



Universiteit
Leiden
The Netherlands

The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal

Villiers, J. de

Citation

Villiers, J. de. (2019, December 16). *The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal*. Retrieved from <https://hdl.handle.net/1887/82072>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/82072>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/82072> holds various files of this Leiden University dissertation.

Author: Villiers, J. de

Title: The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal

Issue Date: 2019-12-16



Universiteit
Leiden

The Anthropomorphic Hegemony of Subjectivity

Critical Reflections on Law and the Question of the Animal

Jan-Harm de Villiers



Universiteit
Leiden

The Anthropomorphic Hegemony of Subjectivity

Critical Reflections on Law and the Question of the Animal

Jan-Harm de Villiers

The Anthropomorphic Hegemony of Subjectivity

Critical Reflections on Law and the Question of the Animal

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op maandag 16 december 2019
klokke 15:00 uur

door
Jan-Harm de Villiers
geboren te Pretoria, Zuid-Afrika
in 1985

Promotor: prof. dr. P.B. Cliteur

Copromotor: mr. dr. A.J. Kwak

Promotiecommissie: prof. dr. A. Ellian

prof. dr. M. Labuschaigne (Universiteit van Zuid-Afrika)

mr. dr. L. Lauwaert (KU Leuven, België)

mr. dr. B.R. Rijpkema

The animal looks at us, and we are naked before it.
Thinking perhaps begins there.

– Jacques Derrida, *The Animal That Therefore I Am*

Table of contents

1. Introduction	1
Problem statement	1
Motivation and background	4
<i>Towards an ethics of difference and singularity</i>	7
<i>Deconstruction and limitrophy</i>	20
Approach and methodology	27
A note on terminology	28
Chapter overview	29
2. Towards an Ethical Relation to the Nonhuman Other: Deconstruction, Veganism and the Law	37
Introduction	37
Deconstruction and the law	38
<i>Conceptualising justice as aporia</i>	40
Reconceiving deconstruction as the <i>philosophy of the limit</i>	42
Veganism and deconstruction	44
<i>The (human) subject and sacrifice</i>	45
<i>Symbolic sacrifice as secondness</i>	46
<i>The anthropocentric predilection of vegetarianism</i>	47
Conclusion	49
3. Animal Rights Theory, Animal Welfarism and the ‘New Welfarist’ Amalgamation: A Critical Perspective	51
Introduction	51
The history of the animal advocacy movement	54
<i>The shift from welfarism to rights</i>	56
The amalgamation of welfarism and rights	58
The theoretical foundations and internal paradoxes of new welfarism	61
<i>Utilitarianism</i>	61
<i>Moral rights</i>	62
The need for a moment of slowness and reflection amidst chaotic violence towards animals	64
Thou shalt not kill (the human)	68
<i>Sacrificing the animal</i>	70
Conclusion	77

4. Examining the Similarity Principle and Language of (Animal) Rights as a Foundation for Animal Liberation	79
Introduction	79
The language of rights	81
Rights theory, the ethical relation and hierarchy	83
<i>The animal as symmetrical Other</i>	83
<i>Hierarchical ordering</i>	86
The same-as characteristic and animal experimentation	89
Conclusion	91
5. Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights	93
Introduction	94
The anthropomorphic hegemony of subjectivity	96
Heidegger and metaphysical anthropocentrism	100
<i>Heidegger and the question of world</i>	101
Thinking at the limit of the subject	104
The post-deconstructive “who”	110
Towards a non-anthropocentric refiguration	115
6. Law and the Question of the Animal: A Critical Discussion of <i>National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development</i>	123
Introduction	123
Background	124
Litigation history	128
<i>The high court’s decision</i>	128
<i>The Supreme Court of Appeal’s decision</i>	129
<i>The Constitutional Court’s decision</i>	130
Analysis	133
<i>The dualistic private prosecution scheme in the CPA</i>	133
<i>The question of the animal</i>	134
Conclusion	138

7. Prolegomenon on the Role of the Polyphonic Novel for (Animal) Law: J.M. Coetzee's <i>The Lives of Animals</i>, the Voice of Refusal, and the Subversive Performativity of the Novel	141
Introduction	142
<i>The Lives of Animals</i> as polyphonic novel, the animal's literary voice, and the subversive capacity of literature	144
<i>The Socratic model, carnival, and laughter</i>	150
Elizabeth Costello as Socratic figure and voice of refusal	151
<i>The politics of refusal and alternative spaces of thinking</i>	152
<i>Costello's refusals, the animal's finitude, and risking law</i>	155
Conclusion	162
8. Conclusion	167
9. Summary	175
10. Samenvatting (Summary in Dutch)	177
11. Bibliography	179
12. Curriculum Vitae	191

INTRODUCTION

1.1 Problem statement

One of the most significant and sustained intellectual efforts of our age concerns the human/animal distinction, or, to be more precise, its radical destabilization and displacement. Various disciplines have contributed findings of animal species exhibiting capacities and qualities once posited to be essential and exclusive to the human, thereby eroding the porous borders that we have constructed to separate and sharply delimit ourselves in opposition to other animals. Long lists of extensive studies enumerate mental phenomena possessed by animals, including the capacity to use tools, generate causal hypotheses from particular events, inhabit the experiential perspectives of others, and navigate spatial complexities.¹ Pro-animal philosophers have predominantly utilized this breakdown in support of an interest-based ethics grounded in an ontology of gradual biologicistic continuism that regards humans and animals as equal co-participants in the evolutionary process, with distinctions between them being a matter of degree rather than kind. These theorists follow through on the ethical implications of deep continuity in respect of ethically relevant capacities and traits by calling for recognition and application of the principle that similar interests warrant equal ethical consideration. This principle maintains that all individuals' similar interests (for example, in not suffering or being confined) should feature equally in our ethical deliberations, regardless of who or what the individual is. From this perspective, sound ethical reasoning would dictate that arbitrary disregard for

1 Martha Nussbaum "The Capabilities Approach and Animal Entitlements" in Beauchamp T and Frey G (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press: Oxford, 2011) 228-51, 231-34.

the interests of other animals based on their species (speciesism)² constitutes unjustifiable prejudice in the same way that arbitrary contempt for the interests of humans based on ethically irrelevant characteristics like race or gender (racism or sexism) constitutes unjustifiable discrimination. Relying on continuity theses and the condition of communal interests, these theorists ultimately regard themselves as exposing a shared fundamental identity or subjectivity that can be utilized to represent and protect the interests of animals in various paradigms.

I find this dominant approach to animal ethics to be theoretically and ethically problematic for several reasons. Firstly, the emphasis on *speciesism* as irrational or inconsistent ethical behavior that can be solely or primarily remedied through sound reasoning fails to adequately frame and address the complexity of the pertinent issues at stake in the contestation of animal subjugation. Rather than being primarily explicable in terms of irrational beliefs and practices, the subjugated status of the animal is the result of complex schemata of power and domination that span numerous historical, institutional, and cultural discourses and practices. As some philosophers have rigorously argued, our subjugating superiority over other animals is intrinsically tied to our historicity, sociality, and indeed what is considered to fundamentally constitute us as human. A destabilization of this complex oppressive schema would require fundamental changes across various discourses and institutions and accordingly necessitates a rigorous deconstruction of the socio-historical processes, relations and conditions that configure our identity. Power relations in the history of Western culture have almost never been constructed on grounds of biological species per se and have, on the contrary, consistently

2 The term “speciesism” is most commonly associated with utilitarian philosopher and bioethicist Peter Singer, who analogizes discrimination based on species membership to (the thinking or worldview that undergirds and ultimately effects) racism and sexism. He argues that “[r]acists violate the principle of equality by giving greater weight to the interests of members of their own race when there is a clash between their interests and the interests of those of another race. Sexists violate the principle of equality by favoring the interests of their own sex. Similarly, speciesists allow the interests of their own species to override the greater interests of members of other species”. Peter Singer *Animal Liberation* 4th ed (Harper Collins Publishers: New York, 2009) 9.

