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LIVING ON THE EDGE: THE MARGINS OF LEGAL PERSONHOOD

SYMPOSIUM FOREWORD

Kimberly Kessler Ferzan*

In January 2008, at the Association of American Law Schools’ annual meeting, the Jurisprudence Section conducted a panel on “The Margins of Legal Personhood.” The goal of this panel was to draw (or sever) connections between and among different “marginal” entities: the psychopath, the animal, and the embryo or fetus. As is perhaps immediately apparent, these entities are not marginalized in a political sense, but rather lie at the margins of our moral and legal communities. Prima facie, they may have some, but lack all of the capacities necessary for full membership. Because they live on the edge, we must question whether they may be held

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responsible and whether they have rights. And, throughout our analysis, we should remain consistent—the test for one entity should apply to another, absent some principled distinction between them.

In the articles that follow, Professors Taimie Bryant, Margaret Little, and Paul Litton take seriously these concerns with regard to animals, abortion, and psychopathy, respectively. This brief Foreword serves both to introduce the ideas presented in their articles and to attempt to draw connections between them.

I. PSYCHOPATHS

In his contribution to this Symposium, Professor Paul Litton resolves a puzzle that has long perplexed moral and criminal law theorists: Is it fair to hold a psychopath morally and legally responsible if he simply does not “get” morality? Litton reveals that our assumptions about psychopathy have been too thin, as, according to Litton, rational self-governance requires affective capacities. In other words, there is no conceptual space for the rational self-governing psychopath.

Despite popular misconceptions, all criminals are not psychopaths (although some psychopaths are criminals). Rather, under the traditional understanding, the psychopath is an individual who fails to understand moral norms because he lacks the capacity to form emotional attachments to others. Viewed this way, one might imagine the psychopath to be akin to Data from Star Trek. Data, an android, does not form any emotional attachments. He can only act logically and rationally. Applied to the psychopath, all criminal laws appear to the psychopath as *malum prohibitum* laws appear to us – the only reason we have to follow these laws is because

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3. *See id.* Part IV.

4. *See, e.g.,* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1564 (1992) (arguing from the psychopath’s perspective that he or she “lack[s] the ability to either feel concern for the interests of others or appreciate why their interests merit [his or her] respect”); Jeffrie G. Murphy, *Moral Death: A Kantian Essay on Psychopathy*, 82 ETHICS 284, 286-87 (1972) (“They do not care about others or their duties to them, have no concern for others’ rights and feelings, do not accept responsibility, and do not know what it is like to defer one’s own gratifications out of respect for the dignity of another human being. Quite significantly, they feel no guilt, regret, shame, or remorse (though they may superficially fake these feelings) when they have engaged in harmful conduct.”).
we will otherwise be punished. The laws do not forbid anything morally wrong in and of themselves.

In his contribution, Litton questions the empirical picture of the psychopath and, in so doing, questions our conceptual picture of rational self-governance. Litton argues that a requirement for rational self-governance is the capacity to reflect on, to evaluate, and to further one’s ends.5 This requires an ability to give and assess the value of one’s ends.6 Because psychopaths cannot assign value and act in accordance with the weight of these values, the psychopath is not simply morally blind – he is irrational.7

Litton’s claim that psychopathy raises rationality concerns may not be such good news for the psychopath. Deep irrationality may take the psychopath out of the holding-responsible frying pan and into the rights-denying fire. If psychopaths (an admittedly degreed category; these generalities may be true of only the extreme cases) are dangerous and irrational human beings, what may we do to them to prevent them from harming us? That is, once we push the psychopath out of our moral community, he may not only lack the status of being held responsible but he may also face the consequence of having fewer rights.8

At a recent conference I attended, when this question arose, one theorist answered by comparing the psychopath to a tiger and arguing that we should treat the psychopath just as we would treat a tiger – we should put him in a

5. See Litton, supra note 2, at 366-68.
6. Id.
7. See id. Part IV.
8. As Stephen Morse points out:

For people who are dangerous because they are disordered or because they are too young to “know better,” the usual presumption in favor of maximum liberty yields. Because the agent is not rational or not fully rational, the person’s choice about how to live demands less respect, and he or she is not morally responsible for his or her dangerousness. The person can therefore be treated more “objectively,” like the rest of the world’s dangerous but nonresponsible instrumentalities, ranging from hurricanes to microbes to wild beasts. In brief, agents incapable of rationality do not actually have to cause harm to justify nonpunitive intervention. We can take preemptive precautions, including broad preventive detention, with nonresponsible agents based on an estimate of the risk they present.

