approach does not necessarily mean that no use which adversely affects a being may be made of that being. It does mean that the same decision-making framework should be applied to all sentient beings as a precondition to "using" them in instances in which such use will affect their sentience. Thus, if a researcher's opportunity to experiment upon humans is constrained under the law by the need to perform a risk/benefit analysis in which the benefit to the individual must greatly outweigh the risk, then a similar risk/benefit analysis is also proper for judging the propriety of experimenting upon nonhumans.

I have thus far attempted to discredit the traditional, widely accepted notion that capricious, "inhumane" treatment of animals is permissible by arguing that: 1) scientific advances establish that the human species is not unique; and 2) therefore, there is no justification for treating the human and nonhuman species in a completely distinct manner. Instead the treatment in each situation should depend on the critical characteristics for that situation and the degree to which a particular creature possesses those characteristics.

Superiority and obligations

The notion that humans are inherently superior creatures and thus are justified in treating animals capriciously may be discredited on other grounds as well. Acknowledging that humans do possess certain abilities lacked by animals, at least two arguments exist to support the concept that superior ability does not necessarily equal superior rights. First, there are certain human/human contexts in which superior individuals are deemed to have greater responsibilities, not greater rights. The special steps we take to secure the interests of the physically and mentally infirm reflect our sense that sentient creatures which are unable to provide for themselves have a right to others' special care and support (42 U.S.C. §§1201-1206(1976)). Children receive similar special treatment (42 U.S.C. §§601-626(1976)). The question is, as Ryder noted, why should we not also recognize "our special duties towards individuals from less clever species?" (Ryder, 1974). In fact, society's concern extends beyond the interest of the helpless and infirm; it extends to all people. The creation of the Occupational Safety and Health Act (OSHA) (29 U.S.C. §§651-678(1976)) is evidence of the evolution of the notion that society has a responsibility to everyone. The law's concern for human integrity is perhaps reflected best in its approach to suicides. Paul Freund has noted: "The law is highly solicitous of physical integrity.... Even self-willed injury, if destructive enough, is made illegal, like attempted suicide" (Freund, 1969).

The second example in the human/human context of the rejection of the notion that superior individuals have greater rights is embodied in a statement by Peter Singer: "(T)he principle of the equality of human beings is not a description of an alleged actual equality among humans." Singer concluded: "If possessing a higher degree of intelligence does not entitle one human to use another for his own ends, how can it entitle humans to exploit nonhumans for the same purposes?" (Singer, 1975).

Might

Having established that humans are not totally disparate from other species, and that they do not necessarily possess greater rights even to the extent that they are superior to other beings, I will now deal with the notion that human might makes right, that, as Hitler noted: "Whoever has pondered over this world order knows that its meaning lies in the success of the best by means of force" (Shirer, 1960).

During World War II, the Nazis exploited many prisoners in the name of science. They considered members of other ethnic groups to be powerless subhumans, ready for sacrifice at the whim of the all-powerful Nazis. As Himmler noted: "Whether nations live in prosperity or starve to death like cattle interests me only in so far as we need them as slaves to our *Kultur*; otherwise it is of no interest to me" (Shirer, 1960).

The notion that might is right, that the strong have an unlimited right to abuse the weak, is in disfavor today. I have already mentioned many of the steps taken in recent years, through our system of laws, to secure the interests of the disadvantaged. This evolution of consciousness regarding the propriety of domination of the weak and defenseless by those in power has affected the nation's view on experimentation. Today, the trend is toward an emphasis on the interests of even the most defenseless individual in the integrity of his or her body and lifestyle. Judith Swazey's article, *Protecting the "Animal of Necessity": Limits to Inquiry in Clinical Investigation*, (1978) recognized the existence of this trend. Swazey quotes a statement made in 1969, "(T)here is today in this country an enormous dynamic of human experimentation to which... the general public is heavily committed," and then notes:

How striking is the contrast between this statement and that written in 1977 by the editors in Ethics in Medicine: 'From the idea of an ethical call to do clinical research, we have moved in less than a decade to medical research viewed in the public eye as a suspect activity.'

The evolution of society's views regarding human rights generally, and in the experimentation context specifically, should be extended to nonhumans. As Peter Singer has noted: "Our sphere of moral concern is far wider than that of the Nazis; but so long as there are sentient beings outside it, it is not wide enough" (Singer, 1975).