oppressed large sections of humanity.³ Dominant perspectives on ethics and community have unfolded in relation to capacities and traits considered to be *quintessentially* human, and emanating hegemony has always been wielded at the expense of large subsets of the human race and animals alike.⁴ The approach of locating these capacities or traits among animals in order to utilize it as the ground for an egalitarian ethics does not result in a displacement of man's supposed exceptionalism, but on the contrary solidifies our position as patriarchal center of beings, reinstates the anthropocentric system that fails to heed the call of the animal, and effects a problematic neutralization or erasure of animality. Inasmuch as discourse on the animal continues to be shaped by this contour of the human as reference point from which to establish ethical agency and consideration, I support the supposition that the critical target for animal ethicists should rather be *anthropocentrism*, or the "set of relations and systems of power that are in the service of those who are considered by the dominant culture to be fully and properly human".⁵ A central concern with the pervasive ramifications of human-centeredness not only allows us to address what I consider to be the centripetal force at work in the nuanced problematic of animal repression, but also allows us better to understand and identify the implicit anthropocentric constraints at work in certain discourses and institutions and, most notably for the purpose of my project, the challenges accompanying the utilization of law in service of animal liberation. My concern is that we paradoxically retain and reinforce the underlying conceptuality of discourses that are contributory to the very problem at hand when we uncritically add animals into existing frameworks of knowledge and modes of social regulation that are fundamentally anthropocentric.

My project accordingly contemplates the possibility of an ethics of difference that can effect a radical displacement of anthropocentrism and provide

3 Matthew Calarco *Thinking Through Animals: Identity, Difference, Indistinction* (Stanford University Press: California, 2015) 26.

4 Calarco *Thinking Through Animals* 26.

5 Calarco *Thinking Through Animals* 25.

an alternative framework within which to consider human-animal relationality against the multiple differences that subsist not only between humans and animals, but also amongst humans and animals. I am thus developing an argument in support of thinking and approaching *difference* differently from the dominant approaches in animal liberation discourse. The aim of my project is not to construct or propose a programmatic ethics that can be accommodated within the discipline of law so that animals can be represented in the legal arena. On the contrary, I aim to illustrate essential congruence between law and animal subjugation by exposing the anthropocentric underpinnings and orientation of law and arguing that law fundamentally grounds and maintains the subordinate status of animals. I am thus contesting what I perceive to be the insufficiently interrogated supposition that the key to animal liberation and emancipation is to be found in existing legal channels. I propose that the critical focus of animal ethicists should be on law and legal discourse as signifier of anthropocentric power, rather than legal reform as such. By disrupting or de-centering the construct(s) of law, my primary aim is to open a critical space wherein an alternative thought and approach to law and the question of the animal might develop.

1.2 Motivation and background

The motivation for this project arose out of real concerns with the increasingly glorifying approach to law and right(s) in animal studies, and the emanating desire to add a critical voice to the field. The academic discipline of animal law has grown exponentially over recent years, largely in response to the relentless efforts of the animal liberation movement. Yet, despite a growing academic interest and increasing legislative reform, it is hard to find evidence of meaningful change in the lives and deaths of animals. Theoretical and practical efforts aimed at legal reform bear witness to law's non-incorporation of the animal's fundamental interests and, as already suggested, I believe there is a subtle, yet pertinent reason why law is so resistant to the protection of other animals.

The dominant animal rights models proceed from the supposition that existing legal constructs provide a suitable framework within which to effect changes in our thinking and relation with animals. The object or property status of animals is commonly regarded as foundational to the problem of animal subjugation and animal rights theorists effectively seek a displacement of the line that separates the (legal) subject from the (legal) object so that animals can be endowed with the substratum of subjectivity from which rights and correlative legal protection flow. I use the word displacement deliberately in order to underscore that these models aim to effect a shift in the exclusionary boundaries of subjectivity, rather than alternative relational frameworks. These theorists consequently develop a jurisprudence that accepts and espouses the parameters constructed by law. My central concern is with the anthropocentrism implicit in the subject-centered model of law and how these models merely reproduce subject-centrism at an(other) equally problematic annexation, thus reinforcing the dogmatic humanism they seek to destabilize and eradicate. My aim is to articulate a series of interrelated issues that foreground the ways in which the model of (animal) rights forecloses certain ethical possibilities.

Philosopher Tom Regan has developed one of the most influential and comprehensive subject-based theories of animal rights,⁶ rigorously refuting the assumption that animals are objects or things in favor of a view of animals as beings with intrinsic worth and lives “that fare better or worse for them, logically independently of their utility value for others”.⁷ Regan’s egalitarian ethics advances a shared subjectivity (or being a *subject-of-a-life*, to use Regan’s terminology) as the ethically relevant property that establishes animals as individual co-subjects deserving of moral consideration and rights. This notion of subjectivity focuses on advanced cognitive, conative, and volitional

6 See Tom Regan *Defending Animal Rights* (University of Illinois Press: Urbana, 2001); Tom Regan *The Case for Animal Rights* 2nd ed (University of California Press: Berkeley, 2004).

7 Regan *The Case for Animal Rights* 178.

capacities as the constitutive requisites for being considered an experiencing subject-of-a-life.⁸ The paradox of this shared subjectivity, however, is that it excludes the majority of the animal kingdom from its scope. Regan readily admits that his theory only applies to “mentally normal mammals of a year or more”,⁹ which means that his model strictly speaking does not provide a case for *animal* rights, but rather for rights of *subjects*.¹⁰ Because this image of the subject situates the human at its determinative center, Regan’s theory draws a different exclusionary boundary that merely reproduces a slightly more charitable iteration of anthropocentrism. The result is that certain animals are granted ethical consideration based on their propinquity to humanness, whilst those animals further removed from this particular standard of subjective life are regarded as having a lower ethical status. Recent law reforms offering increased legal protection to certain species of animals who manifest relevant human-like traits forcefully illustrate this point. Spain and the Balearic Islands have passed resolutions granting legal rights to the great apes¹¹ whilst Belgium, Austria, New Zealand and the Netherlands have all passed laws banning great ape research.¹² These laws *inter alia* grant the right to life and the protection of individual liberty (Spain, Balearic Islands) and the right not to be used in biomedical research (Belgium, Austria, New Zealand, Netherlands) to the great apes, our closest nonhuman relatives.¹³ Insofar as the

8 For Regan, “individuals are subjects-of-a-life if they have beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else’s interests”. Regan *The Case for Animal Rights* 243.

9 Regan *The Case for Animal Rights* 78.

10 Matthew Calarco *Zoographies: The Question of the Animal From Heidegger to Derrida* (Columbia University Press: New York, 2008) 8.

11 Includes gorillas, chimpanzees, bonobos and orangutans.

12 Tom Beauchamp “Rights Theory and Animal Rights” in Beauchamp T and Frey G (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press: Oxford, 2011) 198-227, 214.

13 For more on the starting point, underlying philosophy, and objections of the Great Ape Project see Cavalieri P and Singer P (eds) *The Great Ape Project: Equality Beyond Humanity* (St. Martin’s Press: New York, 1993); Paola Cavalieri “The Meaning of the Great Ape Project” 2015 (1) *Politics and Animals* 16-34.

status and position of other animals remain unaffected, the pertinent question is why would scholars advance a framework that is limited in its application when they would prefer to extend the scope of moral and legal consideration well beyond a small group of animals who possess a certain set of (human) characteristics?

