

ARE WOMEN PERSONS?

By
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In two important books, *Rain Without Thunder: The Ideology of the Animal Rights Movement*¹ and *Animals, Property and the Law*,² Gary Francione eloquently argues that we can only make coherent sense of the duty that human beings owe to animals if we grant animals rights. The distinctions that Francione develops in both of his works have dovetailed with my own search for a conception of right for feminist theory. To defend the idea of right, if one is a leftist, is already a controversial proposition. Rights theory has been controversial because it purportedly has been abstract and therefore masculine. Abstract masculine theory, arguably, is unable to adequately grapple with the suffering that women, children and animals actually endure. We cannot do without this theory of rights, however, and both Francione and I defend a conception of right in order to make coherent any duty of care we demand from the state. The duty that Francione demands is the protection of animals from outright slaughter. Feminists also seek to impose duties of care on the state, such as protection of women and children from sexual abuse and other forms of violence in the family.

Rather than developing a conception of right, as some feminists within the school of feminist jurisprudence support, I suggest that we should try to develop concrete legislation which takes into account the actual experience of women. In *Imaginary Domain*,³ I argue that what the effect of this legislation would be is to make every litigation a series of judgments about the woman's right to the duty of protection that she is demanding. Taking sexual harassment as an example, if we argue that some degree of individual perspective must be incorporated into what constitutes sexual harassment, and that perspective should be the woman's, then we also must develop a way to measure when a woman's perspective should be taken into account. That is what the "reasonable woman" standard purported to achieve. The problem then became how to defend any individual woman as "reasonable." If "reasonable" is simply the legal standard, then one turns to the community of actual people to

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¹ GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* (1996).

² GARY FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995).

³ DRUCILLA CORNELL, *IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY, AND SEXUAL HARASSMENT* (1995).

see what that community considers reasonable. In case after case we saw women trotted onto the witness stand to testify that they did not experience X's behavior as sexual harassment. This type of evidence was legitimated because if the particular woman involved could not be thought of as reasonable or in sync with the community of other women, then her claim that the state owed a duty of protection from this kind of harassment faltered.

My argument against any attempt to subjectify legal standards can be summarized as follows: we must develop a concept of a person's deontological core and this core must be protected. The deontological core of a person mandates the duty of care correlated with the right. I call this deontological core "minimum conditions of individuation." These minimum conditions of individuation can only arise within the sanctuary of what I have named the "imaginary domain." The "imaginary domain" is the space in which we enter as free and equal persons, the scope of our rights are then determined by the prevailing moral methodology.

In Francione's language, any legitimate interpretation of what it means for women to be included as persons in the moral community demands the protection of this deontological core. I owe to Francione, the distinction between inclusion in the moral community and the scope of any resulting rights. My concept of a deontological core of a person implicitly relies on such a distinction. If we view many of the controversial issues in feminism as issues involving whether or not women are persons, we can then understand that those issues must be resolved in favor of the right for women. If women are persons and have the right, for example, to bodily integrity—and I define bodily integrity as one of the minimum conditions of individuation—then there is no question that there is a right to abortion. There is no other interest in bodily integrity that can be weighed against that interest which is not basic to the deontological core of personhood. Personhood trumps all other interests. The only argument that could effectively defend the position that women do not have the right to abortion, once it is understood as basic to personhood, would be one that excluded women from the moral community of persons.

Francione's work has been so important to me as a feminist because it demonstrates the danger that exists if we allow a moral methodology to effect the scope of rights without first deliberating on the meaning of what inclusion in the moral community means. If women are entered into the calculation already marked as unequal, the scales inevitably tilt in favor of men. The question of whether women could be covered by a deontological theory is one that has troubled analytic liberal jurisprudence.⁴ The analytical difficulty is that if one treats women as if they were ontologically dissimilar to men, and appeals to facts of nature in order to bolster that view of women, then women can only be entered into the calculation already defined as unequal. If they are already so defined, any utilitarian calculus or consequentialist reasoning would yield the result that the at-

⁴ Thomas Nagel, *Nature and Justice*, OXFORD J. LEGAL STUD. (forthcoming Summer 1997).

tempt to bring women up to men is either impossible, too expensive, threatening to our freedom, or all three. Thus, we must have a new starting point in which the requirements of Kantian conceptions of proceduralist justice are met. The space required for equal personhood is the imaginary domain.

Francione correctly argues that those who advocate rights for animals should not be rebuffed with charges of utopianism. He deploys his own distinction between issues of inclusion and scope to effectively challenge the charge of utopianism. Even if animals are initially included in the moral community of persons, it would not follow that they would require an identical scope of rights as human beings. Thus, animal rights theory does not mean that we would give animals the right to vote or run for president.