In sum, therefore, I do not believe that either notion—inherent human superiority and concomitantly superior rights for humans, or might makes right—justifies the disparate treatment of other species. Instead, I believe that the current willingness to give less consideration to the interests of members of other species than to the interests of members of our own species is indefensible. Richard Ryder has termed this attitude "speciesism", and Peter Singer has noted that a speciesistic bias... "is no more defensible than racism or any other form of arbitrary discrimination" (Singer, 1975).

Legislative Action

The first argument in support of a call to action to achieve the revision of the nonhuman experimentation laws focused upon the nature of nonhumans, specifically upon their similarity to humans. The second argument for the revision of our animal experimentation laws takes a different tack. In *Ethical Aspects of Experimentation with Human Subjects*, Freund (1969) concludes that experiments involve four interests: 1) the subject's; 2) the investigator's; 3) the scientific team with which the investigator is often associated; and 4) the larger society that sanctions such experiments. The first interest, that of the subject, has already

been covered. The argument that experimentation upon animals should be stopped, or at least significantly restricted, is also supported by the effect such experiments have upon the larger society that sanctions such experiments and, on a more personal level, upon the individual experimenters. This notion may be characterized by a syllogism: Humans should strive to reach an ideal state of compassion and tolerance. Acts of kindness and sensitivity toward others gently nudge the actor towards this desired end, while acts of inconsideration and insensitivity lower the consciousness of the actor and cause him or her to fall toward a state of unenlightenment. Thus acts of inconsideration and insensitivity should not be sanctioned and should be discouraged under the law, while acts of kindness and compassion should be encouraged.

R.D. Laing has recognized that acts of insensitivity toward animals brutalize the actor, thus retarding development as an enlightened human: "It is quite clear that in abusing animals we abuse our relationship with animals, and that we abuse ourselves. We become less human to the extent that we treat any living beings as things" (Godlovitch et al, 1972). The same point, in the context of human/human relationships, was made by Jonas (1969): "Society cannot 'afford' the violation of the rights of even the tiniest minority, because these undermine the moral basis on which society's existence rests. Nor can it, for a similar reason, afford the absence or atrophy in its midst of compassion." We are dynamic individuals, living in a dynamic society and no human being remains the same from one day to the next. As a result, an effective and progressive system of laws must be concerned with the impact it will have upon the development of those subject to its jurisdiction. In this context, the law's legitimization of our treatment of other living beings as things constitutes the perpetuation of a system of attitudes and policies that undermines notions of compassion and will ultimately deaden us to the cries of all lives in need.

Given that human insensitivity to the rights of nonhumans in the integrity of their bodies harms both nonhumans and the human actor, how should the issue concerning the proper bounds of experimentation upon animals be resolved? Since prospective nonhuman and human subjects have similar concerns, reference to the law regarding human experimentation may be helpful in deciding under what circumstances experiments upon animals should be permitted.

Human research and its regulation

Pursuant to 5 U.S.C. §301 (1976) the Secretary of the Department of Health and Human Services (HHS) has promulgated regulations establishing the procedures to be followed before HHS funds will be provided for experimentation upon human subjects. The first HHS requirement is that an institution seeking to conduct an experiment involving human subjects create an "Institutional Review Board" to review and approve such experiments. The substance of the review is set forth in 45 CFR §46.102(b) (1977):

(b) This review shall determine whether these subjects will be placed at risk, and, if risk is involved, whether:

- 1) The risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant a decision to allow the subject to accept these risks;

- 2) The rights and welfare of any such subjects will be adequately protected; and
- 3) Legally effective informed consent will be obtained by adequate and appropriate methods in accordance with the provisions of this part.

Guidelines for the composition of the Board are enunciated in 45 CFR §46.106(b) (1977). The Guidelines are designed to insure that Board members are impartial and have sufficiently diverse backgrounds to enable the Board to ascertain "the acceptability of applications and proposals in terms of institutional commitments and regulation, applicable law, standards of professional conduct and practice, and community attitudes".

If the Board approves an application for an experiment, it is submitted to the Secretary of HHS with the Board's certification of approval. The two main components of the application are: 1) a description of the risks to subjects that the Board recognizes as inherent in the activity, and justification of the Board's decision that "these risks are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant the Board's decision to permit the subject to accept these risks" (45 CFR § 46.107 (1977)); and 2) documentation of the subject's informed consent to the experimentation.

These procedures obviously constitute a significant constraint upon an experimenter's ability to use human subjects. Not only must the subject consent, but both an independent Board and the Secretary of HHS must find that any risks to the subject are significantly outweighed by the benefits to be derived.