The reason is that both moral philosophy and law mainly function around an inherently anthropocentric subject-centered model and in order to effect any changes within these paradigms, scholars have to translate and fit their claims into philosophically or legally digestible language and constructs. Yet it is precisely these discourses, institutions and constructs that have historically legitimized and facilitated animal subjugation and, ironically, continue to shape animal liberation discourse. In the same way that a specific deleterious definition of the human was constructed to legitimize and normalize prejudicial treatment of some humans, current constructs of animal rights privilege certain groups of animals on account of their perceived similarity to humanness. The critical issue here concerns the implicit anthropocentric constraints that operate within political and legal institutions and the ways in which animal liberation discourse ends up accepting and replicating the constraints that ground and preserve these institutions. By subscribing to these restrictions, these theorists are subtly bound to determine the animal's Being and worth in consonance with anthropocentric standards and ideals¹⁴ and end up granting ethical (and legal) consideration against a standard of humanness.

1.2.1 Towards an ethics of difference and singularity

We can identify a fundamental ethical problematic here, if by "ethical" we understand the notion of being in non-subsumptive relation with a particular Other who radically calls my being into question and awakens me to (ethical)

14 Calarco *Zoographies* 8.

responsibility. This notion of the ethical,¹⁵ developed by Emmanuel Levinas, is grounded in the primacy of the Other and signals a radical withdrawal from the egocentric supremacy entrenched in traditional Western thought:

A calling into question of the same – which cannot occur within the egoist spontaneity of the same – is brought about by the other. We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into question of my spontaneity, as ethics. Metaphysics, transcendence, the welcoming of the other by the same, of the Other by me, is concretely produced as the calling into question of the same by the other, that is, as the ethics that accomplishes the critical essence of knowledge.¹⁶

This passage from the opening pages of his first major philosophical text, *Totality and Infinity*, in a sense encapsulates the entire philosophy of this work. Here Levinas reiterates, nuances and expands his original proposition regarding the Other's problematization of the self to eventually designate this relationship as the site where not only ethics, but also knowledge are at stake. Indeed, Levinas's thought largely developed in response to the Western philosophical tradition's suppression of *alterity*, by which concept Levinas refers to both the Other's intrinsic quality of strangeness (or otherness), and the fact of her strangeness. Against the solidification of the individual "I" as central point of reference from which others are grasped and embraced, Levinas characterizes the Western

15 Colin Davis suggests that Levinas's work is not predominantly concerned with *ethics* per se, but perhaps better described as falling within the broader domain of *the ethical*, "where ethical experiences and relationships occur before the foundation of ethics in the sense of philosophically established principles, rules or codes". Levinas's own use of the word *éthique* is furthermore ambivalent, as he most commonly uses it as an adjective or, when used as a noun, in contexts that make it impossible to determine its gender. This nuance is significant as *éthique* as a feminine noun denotes ethics in the English sense, whilst its use as a masculine substantivized adjective would denote something like *the ethical*. See Colin Davis *Levinas: An Introduction* (Polity Press: Cambridge, 1996) 48.

16 Emmanuel Levinas *Totality and Infinity: An Essay on Exteriority* (trans Lingis A) (Martinus Nijhoff Publishers: The Hague, 1979) 43.

philosophical tradition as most often being an ontology that reduces the Other to the self “by interposition of a middle and neutral term that ensures the comprehension of being”.¹⁷ The self has always been the privileged term, conceived as incorporating (be it in actuality or potentiality) that which is other. The Other, as Levinas reminds us, is however radically and wholly other (to the self) and resists subsumption or comprehension within my schematic thought. The Other lies beyond my categories of understanding and an attempt at grasping the Other within my sphere of knowledge denies her irreducible particularity and ensuing difference, in effect suppressing and holding the Other hostage: “Stranger ... means the free one. Over him I have no *power*. He escapes my grasp by an essential dimension, even if I have him at my disposal. He is not wholly in my site”.¹⁸

It is via *the face* of the Other that she is presented to me and interrupts me from a dimension of irreducible infinity:

The way in which the other presents himself, exceeding *the idea of the other in me*, we here name face. This *mode* does not consist in figuring as a theme under my gaze, in spreading itself forth as a set of qualities forming an image. The face of the Other at each moment destroys and overflows the plastic image it leaves me, the idea existing to my own measure and to the measure of its *ideatum* – the adequate idea. It does not manifest itself by these qualities, but ... *expresses itself*.¹⁹

The face, in Levinas’s particular philosophical sense, does therefore not present itself in the form of evidence to be seen and should not be confused with the anatomical landmark of the body. We do not see or experience the face in any manner that would constitute it as the object of my intentions and it cannot be reduced to my own definitions:

17 Levinas *Totality and Infinity* 43.

18 Levinas *Totality and Infinity* 39.

19 Levinas *Totality and Infinity* 50-1.

The face is present in its refusal to be contained. In this sense it cannot be comprehended, that is, encompassed, it is neither seen nor touched – for in visual or tactile sensation the identity of the I envelops the alterity of the object, which becomes precisely a content.²⁰

The face, then, is prior to all else the locus in which alterity is revealed or expressed to me and it therefore dwells outside and beyond that which I can perceive or experience; “the face is signification, and signification without context”.²¹ The relation with the Other is an epiphany or revelation of an appeal that is “totally different from experience in the sensible sense of the term, relative and egoist”.²² Yet the mere appearance (or fact) of the Other in itself does not suffice to occasion an epiphany that reveals an appeal, as it is possible for the Other to merely exist alongside the self without meeting or touching the self.²³ It is only when the self enters into the ethical dimension of the face and is touched as an (impotent) imperative that proximity is established.²⁴ This encounter with the face of the Other is fundamentally ethical because it gives rise to the realization that I am not alone in the world and hence my power and freedom are called into question. The ethical nature of this encounter does however not mean that I will necessarily heed the call of the Other and act in an ethical way. The face is above all vulnerable and destitute in its uniqueness and, against its limitless forms and consequences, expresses the primordial commandment “you shall not commit murder”.²⁵

20 Levinas *Totality and Infinity* 194.

21 Emmanuel Levinas *Ethics and Infinity: Conversations with Phillipe Nemo* (trans Cohen R) (Duquesne University Press: Pittsburgh, 1985) 86.

22 Levinas *Totality and Infinity* 193.

23 Roger Burggraeve “‘No One Can Save Oneself without Others’: An Ethic of Liberation in the Footsteps of Emmanuel Levinas” in Burggraeve R (ed) *The Awakening to the Other: A Provocative Dialogue with Emmanuel Levinas* (Peeters: Leuven, 2008) 13-65, 41.

24 It is important to note that this does not entail an exposure of the Other’s interiority, as “[t]he presentation of the face, expression, does not disclose an inward world previously closed, adding thus a new region to comprehend or to take over”. Levinas *Totality and Infinity* 212.

25 Levinas *Totality and Infinity* 199.

This commandment is not made from a position of compelling authority, but rather absolute passive otherness, a “paradoxical position of majesty and misery”.²⁶ Because the Other is wholly other and resists my efforts at comparison and appropriation, I cannot control or even fathom her and she fundamentally escapes my power in a profound sense; “the face ... invites me to a relation incommensurate with a power exercised, be it enjoyment or knowledge”.²⁷

The ethical relation to the Other is thus characterized by an irreducible asymmetrical distance of nonidentity separating the self and the Other, and the prospect of a nonviolent relation requires that I guard this asymmetry against an appropriation or transmutation that would negate the Other’s quality of otherness. For Levinas, an extension of consideration to the Other on grounds of sameness thus constitutes a fundamental ethical failure and form of killing, in its broad sense. As we will see, it also amounts to a disavowal of my state of being exposed, addressed and dedicated to the Other *before* I direct myself towards her, as my devotion to the Other already existed before I discovered it. Levinas insists that our relation with the Other “precedes all ontology; it is the ultimate relation in Being. Ontology presupposes metaphysics”.²⁸ Indeed the primary value of *Totality and Infinity* arguably lies in its anticipation of the prospect of a different sort of practice that might engage with the otherness of the Other in a nonviolent way. I intentionally characterize it as the anticipation of a certain prospect, because Levinas’s project of articulating why ethics

26 Davis *Levinas* 50.

27 Levinas *Totality and Infinity* 198. Levinas illustrates how the depth of the face radically modifies the very nature of power, which is henceforth not aimed at possessing, but at killing. Because the Other is absolutely beyond my power, it is, for Levinas, “the sole being I can wish to kill”. In the passion for murder, we identify and approach death as nothingness, because the intention here is aimed at annihilation. What Levinas ultimately illustrates, is that violence towards the Other can never accomplish its true aim, as any annihilation will inevitably be a *relative* annihilation. Because the face (of the Other) does not belong to my world, despite appearing in my world, I cannot eradicate it. In a very profound sense, then, the Other remains. See Levinas *Totality and Infinity* 198-99.