Conflation of issues of inclusion and scope have also made it extremely difficult for legal theory to conceptualize the rights of children. Normally, children are simply viewed outside the moral community of persons. Therefore, determining the duties owed to children is then fraught with incoherence, as one can find no solid justification for why children are owed the duty in the first place. Conversley, if we included children in the moral community of persons initially, the question of the scope of rights and how these rights would differ from adults would be one that we would develop with the recognition of children as persons. In this way, children would have a coherent claim for the rights appropriate to their age and maturity against adults who have used them or mistreated them in any serious way. If we were to truly include women, animals, and children in the moral community of persons as an initial matter, we would enormously shake the foundations of our world. This simply indicates how dependent our current world is on excluding certain beings from the moral community.

The argument that a theory of rights shakes the foundations of our world cannot stand unless the theory of right itself makes an illegitimate claim upon the state. If, in fact, a politically liberal state's only legitimacy stems from the recognition of basic rights to persons, what is at stake, certainly for adult women, is then whether they can continue to participate in societies in which they are treated as anything less than full persons. The demand that the moral community expand the class of those included initially as persons, is utopian only to the extent that it conflicts with basic patriarchal institutions. As Jacques Derrida has argued, it is the logic of carno-phallogocentrism, where the sacrifice of interests of others helps to prop up the very idea of the phallic man, that limits who is then qualified as people. This propping up of the phallic man, however, can hardly be a legitimate state project in a politically liberal society. Francione's work is courageous because it demands that political liberalism come to terms with the truth of its own claim, namely that the basis of any coherent claim for state duty is the right to be recognized as a person.

The theory of right that I advocate demands that this imaginary domain be understood as prior to all of the proceduralist theories of justice

that have been developed in recent political philosophy. It is prior because without it, we are entered into the scales of justice as unequal, and so we remain.

The fear of totalitarian governments, so eloquently evidenced in George Orwell's *1984*,⁵ helps us think about the imaginary domain as a sanctuary in which each one of us is given an equal chance to become a person. In Orwell's work, the ultimate totalitarian move is to turn internal fantasies, the worst nightmare of the individual, into a reality. In my terms, such an intrusion would be a complete eclipse of the imaginary domain in which each one of us struggles to become an individuated being. I use "individuated" because in my theory of political and legal reform, I offer that individuality and the person are not assumed as a given, but rather respected as part of a project and one that must be made to each one of us on an equivalent basis. I am also using the word "person" in a particular way. *Personae* in latin means "a shining through." A person is what shines through a mask even though the concept of the mask is usually associated with the word "personae." For a person to be able to shine through, she must be able to imagine herself as whole, even if she can never truly succeed in becoming whole or conceptually differentiating between the mask and the real self. The equal worth of our person must be legally guaranteed, in part, at least in the name of the equivalent chance to take on a person. Precisely because the person is never assumed as a given, the protection of our personhood demands minimum conditions of individuation that are best understood as arising in the sanctuary of the imaginary domain. The minimum conditions of individuation are bodily integrity, access to symbolic forms sufficient to achieve linguistic skills, and permitting the differentiation of one's self from others. The claim to parity of women or any other form of what I call "sexuate beings" appeals to the imaginary domain and the minimum conditions of individuation as basic to the deontological core of personhood. It is not a theory of equality that turns us to comparisons with actual men.

I use the phrase "sexuate being" to distinguish between both gender and sex. As Judith Butler has eloquently argued in *Bodies That Matter*,⁶ the idea that gender is the social construction of sexual difference, and sex refers to the biological underpinnings of that difference, is inadequate to understand the complexities through which any of us are sexed or gendered. I use "sexuate being" to indicate that all of us, one way or another, no matter how we do it, must orient ourselves to our sexuality. Both gender and sex become loaded with a whole set of meanings which make it difficult to deploy on the level of abstraction that I argue must be maintained in an equivalent law of persons. The abstraction, in a sense, is necessary for what we would usually think of as the sexual freedom to work through sexual personae in our own way. This process of working through personae must be given over to the person to take on and struggle with in his or her own way. Abstraction, in the sense of appealing to a

⁵ GEORGE ORWELL, *1984* (1949).

⁶ JUDITH P. BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* (1993).

deontological core, is crucial for our freedom. It is the sanctuary of the imaginary domain that allows us the space in which we struggle through personae in order to fashion a life for ourselves.

The alliance between Francione and myself is that without rights, care for animals and women cannot be other than paternalism. If history has taught us anything, it is that relying on those who do not regard us as rights holders is deadly in the most literal sense of the word.