Animal research and its regulation

The laws regarding experimentation upon animals are dramatically different (7 U.S.C. §§2131-2155 (1976)). At present, experimentation on animals proceeds apace, with virtually no consideration given to the impact of such experimentation upon the subject animals. For example, manufacturers in the U.S. commonly test their prospective drug products on animals before marketing them. The Food and Drug Administration (FDA), the government agency responsible for administering the drug laws, is aware of and permits this practice. Because the FDA does not provide for inquiry into a drug's value as a condition to approval (See 21 U.S.C. §355 (1976)), considerable suffering to subject animals can result with no guarantee that any benefit will thereby accrue. It is doubtful that such a scheme would pass muster under the federal regulations regarding human experimentation even if the subject's informed consent were obtained. The question is: Why should such experiments be permitted simply because nonhumans are used as subjects?

The dramatic difference between the treatment of animal and human experimental subjects exists because animal welfare laws in this country ignore animal interests. Under these laws, an experiment using an animal subject may be performed without regard to the likely impact upon the animal. The government has no power to prohibit experiments on the grounds that the benefits therefrom will not outweigh the costs or risks to the animal. This fact is made apparent by §2143 of the Animal Welfare Act Amendments of 1976 (7 U.S.C. §§2131-2155 (1976)), which states "Nothing in this Act shall be construed as authorizing the

Secretary of Agriculture to promulgate rules, regulations, or orders with regard to design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility."

The clear priority given the experiment over the subject animal is brought into focus by the regulations promulgated under the Act regarding the need to provide the animal with veterinary care. This provision clearly subordinates the concern over the animal's suffering to the successful conclusion of the experiment: "Sick or diseased animals shall be provided with veterinary care... *unless such action is inconsistent with the research purposes for which such animal was obtained and is being held*" (9 CFR §3.10(b) (1976)). In direct contrast to a human's status under federal regulations, an animal under the law is completely under the control of, and its interests are completely subordinated to the interests of the experimenters.

Conclusion

It has been demonstrated that, just as in the election context the only distinction among beings that is justifiable is a distinction based upon competence to vote, so in the experimentation context, the only distinction among beings that is justifiable is based upon whether the being is a sentient creature. In either case, once the floor of minimum capacity is satisfied, all those above the floor are entitled to equal consideration. Thus, the present policy, embodied in the law, of permitting essentially uninhibited experimentation on animals should be revised to include the type of risk/benefit analysis contained in HHS regulations on human experimentation.

Before animals may be experimented upon, an independent decision maker, such as the Institutional Review Board which operates in the human experimentation context, should be delegated the responsibility of determining, as a condition precedent to the initiation of an experiment, that the benefits to be gained therefrom significantly outweigh the risk to the subject. [As Bronowski (1976) noted: "It is both arrogant and illogical to condemn millions of animals to suffer on the chance that, for example, some profit-motivated commercial organization may produce a new nontoxic cosmetic."] While the question of informed consent is obviously different for humans and nonhumans, an "Advocates Position" could be established to represent the animals interests, in which case the federal regulatory framework could be transferred wholesale to the animal context. Alternatively, the informed consent issue could be dropped entirely for animals. A guardianship system could track the system currently in place for incompetent, minor, and orphaned human beings, with owners serving as private guardians and animal welfare organizations or other groups serving as public guardians of sentient beings who lack private guardians. Before ultimately adopting a guardianship system, however, under which an individual could consent to an animal's being subjected to potential harm and even death, the positions which have been taken regarding the propriety of one person authorizing action likely to lead to the harm and perhaps the death of another, which have been raised before the courts in recent years and have generated considerable debate, should be considered. See e.g., *William H. Severns vs. The Wilmington Medical Center, Incorporated, et al.*, _____ A. 2^d. _____ (Del. Supr., 1980).

If a risk/benefit approach is adopted in the animal experimentation context, significant change is likely in the use of animals as subjects. The risk/benefit analysis should, at minimum, ascertain whether the knowledge to be derived is important, whether the experiment is likely to provide such knowledge, and the degree of risk to the subject. In addition, it should evaluate the necessity that the experiment be performed on a sentient creature — an experiment should be performed on a sentient being only if substantially similar results could not be obtained through experimentation upon a nonsentient entity — and it should assess the necessity of inflicting pain or distress on the subject animal. Affording humans a greater degree of protection is no more defensible than racism or any other form of arbitrary discrimination. The direction the law should take consistent with this view is obvious: "Since a 'speciesist' bias, like a racist bias, is unjustifiable, an experiment cannot be justified unless the experiment is so important that the use of a human being would also be justifiable" (Singer, 1975).

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