28 Levinas *Totality and Infinity* 48.

has primacy over ontology and showing that there is something *outside* or *before* Being, here remains beholden to the constraints of the ontological enterprise through retention of its language and concerns. His second major philosophical text, *Otherwise than Being, or, Beyond Essence*,²⁹ is however more self-conscious and introspective, and better succeeds in critically reflecting on philosophy itself and circumventing the constraints of ontological language.³⁰

The title of this text presents a dual transformative translation of the Platonic Good beyond Being and explicitly identifies the intention of his project to overcome ontology. *Otherwise than Being* is throughout extremely aware of the problematic that its textuality presents to its own intelligibility, and it focuses our attention on the surface irregularities of language that obstruct effortless interpretation and access to philosophical propositions.³¹ The challenges of expression posed to his thought are foregrounded at the outset:

When stated in propositions, the unsayable (or the an-archival) espouses the forms of formal logic; the beyond being is posited in doxic theses, and glimmers in the amphibology of *being* and *beings* – in which beings dissimulate being. The *otherwise than being* is stated in a saying that must also be unsaid in order to thus extract the *otherwise than being* from the said in which it already comes to signify but a *being otherwise*.³²

29 Emmanuel Levinas *Otherwise than Being, or, Beyond Essence* (trans Lingis A) (Duquesne University Press: Pittsburgh, 1998).

30 In the foreword to the German translation of the text, Levinas himself acknowledged that *Totality and Infinity* simultaneously preserved and problematized its own main conceptual tools (see Emmanuel Levinas *Totalität und Unendlichkeit: Versuch über die Exteriorität* (trans Krewani W) (Verlag Karl Alber: München, 1987). There is wide consensus amongst scholars that *Otherwise than Being* can be seen as a re-reading of *Totality and Infinity* that responds to Jacques Derrida's critique in "Violence and Metaphysics" (see Robert Bernasconi and Simon Critchley "Introduction" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington, 1991) xi-xviii; Robert Bernasconi "Skepticism in the Face of Philosophy" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington, 1991) 149-61.

31 Davis *Levinas* 74.

32 Levinas *Otherwise than Being* 7.

The distinction between otherwise than being (*autrement qu'être*) and being otherwise (*être autrement*) is foundational to Levinas's project. In approaching something that transcends Being, Levinas is all too aware of the peril of transmuting this other-than-being into merely another Being, and the danger lies in the ontological assumptions embedded in philosophical language. The oftentimes overwhelming complexity of Levinasian ethics (at least partially) derives from this enterprise of trying to exceed a tradition *from within*, neither accepting nor evading the philosophical heritage that poses as both site and target of the project: "The extreme audacity of Levinas's text lies in its attempt to theorize the limitations of theory, to conceptualize and to exemplify a dimension of language which normally slips through the themes and propositions of philosophy".³³

In *Otherwise than Being* Levinas portrays the radical passivity and primordial exposure to the Other through a distinction between two dimensions of language, which include a pre-original Saying (*le Dire*) or foreword that constitutes the condition of possibility of any type of speech act that breaks silence by verbal (or written) signs in the Said (*le Dit*). We acknowledge the Other through language and for Levinas, "language does not begin with the signs that one gives, with words. Language is above all the fact of being addressed".³⁴ The (ethical) Saying is therefore a pre-condition and ground of the (ontological) Said and my radical responsibility towards the Other originates prior to language or, indeed, my consciousness of the Other's call: "the responsibility for another is precisely a saying prior

33 Davis *Levinas* 75.

34 Emmanuel Levinas "The Paradox of Morality: An Interview with Emmanuel Levinas" (trans Benjamin A and Wright T) in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York, 1988) 168-80, 169-70. Levinas elsewhere writes that "[s]aying opens me to the other, before saying something said, before the said that is spoken in this sincerity forms a screen between me and the other. It is a saying without words, but not with empty hands". Emmanuel Levinas *Of God Who Comes to Mind* (trans Bergo B) (Stanford University Press: Stanford, 1998) 74.

to anything said ... [It is] an interruption of essence".³⁵ This interruption and infinite responsibility is furthermore inescapable; whilst I may decide not to answer the Other's call that originates responsibility, I cannot silence her. I am hostage to the Other and her interruption derives from a past removed from my consciousness and will. For Levinas, philosophy has traditionally focused on the Said and in doing so, failed to recognize our primordial exposure to the Other that is effected in Saying. It is precisely through the Saying that Levinas offers a defense of subjectivity from the context of a poststructuralist critique that undermines and disrupts the fundamentality of the classical humanist subject's sovereignty. Levinas's subjectivity is not formulated in terms of autonomy, consciousness, intentionality or choice, but rather heteronomy, subjection, passivity and responsibility. My exposure to the "alterity, the radical heterogeneity of the other"³⁶ is a condition of my subjectivity, rather than a mere aspect of it:

There is an abandon of the sovereign and active subjectivity, of undeclined self-consciousness, as the subject in the nominative form in an apophansis. And there is in subjectivity's relationship with the other, which we are here striving to describe, a quasi-hagiographic style that wishes to be neither a sermon nor the confession of a "beautiful soul" ... One must show in saying, qua approach, the very de-posing or desituating of the subject, which nonetheless remains an irreplaceable uniqueness, and is thus the subjectivity of the subject. This passivity is more passive still than any receptivity, in which for philosophers the supreme model of the passivity of the subject resides.³⁷

The crucial importance that Levinas's conception of ethics accords to otherness has made it an appealing framework for scholars working in various areas,

35 Levinas *Otherwise than Being* 43.

36 Levinas *Totality and Infinity* 36.

37 Levinas *Otherwise than Being* 47-8.

including queer theory,³⁸ feminist studies,³⁹ and animal ethics.⁴⁰ Yet the application of Levinasian ethics outside of his circle of interest is not without complications. Some scholars have argued that Levinas's account of femininity depicts women as sexed beings that are determined and differentiated in relation to man,⁴¹ and that aspects of his writing revert "back within the boundaries staked out by the philosophical constitution of the masculine subject".⁴² Similarly, it needs to be noted that Levinas's writings on the animal are problematic in denying (albeit inconsistently) that the animal is capable of eliciting an ethical response, or, put simply, that all animals have a face. Indeed, Levinas's insistence that the ethics he contemplates is a *humanism of the other man* should be taken seriously and warrants sustained consideration.⁴³ In my project I defend the proposition that Levinasian ethics, despite having its genesis in a mainly anthropocentric context, can make a valuable contribution to the field of animal ethics. My reasoning here is twofold and necessitates elaboration.

Firstly, I read the underlying logic of Levinas's notion of the ethical as fundamentally belying any form of anthropocentrism. A rigorous reading of Levinas's logic opens onto a deeper conception of "*universal ethical consideration*, that is, an agnostic form of ethical consideration that has no a priori constraints or boundaries".⁴⁴ I believe this reading is best supported through a close

38 See Matthew Bolton "The Ethics of Alterity: Adapting Queerness in *Brokeback Mountain*" 2011 (5) *Adaptation* 35-56.

39 See Tina Chanter "Feminism and the Other" in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York, 1988) 32-56; Alison Ainley "Amorous Discourses: 'The Phenomenology of Eros' and Love Stories" in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York, 1988) 70-82.