Stephen J. Morse, Neither Desert Nor Disease, 5 Legal Theory 265, 269-70 (1999); see also Murphy, supra note 4, at 291 (“[P]ractices of punishment and responsibility are compatible with a recognition of human dignity in that they place a premium upon the status of persons as choosing beings. One alternative to this is therapy. One here gets not what one deserves but, rather, what one (in some paternalistic sense) needs – perhaps a total restructuring of one’s personality.”).
cage. I demur. Does anyone doubt that we would unapologetically shoot an animal that was as dangerous as some psychopaths?

I will return to questions about how we should treat the psychopath. For now, though, let us note that the psychopath occupies a particular status simply by being a human being. He enjoys a particular presumptive status – not by polite extension – but because he is presumptively like us.

II. ANIMALS

In contrast to the presumptive privileges that the psychopath enjoys, nonhuman animals certainly appear to live outside of our moral community. In her contribution to this Symposium, Professor Taimie Bryant discusses a range of heart-breaking examples of how humans mistreat animals.9 No animal seems immune from our cruelty – even animals much like us have been subjected to extraordinarily inhumane treatment.

There are two important themes within Bryant’s contribution. The first theme is a repudiation of the need to compare animals to humans to make claims about the rights of animals. Bryant believes this approach is misguided for a number of reasons. For one thing, it may require humans to subjugate some animals for the benefit of others. As she argues elsewhere, under this approach, the increased status of the sea lion leads to increased mistreatment of the fish they need to eat.10 Secondly, she rejects some tests for moral standing, such as the capacity to suffer, because an animal’s capacity to suffer only gives animals a claim against painful killings, not killings writ large.11 Indeed, Bryant seems to reject that there is any sort of critical question for standing within the moral community. At one point, she

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10. Id. Part I.A.1; see also Taimie L. Bryant, Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?, 70 Law & Contemp. Probs. 207 (2007):

[H]ierarchical ordering of animals based on their similarity to humans would increase harm to dissimilar animals by facilitating exploitation of dissimilar animals for the benefit of animals deemed to be like humans. . . . If, for example, sea lions were found to be sufficiently similar to humans that justice required their receiving entitlements, their representatives surely would try to safeguard the health of sea lions by securing for them all the fish they need, which would most likely mean increasing the production of fish by intensive fish-farming.

Id. at 217-18 (footnote omitted).
11. Bryant, supra note 9, Parts I.A.1, I.B.
describes the ecosystem surrounding the thorny African acacia tree and the interdependence of the trees, ants, giraffes, and elephants. She argues that we must protect the entirety of this ecosystem, not just the endearing ones with the long necks or floppy ears. Most importantly, the question – how are animals like us and therefore deserving of rights – presupposes that human beings belong at the center of the moral universe, and it is this status as central figure that Bryant denies.

Bryant’s second theme draws on the property status of animals. She believes that Professor Gary Francione has it exactly right – no progress can be made for animals so long as animals belong to humans. She thus advocates incremental undermining of this property status, focusing specifically on two examples in which we have implicitly denied that animals are property and can therefore be sacrificed even when supposedly this killing is in the animals’ best interest.

III. EMBRYOS AND FETUSES

Property and possession take a rather different form in the debate over abortion. Here, “the woman’s body” as her property and basis for autonomy is used to justify the termination of a zygote, embryo, or fetus’s life. Professor Margaret Little, however, does not focus on the strength of the “property” claim, but rather, the claim on the other side of the moral equation.

Little’s contribution discusses our understanding of the zygote, embryo, and fetus. Eschewing the polarized positions that this life has no intrinsic status or that it is inviolable, Little argues that we should understand that the fetus’ coming into a particular moral status is gradual. A fetus both has a moral value as being something that could ultimately be like us, and it partly has moral status because of what it has already achieved.

12. *Id.* at 266-67.
13. *Id.* at 267.
14. See generally *id.* Part I.
15. See *id* Part I.E.
16. See *id* Part II.
18. *Id*.
19. *Id.* at 334.
20. *Id.* at 341.
fertilized egg becomes a newborn infant, the potential moral claims give way to actualized ones. But both claims exist side by side. In offering this theory, Little tries to make sense of what are likely some widely shared intuitions. The first is that it is simply not as wrong (if wrong at all) to terminate a pregnancy within the first three weeks as it is to kill one’s newborn infant. The second is that even the early termination of a pregnancy seems to involve some loss. As Little notes, to see a zygote, embryo, or fetus as lacking intrinsic status worthy of our regard is to see mourning a miscarriage as a category mistake. And yet, we see loving the entity and mourning its loss as a perfectly intelligible thing to do.