40 See Jonathan Crowe "Levinasian Ethics and Animal Rights" 2008 (26) *Windsor Yearbook of Access to Justice* 313-28.

41 Simone De Beauvoir *The Second Sex* (trans Borde C and Malovany-Chevallier S) (Vintage Books: London, 2011) 6.

42 Luce Irigaray "Questions to Emmanuel Levinas: On the Divinity of Love" (trans Whitford M) in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington, 1991) 109-18, 113.

43 John Llewelyn "Am I Obsessed by Bobby? (Humanism of the Other Animal)" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington, 1991) 234-45, 244.

44 Calarco *Zoographies* 55.

examination of the texts in which Levinas directly addresses questions of animality, against the backdrop of his larger oeuvre.⁴⁵ The unresolvable internal contradiction that an anthropocentric predilection transposes into Levinas's thought is most evident in his struggle to logically metabolize the possibility of the "you shall not commit murder" commandment being expressed in the face of the animal. When provoked with the question of *animal* ethics, Levinas confirms "the ethical extends to all living beings"⁴⁶ whilst also paradoxically maintaining "one cannot *entirely* refuse the face of an animal"⁴⁷ and that "a more specific analysis is needed"⁴⁸ before he can say whether a specific animal (for instance a snake) has a face. These statements are incompatible with his defense of subjectivity as the direct responsibility emanating from a call that precedes my consciousness and any form of conceptualization that would foreshadow the transference of an "idea" in the Said,⁴⁹ and his conceptualization of the Other as wholly other with a face that expresses an infinity that resists any appropriation within cognition. It is precisely the unknowability of the Other that, for Levinas, initiates our relation, and this means that the Other cannot be delimited in advance of an encounter with this infinity.⁵⁰ Because of his tendency to revert

45 Focusing on different foundational questions than I do, Peter Atterton also argues that "the logic of Levinas's own arguments concerning the otherness of the Other militates against interpreting ethics exclusively in terms of human interests and values, and, furthermore, that Levinas's phenomenology of the face applies to all beings that can suffer and are capable of expressing that suffering to me". Peter Atterton "Levinas and Our Moral Responsibility Toward Other Animals" 2011 (54) *Inquiry: An Interdisciplinary Journal of Philosophy* 633-49, 633.

46 Levinas "The Paradox of Morality" 171-72.

47 Levinas "The Paradox of Morality" 169, own emphasis.

48 Levinas "The Paradox of Morality" 172.

49 Levinas elsewhere emphasizes "I speak of responsibility as the essential, primary and fundamental structure of subjectivity. For I describe subjectivity in ethical terms. Ethics, here, does not supplement a preceding existential base; the very mode of subjectivity is knotted in ethics understood as responsibility". Levinas *Ethics and Infinity* 95.

50 Derrida articulates a more radical critique around Levinas's notion of otherness and his illogical reluctance to recognize the animal as Other, arguing that it "can be a surprise, coming from a thinking so 'obsessed' (I am purposely using Levinas's word), so preoccupied by an obsession with the other and with his infinite alterity. If I am responsible for the other, and before the other, and in the place of the other, on behalf of the other, isn't the animal more other still, more radically other, if I might put it that way, than the other in whom I recognize my brother, than the other in whom I identify my fellow or my neighbor? If I have a duty [*devoir*] – something owed before any debt, before any right – toward the other, wouldn't it then also be toward the animal, which is still more other than the other human, my brother or my neighbor?" Jacques Derrida *The Animal That Therefore I Am* (trans Wills D, ed Mallet M) (Fordham University Press: New York, 2008) 107.

to anthropocentrism, Levinas risks reinforcing certain aspects of the traditional metaphysical humanism that he finds problematic. Acknowledging the ground of “the crisis of humanism” being the notion that man (of Western metaphysics) is the central point of reference of the universe, Levinas admits “the unburied dead in wars and extermination camps make one believe the idea of a death without a morning after and render tragic-comic the concern for oneself and illusory the pretension of the rational animal to have a privileged place in the cosmos and the power to dominate and integrate the totality of being in a self-consciousness”.⁵¹ Yet despite the displacement (of classical metaphysical humanism) brought about by the radical openness to alterity that characterizes Levinas’s subject, his self-confessedly non-metaphysical humanism remains grounded in the unquestioned metaphysically humanist assumption that the imperative of ethics can only arise from another *human* being. It is this aspect of Levinas’s thought that presents a counter-movement that forecloses the prospect of a true openness to Otherness, and that Jacques Derrida is implicating in his charge that Levinas’s discourse, despite disrupting “a certain traditional humanism ... nonetheless remain[s] [a] profound humanism”.⁵² I would suggest, along with Derrida, that the role of animality in Levinas’s thought can be carefully considered as not only presenting a latent logical inconsistency, but also the site where Levinas risks betraying his own project of decentering the “Man” of classical humanism. I am therefore, in a sense, offering an ethical reading of Levinas, because my reading is based in his structures of thought and examined against the criteria dictated by his own texts. My neo-Levinasian approach to the question of the animal thus also presents an attempt to salvage Levinas’s formulation of the ethical relation as Other by preserving it as the unsayable.

51 Emmanuel Levinas *Collected Philosophical Papers* (trans Lingis A) (Martinus Nijhoff Publishers: Dordrecht, 1987) 127.

52 Jacques Derrida and Jean-Luc Nancy “‘Eating Well,’ or the Calculation of the Subject: An Interview with Jacques Derrida” (trans Connor P and Ronell A) in Cadava E, Connor P and Nancy J (eds) *Who Comes after the Subject?* (Routledge: New York, 1991) 96-119, 113. Matthew Calarco correctly notes that Derrida’s use of the word “profound” should here be understood as meaning something like “dogmatic” or “metaphysical”. See Matthew Calarco “Deconstruction is not Vegetarianism: Humanism, Subjectivity, and Animal Ethics” 2004 (37) *Continental Philosophy Review* 175-201, 180.

Secondly, Levinas's engagement with the ethical provides a fitting framework within which to deconstruct and critique the current models of animal rights because it allows us more clearly to understand and articulate why the very starting point of these models can be seen as unethical. Given the disparate nature and scope of Levinas's vast oeuvre, it is impossible to do justice to the complexity of his thought in the scope of a few chapters. Despite being foundational to my project, my engagement with Levinas's ethics will be schematic and focus on the main lines of his thought and development as they pertain to my project. Levinas's ethical philosophy of alterity is not concerned with a programmatic ethics in search of a behavioral system of rules, nor an attempt at articulating how one determines the right way of behaving. Rather, he is concerned with that which precedes the above, namely "the fundamental condition and conditions of possibility that lie at the foundation of every concrete encounter, whether with friend or foe: the face-to-face itself".⁵³ Levinas's thought is often called an "ethics before ethics" precisely because it concerns our ethical mode of being that precedes any decision or action of an ethical nature.⁵⁴ Whilst a concrete or practical ethics can (and I will argue *should*) indeed proceed from a Levinasian basis, Levinas saw his primary task as illustrating that the foundation of ethics does not entail an identification with another being in terms of either sameness or distinction,⁵⁵ but that it rather inheres in an encounter with the radically Other whose face beckons from a dimension of irreducible infinity that interrupts the totality of the self's existence and gives rise to an inescapable ethical responsibility.

Levinas's insights into the meaning of ethics (understood as being borne from the radically Other) is especially apposite for both understanding the

53 Roger Burggraeve "Awakened into Vigilance – In Conversation with a Recalcitrant Thinker" in Burggraeve R (ed) *The Awakening to the Other: A Provocative Dialogue with Emmanuel Levinas* (Peeters: Leuven, 2008) 1-11, 4.

54 Burggraeve "Awakened into Vigilance" 4.

55 Levinas insists that "[t]he alterity of the Other does not depend on any quality that would distinguish him from me, for a distinction of this nature would precisely imply between us that community of genus which already nullifies alterity". Levinas *Totality and Infinity* 194.

violence and erasure effected by what I here term *the anthropomorphic hegemony of subjectivity*, and the possible configuration of a positive animal ethics that can think through and respond to the singularity and absolute alterity of the animal Other. I have coined the phrase *anthropomorphic hegemony of subjectivity* in order to designate the tacit anthropocentric contours of the construct of subjectivity that guide a determination of animal Being and ethical worth against a standard of humanness. This focus forces us to (re)turn to our traditional conceptions of animality and interrogate critically the functioning of our reductionistic and essentialist accounts of animals. The significance of drawing attention to these aspects cannot be overstated, as it fundamentally concerns the very possibility of locating the disruptive power inherent to an encounter with the animal, and thus of an alternative thought of relationality that might develop from nonanthropocentric grounds. These reflections awaken us to the question of the animal as a transgressive and transgressal experience of limitrophy, one that exposes the limits of existing discourses and also the crucial need for alternative thoughts and practices.

In situating and characterizing the current epoch of human-animal relations against a historical background of exponential proliferation in violence towards animals despite the increasing presence of the animal liberation movement's counter-voice, Derrida describes this struggle (for compassion) as passing through a critically important phase:

We are passing through that phase, and it passes through us. To think the war we find ourselves waging is not only a duty, a responsibility, an obligation, it is also a necessity, a constraint that, like it or not, directly or indirectly, no one can escape. Henceforth more than ever. And I say 'to think' this war, because I believe it concerns what we call 'thinking'.⁵⁶

Derrida's reference to "thinking" suggests that the question of violence and compassion towards animals is positioned at the limits of extant discourses

56 Derrida *The Animal That Therefore I Am* 29.

- be it philosophical, scientific or legal - and he is calling for an alternative approach and thought in regard to the question of the animal.⁵⁷ More than just a call to *think*, Derrida is foregrounding our ethical responsibility to engage in *a thinking* that allows us to critically reflect on the underlying assumptions and anthropocentric constraints at work in the resources we use to address the plight of the animal. I share the position that our ethical duty towards animals requires no less than radically new discourses, ethical frameworks, and determinations of animality that destabilize the problematic of anthropocentrism from a context it no longer controls at its center. This need arises because the anthropocentric discourse from which the subject emerges remains expressive of its constitutive presuppositions of human chauvinism and continues to assimilate animals to a norm of humanness. The problematic necessitates a critical deconstructive project to be situated at the limit(s) of the subject in order to firstly gain insight into the significance of the anthropocentric and carno-phallogocentric metaphysical structure from which the concept of subjectivity emanates, and to secondly open up a space within which an alternative thought and approach to (the question of) the animal might develop. Matthew Calarco situates deconstruction at precisely this level, “namely, the level of trying to articulate another thought of relation (ethics) and practice (politics) that moves beyond the limits of anthropocentric traditions and institutions”.⁵⁸

1.2.2 *Deconstruction and limitrophy*

Very important to the practice of deconstruction, as already alluded to above, is the notion of *limit*. Critics of deconstruction have repeatedly misinterpreted the concept over the years, oftentimes willfully engendering negative preconceptions of nihilism and fatalism. Drucilla Cornell’s remarkable project of re-conceptualizing deconstruction as *the philosophy of the limit* allows us to

57 See Calarco *Zoographies* 113-14.

58 Calarco *Zoographies* 115.

better comprehend the philosophical foundations of deconstruction and, very importantly for the purposes of my project, its implications for a legal system.⁵⁹ Cornell's designation responds to the misinterpretations that depreciate deconstructive theory to an "'unreconstructable' litter"⁶⁰ by illustrating that the philosophical tradition allows for the discovery and preservation of standards for ethical conduct and thereby reserves the possibility of ethical engagement within deconstructive thought.

Proceeding through what Derrida calls "the logic of parergonality",⁶¹ Cornell's project "exposes the quasi-transcendental conditions that establish any system, including a legal system as a system"⁶² and, in turn, demonstrates the inevitability of an excess or "beyond" to a system, that which the system inescapably excludes. The primary significance of Cornell's notion of ethics for my project is the way in which it helps us better to understand justice as the limit to a system of positive law and the attendant increase in our ethical responsibility, precisely because it reveals the ethical aspiration impelling the exposure of the system's limit and Other. Cornell's reading of deconstruction reflects deep insight into the limitrophe nature of deconstruction and the relevance of the way in which deconstruction exposes the limit of a system or concept. The limit cannot be positively described as an oppositional cut or self-limitation and thereby reduced to a dichotomy or excess that can be incorporated into the system. As I will repeatedly emphasize, the work of deconstruction is not to efface a limit, but rather to complicate, multiply and delinearize the limit(s). The consonance between Derrida and Cornell, the two philosophers most intimately linked to my project, perhaps resonates strongest and most pertinently in Derrida's later claim with regards to his deconstructive interventions into animality, that "*limitrophy* is therefore

59 See Drucilla Cornell *The Philosophy of the Limit* (Routledge: New York, 1992).

60 Cornell *The Philosophy of the Limit* 1.

61 See Jacques Derrida *The Truth in Painting* (trans Bennington G and McLeod I) (University of Chicago Press: Chicago, 1987).

62 Cornell *The Philosophy of the Limit* 1.

[his] subject. Not just because it will concern what sprouts or grows at the limit, around the limit, by maintaining the limit, but also what *feeds the limit*, generates it, raises it, and complicates it".⁶³

In this vein, my project identifies the human/animal oppositional limit, specifically its constitutive functioning in relation to the construct of subjectivity, as the starting point for the clearing of a critical space for the development of an alternative thought of relation. Western metaphysical discourse has consistently entrenched a human/animal binary in order to oppositionally define and delimit man in relation to the rest of animalkind. Within this analytic, man has been defined by contrast to its animal-supplement and, in turn, the animal has been juxtaposed privatively as a site of dis-possession by being differentiated as lacking certain capacities and traits considered proper to the human. Through this juxtaposition, the differences between humans and other animals are conceptualized as a contradiction grounded in deficiency and the oppositional limit operates as architect of man's position of mastery. As with most classical philosophical oppositions, this limit does not involve "the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper hand".⁶⁴ A critical engagement with these concepts elucidates their metaphysical functioning which, when placed in opposition, never effects the face to face of two concepts, but a "conflictual and subordinating structure".⁶⁵

The single oppositional line has not only functioned to solidify anthropocentric hegemony, but has eradicated the complex matrix of existences and relational structures on both sides of the rupture by effacing differences and reverting to the homogenous. Just as the pseudo-concept of "the animal" suggests a homogenous group of beings that encapsulates the single essence of ants, gorillas, kangaroos, and everything in between, "the

63 Derrida *The Animal That Therefore I Am* 29.

64 Jacques Derrida *Positions* (trans Bass A) (University of Chicago Press: Chicago, 1981) 41.

65 Derrida *Positions* 41.

human” absorbs all racial, historical, and gender differences and is charged with various violent hierarchies that have accompanied the figuring of this grouping in opposition to people of color, women, homosexuals, and other Others. It is only through a rigorous deconstruction of these oppositions that we are able to clear a critical space wherein we can rethink the dissimilarities between (distinctive) humans and animals through a logic of difference and singularity, rather than oppositional distinction. The task, then, is to revisit the radical heterogeneities that exist beyond the reductive homogeneity engendered by the human/animal categorization. The starting point of this project, I argue, is a reflection on the importance or internal necessity of this reductive disengagement in Western philosophical discourse and law, and I subsequently deconstruct its constitutive functioning in relation to man’s becoming-subject and the subjugating mastery facilitated in its historicity. In line with much of the scholarship written in the posthumanist tradition, I thus also take the metaphysics of subjectivity as the point of departure and critical target of my project. I am in particular concerned with *anthropocentrism* as a guiding thread of the Western metaphysical tradition and its implications for an attempt to assimilate animals to the model of (legal) subjectivity born from that tradition.