Because of her gradualist perspective, to Little, there are no clear lines about abortion. The woman must weigh the interests of the fetus against her own, and as Little reminds us, the requirements that pregnancy places on a woman are significant. These intimate duties to share one’s body are duties that can be satisfied by the mother alone. Moreover, as Little has elsewhere noted, to carry a child to term is not just a biological event, but rather an event that requires one to conceive oneself as a mother, thus profoundly changing the mother’s own practical identity. For these reasons, Little believes that there can be fully honorable reasons to terminate a pregnancy. But the point is that the reasons have to be good because the embryo has some intrinsic moral status. That is, it is viewing aborting one’s fetus as akin to killing a cockroach that is the category mistake.

As the intrinsic status of the fetus increases, and again, as the fetus has opportunities for life outside its mother’s womb, actions that result in the death of the fetus require much stronger reasons. The point, however, is that the morality of abortion will always turn on a complex weighing of the zygote/embryo/fetus’ interests against the mother’s, and the larger the moral claim of the former, the better the latter’s reasons must be.

For these reasons, Little argues that law is insufficiently nuanced to be able to encounter this constant balancing. Interestingly, her view comes

21. Id.
22. Id.
23. Id. at 333.
24. Id. at 344-46.
25. Id. at 346.
26. Id. at 348.
28. Little, supra note 17, at 346.
29. Id. at 346-48.
30. Id. at 349-50.
quite close to that in *Roe v. Wade*.\(^{31}\) *Roe’s* viability distinction is a blunt instrument but it presumptively recognizes where the weight of reasons must be: by the point of viability, the fetus is worthy of *our* concern, and the reasons to end its life must be extraordinary indeed.\(^{32}\)

IV. FROM EMBRYOS TO ANIMALS

Debates about abortion often invoke comparisons between embryos or fetuses and animals. For her part, Little uses both cats and five-year-old children in contradistinction to embryos.\(^{33}\) Although I think there are parts of Little’s article that Bryant is likely to reject, I believe that Little’s insight can and should affect how we perceive animal rights.

There are some facets of Little’s argument that are not amenable to easy translation. Recall first that she believes that embryos and fetuses have status because they are “on their way to becoming one of us.”\(^{34}\) In this respect, the embryo or fetus is pulled within the moral community because it would soon, if gestated, be part of our human being core. Part of its tug, and its claim, come from its future status. The transformation from “organismic good” to “self” to “agent” is not a full transformation for the animal.\(^{35}\) The majority of nonhuman animals are thus foreclosed from this highest achievement.

Of course, this varies from animal to animal. Some animals have substantial cognitive faculties, while others only have the pull of sentience, and thus, animals align along the same continuum that the zygote, embryo, and fetus do, having less or moral intrinsic worth.

\(^{31}\) 410 U.S. 113 (1973). “[T]he State does have an important and legitimate interest . . . in protecting the potentiality of human life. [This interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, [this interest] becomes ‘compelling.’” *Id* at 162-63.

\(^{32}\) *Id*. at 163-64: With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

*Id.*

\(^{33}\) See, e.g., Little, *supra* note 17, at 336, 338.

\(^{34}\) *Id*. at 341.

\(^{35}\) *Id*. at 343-44.
There is no doubt that Bryant will reject these assignments of value. Bryant’s concern, I believe, is grounded in the belief that any confrontation between nonhuman and human will end badly for the animal. But here, I hope, we can gain some insight from Little. After all, if the debate over abortion tells us anything, it is that we must resolve the question of what to do when rights and interests conflict.

In my view, Bryant cannot avoid the question of where the boundary lies (or at least the assignment of some comparative values), even if she seeks to deny that the human agent lies at the center. The reason, I think, is this: To take Bryant’s ecosystem example, it is certainly true that many different parts of nature are part and parcel of each other, and that any disruption may be problematic. But such a theory yields not just that animals are inviolable but also that plants are inviolable, and maybe even that some parts of the earth may be inviolable. But in this case, what is a hungry human to do? That is, if a human seems to do wrong on any account, then there is no reason to eat tofu instead of turkey. That is, Bryant must give us a line (or some other criterion for decision making), because if nothing goes than anything does. There is nowhere for a skeptic to stand, and no grounding for a moral claim.