My aim in approaching the deconstructive exercise from this specific vantage point is twofold. I firstly wish to clarify the larger stakes involved in the critique of the metaphysics of subjectivity. As Calarco has argued, the work of philosophers like Jacques Derrida, Giorgio Agamben, Gilles Deleuze and Félix Guattari⁶⁶ has often been misread as leading “to a political dead

66 Although I do not touch on their work here, the critical contributions that Agamben, Deleuze and Guattari have made to animal studies helped clarify my thinking and shape my project aimed at effecting a radical displacement of metaphysical humanism and anthropocentrism. See especially Giorgio Agamben *Infancy and History: Essays on the Destruction of Experience* (trans Heron L) (Verso: London, 1993); Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (trans Heller-Roazen D) (Stanford University Press: California, 1998); Giorgio Agamben *The Open: Man and Animal* (trans Attell K) (Stanford University Press: California, 2004); Gilles Deleuze and Félix Guattari *A Thousand Plateaus: Capitalism and Schizophrenia* (trans Massumi B) (Bloomsbury Academic: London, 2013); Gilles Deleuze *Francis Bacon: The Logic of Sensation* (trans Smith D) (University of Minnesota Press: Minneapolis, 2003).

end”.⁶⁷ More than just exposing the consequences of a lingering legacy of Cartesian subjectivity in postmodernity, the critique of subjectivity, if properly understood, allows us more clearly to see and articulate the relationship between metaphysical humanism and metaphysical anthropocentrism.⁶⁸ I aim to contribute a deeper understanding of the way in which discourses that critique metaphysical humanism whilst remaining beholden to an essentialist logic of opposition between human and animal, ultimately leaves us with a more rigorous delimitation of man that remains tributary to precisely what it aims to displace.

I secondly wish to (re)turn animal rights discourse to the technical language and theoretical discipline of law and right(s). Whilst there is no shortage of theories advocating the reformation of humanist liberatory discourse to ground the animal’s ethical agency, there is a dearth of scholarship that addresses the juridical register and conditions of existence of animal rights at a critical and theoretical intersection. By undertaking a jurisprudential positioning of the animal in law, I aim to foreground the anthropocentric conditions that limit law’s ability to logically and ethically take account of its construction and destruction of animal life, and problematize approaches that advocate a hasty retrieval of legal subjectivity towards an end of rights for animals. Being very cautious and skeptical of movements grounded in classical models of subjectivity, I ultimately urge that any engagement with law (and especially a resort to law) in service of animal liberation should be tentative, reflective and cautious.

My reservations concerning the liberatory discourse of animal rights are obviously controversial given the unimaginable suffering that millions of animals endure every day and the significance of the law reforms achieved by

67 Calarco *Zoographies* 13.

68 Calarco *Zoographies* 13. Not unrelated to this thesis, scholars like Kelly Oliver have argued that the human/animal binary opposition is intimately linked to the man/woman and heterosexual/homosexual binaries, and that a dismantling of the former binary inevitably has important implications for the latter binaries. See Kelly Oliver “Sexual Difference, Animal Difference: Derrida and Difference ‘Worthy of Its Name’” 2009 (24) *Hypatia* 54-76.

some animal rights groups. It is therefore important that I briefly give a broad contextualization of my views and project in relation to animal rights strategies and discourse as a whole. It is important to note that I am sympathetic towards the initiatives of animal rights groups for two reasons; I firstly support the general abolitionist goal of the animal rights movement, and secondly appreciate that the animal rights model presents one of the very few concrete and feasible options that currently exist for the realization of a positive political project in support of animal protection. I would however insist that such sympathy neither negates nor contradicts the importance and need for my critical project of thinking through the limitations and shortcomings of the animal rights approach in order to open a space within which we can develop a more sophisticated ethical disposition towards animals. To critique the theoretical presuppositions and underlying metaphysical support of animal rights theory does not by the fact itself constitute a critique of its underlying ideology. On the contrary, I aim to illustrate that the theoretical conditions of existence of animals rights and equality discourse does not allow for the realization of its emancipatory ideal because it fails to address more fundamental issues around conceptions of “(hu)man”, “animal”, and “right(s)” that both constitute and preserve precisely what is in question. The philosophy of animal rights paradoxically solidifies an anthropocentric way of thinking about animals via an uncritical reproduction of the juridical concept of human rights, and entrenches relations of subordination through a disavowal of difference. As I will repeatedly illustrate, my project furthermore supports the thesis that animal liberation will, unfortunately, inevitably be a slow and gradual process. I will indeed advance a critical approach of *slowness* as one way of rigorously deconstructing the (functioning of the) human/animal limit and its relation to different discourses and institutions, particularly law. I believe that any approach failing to take on the laborious, time-consuming task of confronting the nuanced problematic of metaphysical anthropocentrism will foreclose the possibility of destabilizing and moving beyond the very interpretation of the human (as subject) that lies at the heart of animal subjugation.

What is needed, then, is a ceaseless deconstruction of “the whole conceptual machinery, and its interestedness, which has allowed us to speak of the ‘subject’ up to now”.⁶⁹ Concomitant to my focus on the anthropocentrism of the metaphysics of subjectivity, this task necessitates an engagement with the complex network of relations and traditions that configure the sacrificial structure characterizing the subject. Derrida’s neologism *carno-phallogocentrism* underlines and further complicates the violence embedded in the partitions that institute the anthropo-centric subject beyond the privative space that the animal occupies at the border of the human (subject)/animal (object) rupture, foregrounding carnivorousness (*carno*), masculinity (*phallo*) and rationality (*logo*) as constitutive prerequisites of classical conceptions of subjectivity. Derrida’s concept firstly highlights a constitutive scheme of ingestion that underlies the relation between subjectivity and the animal’s body. Derrida furthermore emphasizes that the violence of the metaphysics of subjectivity reaches well beyond the human/animal divide and has historically excluded other beings from the construct of subjectivity, particularly women and children.

Feminists and sociologists such as Carol Smart have made similar arguments in other contexts by illustrating the exclusionary and hierarchical logic of classical conceptions of subjectivity and the implications for institutions that evoke this construct. Smart has argued that any challenge to exclusionary mechanisms of power “require no less than a major change in forms of subjectivity and understanding”⁷⁰ and, having convincingly argued that the law is deeply resistant to the concerns of women, warned feminists to “avoid the siren call of law”.⁷¹ Smart illustrates how the law produces and sustains a gendered order and draws parallels between a feminist resort to law and the iatrogenic potential of medicine to create illness and disease in the strive for cures. Providing examples of what she terms *the juridogenic*

69 Derrida and Nancy “‘Eating Well’” 109.

70 Carol Smart *Feminism and the Power of Law* (Routledge: New York, 1989) 2.

71 Smart *Feminism and the Power of Law* 160.

potential of law to generate harm as a consequence of its operations, Smart argues that emancipation cannot be sought within a system of knowledge that celebrates and sustains the very oppression in question. Smart's wider thesis on the paradox of challenging a form of power whilst accepting its own terms of reference holds value for all liberation movements seeking to effect change within a space of marginalization and disqualification. For reasons not unrelated to Smart's appeal to feminists to de-center law wherever feasible rather than using the law hardheadedly "in the hope that new law or more law might be better law",⁷² I call for an engagement with the underlying metaphysical support of animal rights at a conceptual level, rather than a simple pragmatic utilization of law as an instrument of immediate resolution.