On the other hand, Bryant’s cry for some humility on our part can and should be heard. The recent (overdue) acknowledgement of global warming, and the trend to fuel efficiency, hybrid cars, and the like means that humans are finally beginning to view themselves as part of their environment instead of the conquerors of it. One can only hope that we find some harmony with animals as well. Bryant’s claim, ultimately, is both about intrinsic value for all life and about the instrumental value that some lives play in promoting others’.

We must recognize that granting intrinsic moral status to animals must mean something, and even when such status varies depending upon sentience and rational capacity, it must still be given weight. In other words, the view implicit in comparing killing some type of being to killing a cockroach is that

36. As Bryant has argued elsewhere:

Most animals’ advocates respond by defining “animals” as sentient in ways that distinguish them from bacteria and make it easy to wash our hands but difficult to eat chickens. In other words, they would engage in the same line-drawing exercise as animal exploiters, only drawing the line at a different point, one that would include some animals as protected individuals. This is inadequate.

Taimie L. Bryant, Animals Unmodified: Defining Animals/Defining Human Obligations to Animals, 2006 U. CHI. LEGAL F. 137, 165; see also id. at 168-70 (discussing coral).
the cockroach has no value, but this may be a mistake. Even a cockroach may be entitled to some respect.\(^{37}\)

V. FROM ANIMALS TO PSYCHOPATHS

Of course, there can be little doubt that when an animal proves itself dangerous to humans, humans will prefer their own lives. In the case of the rabid dog, humans have to confront the danger that the animal poses. Moreover, because a rabid dog is both dangerous and lacking of any rationality, captivity is the most a rabid dog can hope for.

This brings us back to the psychopath. Though the psychopath was thought to present a profound problem for conceptions of moral responsibility, it appears as though the true problem is one for the criminal law. Although minor defects in rationality may (or at least should) suffice for mitigation in punishment,\(^ {38}\) profound defects in rationality may leave the psychopath utterly outside the moral community, yielding the result that they should be exempt from the criminal law.\(^ {39}\) Having failed to achieve the potential status of agent, the psychopath looks very much like an animal, and some like dangerous animals at that.

Taking the psychopathy challenge seriously, then, requires us to ask what we should do with them if we are not and cannot punish them. Litton raises some questions for the criminal law, asking whether, because we cannot wrong the psychopath by punishing him, we should just continue to act as we do. According to Litton, we cannot fix them; we can only detain them.\(^ {40}\) So why expend resources litigating these claims and create a schism in criminal law when we will reach much the same result (detention) as we do with criminal punishment?\(^ {41}\) Years ago, Professor Jeffrie Murphy listed the practical implications of preventatively detaining (or exterminating!) the psychopath, including the possibility of false positives, the possibility of corruption and abuse, and the allowance for self-deception about societal responsibilities.\(^ {42}\) If we learn nothing else from Bryant, it is that we must tread wisely here. Exclusion from the moral and legal community can be

\(^{37}\) See Bryant, supra note 9, at 267 n.102 (discussing the intrinsic value of an ant).


\(^{40}\) Litton, supra note 2, at Part V.

\(^{41}\) See id.

\(^{42}\) Murphy, supra note 4, at 296-97.
devastating. Moreover, though Bryant may find this concern less compelling, we may always wish to be wary of how we treat other human beings – even defective human beings. That is, we must always worry not only about assessing the intrinsic moral worth of the psychopath but also about creating a slippery slope that devalues us.

Perhaps the consequences of taking the psychopathy challenge seriously are too great to face head on, but, as a retributivist, I am awestruck by the implications the other way around. What percentage of current prison inmates must be significantly psychopathic before we worry that our criminal justice system is just a system of preventive detention? How do we teach our students to believe in moral desert, if sleeping in the same cell as the morally deserving is someone whom we do not punish, but only contain? How can our moral code simply co-exist side by side with the detention of the dangerous?43

VI. A RICHER DEONTOLOGY?

At the conclusion of her article, Professor Little argues that the categories of child and person are insufficient to cover fetuses. In her own words, “the fetus deserves a theory of its own.”44 The intrinsic moral worth of the fetus often conflicts with the pregnant woman, who is asked to surrender her body to provide for it. These are not arms-length negotiations; the relationship is unlike any other relationship that one entity may have with another.

As the articles in this Symposium reveal, the need for a richer deontology reaches beyond the fetus. Because our lives not only clash with other “moral agents” but with those at the boundaries of our moral and legal community (and beyond), we cannot simply apply our quid-pro-quo negotiations to those who need, or suffer, but cannot reason (or reason as well as we do). Thus, for each of these conflicts, we need a good theory about how to understand both sides of the conflict so as to reach meaningful and moral resolutions.


44. Little, supra note 17, at 349.