1.3 Approach and methodology

The main conceptual framework of this project draws from the work of Derrida and Cornell. I explore the question of the animal from a critical perspective that seeks to illustrate the significance of deconstruction for animal ethics and foregrounds various elements of the theoretical and ethical problematic surrounding the traditional rights-based approach that has come to dominate animal ethics discourse. My project is also grounded in a critical understanding of theory itself and my engagement with concepts and aesthetic ideas problematizes the notion of a single rigidly disengaged or circumscribed theory that can provide an all-encompassing account of animal Being and effect an exhaustive revolution. My approach acknowledges the pervasiveness of anthropocentrism and the profound hold that it has over Western culture, including extant sciences and philosophies. As Calarco notes, "there is no doubt that we need to think unheard-of thoughts about animals, that we need new languages, new artworks, new histories, even new sciences and philosophies. The field of animal studies is interdisciplinary precisely for this reason: it is

⁷² Smart *Feminism and the Power of Law* 160.

seeking out every available resource to aid in the task of working through the question of the animal".⁷³ My particular study is animated by the urgency to add to this list the need for not only a new (kind of) law, but also new ways of approaching law and understanding law's role as operative architect of animal oppression. In this regard I also challenge the view that there can be a meaningful disentanglement of a strive for (formal) justice in the public legal sphere and in the (informal) sphere of social relations, as prevailing societal norms and assumptions will inevitably be replicated in the legal system.

1.4 A note on terminology

As already explicated, the reductive functioning and violent consequences effected by the concept of "the animal" (as homogenous contradistinctive to the human) lay central to the argument that I am developing. Having facilitated a disavowal of our own animality and a veritable war of the species, the concept is deeply embedded in the Western philosophical tradition and inextricably linked to man's position of mastery. The task for thought here concerns designation of the unsubstitutable singularity of an existence that refuses conceptualization. In response, Derrida invents the portmanteau word *animot*, which as a homophone of (the plural) *animaux* reverberates the plural for animals in the singular form and "envisage[s] the existence of 'living creatures', whose plurality cannot be assembled within the single figure of an animality that is simply opposed to humanity".⁷⁴ The suffix "*mot*" ("word") implicates language, which the animal has always been deprived of, in order to accede to a certain type of thinking that does not approach this difference privatively. It is thus not "a matter of 'giving speech back' to animals", but of thinking the absence of the word as asymmetrical separateness rather than a privation.⁷⁵ I use the plural "animals" and general singular "(the) animal" in this dissertation to represent all animal

73 Calarco *Zoographies* 6.

74 Derrida *The Animal That Therefore I Am* 47.

75 Derrida *The Animal That Therefore I Am* 48.

species other than humans, in full awareness of the biologicistic inaccuracy and violent metaphysical baggage that these terms carry. Whilst their retention is necessary for the work of deconstruction, I ask, following Derrida, that these terms be silently substituted by *animot* and read as if appearing under erasure as ~~animals~~ and ~~the animal~~ in acknowledgement of their insufficiency and limitation.⁷⁶

1.5 Chapter overview

This dissertation consists of eight chapters. It comprises this introductory chapter in which I outline the proposed problem statement and aims of my study, a concluding chapter in which I offer a holistic overview of the issues pursued and argument developed, and six substantive chapters in the form of research articles that have been published in accredited peer-reviewed journals.

In chapter 2 I jurisprudentially position the question of the animal in relation to law, justice, and the call for a deconstruction of the human (subject) by examining the philosophical foundations of- and reciprocation between justice and deconstruction through Derrida's notion of "(un)deconstructibility". I draw on Cornell's reconception of deconstruction as the *philosophy of the limit* in order to highlight the ethical significance of deconstructive theory for law and more clearly articulate the operational force of justice as *aporia* or the limit to a system of law. I examine the deconstructive potential of veganism against the carno-phallogocentric schema of sacrifice that constitutes the human as subject and patriarchal center of beings, and argue that veganism provides one possible mode of effecting a destabilization of this sacrificial configuration

76 For a concise explanation of Derrida's use of erasure, see Jacques Derrida *Of Grammatology* (trans Spivak G) (Johns Hopkins University Press: Baltimore, 2016) xxxii-xxxix. Christopher Norris explains the functioning of the marks of erasure as an acknowledgement "of both the *inadequacy* of the terms employed – their highly provisional status – and the fact that thinking simply cannot manage without them in the work of deconstruction. By this graphic means, much akin to the anomalous spelling of *différance*, concepts are perpetually shaken and dislodged". Christopher Norris *Deconstruction: Theory and Practice* 3rd ed (Routledge: London, 2002) 68.

and a vehicle through which we can respond to our ethical responsibility to the animal Other in thought and praxis. My contemplations on veganism as a form of deconstruction and mode of being should not be misunderstood as an attempt at concretizing justice in relation to a programmatic ideality or advancing the same link between veganism and deconstruction that Derrida theorizes between justice and deconstruction.⁷⁷ On the contrary, I draw on Charles Pierce's notion of *secondness* as a prism through which to illustrate the inescapability of a sacrificial existence and develop an understanding of the ethical as a necessary impossibility. As certain manifestations of sacrifice inevitably remain in the impossibility of its delimitation and "one eats [the Other] regardless and lets oneself be eaten by [the Other]",⁷⁸ it is ultimately not a question of eating, but of addressing the metonymy of introjection configuring the question of eating well. I accordingly explore and propose veganism as one way of eating well.

In chapter 3 I consider law's relation to animal subjugation, both as facilitator of animal sacrifice and possible enabler of animal liberation, by philosophically examining the relationship between the two most prominent theories aimed at addressing the plight of the animal, namely animal welfarism and the rights-based approach. I return to the problem of sacrifice by reflecting on the logic that undergirds the exclusion of animals from the *thou shalt not kill* proscription, and examining its ideological translation into the respective theories. A destabilization of the enabling hegemonic framework requires that we "sacrifice sacrifice"⁷⁹ by rigorously deconstructing the underlying assumptions of discourses and practices that see the killing of animals as a noncriminal putting to death, and adapting our engagement with animals accordingly. I utilize Karin van Marle's deconstructive approach of *slowness* as

77 See Jacques Derrida "Force of Law: The 'Mystical Foundation of Authority'" (trans Quaintance M) in Anidjar G (ed) *Acts of Religion* (Routledge: New York, 2002) 230-98.

78 Derrida and Nancy "'Eating Well'" 114.

79 Derrida and Nancy "'Eating Well'" 114.

theoretical framework for a critical reflection on the philosophical foundations of the two approaches and the channels and strategies we employ in the pursuit of animal liberation. Slowness, as a strategy of delay, calls for a suspension or disruption of a chronological and linear conception of time in order to understand the configuration of a particular contemporary problematic as situated in the past, present and future, and to create a (moment of) thinking that can adequately reflect on the underlying assumptions and constraints at work in the resources we use to address the plight of the animal. After critically engaging with the historical-ideological trajectory of the animal defense movement, I demonstrate that animal welfarists accept and operate within a sacrificial anthropocentric configuration whilst animal rightists are ideologically committed to a recalibration of the animal's status as sacrificial being. These ideological inconsistencies, I argue, demand a conceptual separation of the two paradigms if we are to preserve the possibility of transforming the juridicism and sacrificial logic that underpins our thinking and the legal institutions that legitimize our sacrificial practices.

Having identified animal rights theory as grounded in a more progressive ideology than the welfarist paradigm, I turn to a theoretical problematization of the construct of animal rights in chapter 4 in order to examine whether the theoretical conditions of existence of animal rights allow for the realization of its emancipatory ideals. In the first part of this chapter I employ a semiotic approach to consider the composition of rights and its symbolic functioning. I illustrate that rights do not stand in concrete relation to any specific thing or entity but rather comprise of legal and linguistic signs, words, symbols and ideals, and that this expansive potential of the construct makes it possible for animals to be bearers of rights. My focus in the second part of this chapter concerns a deconstruction of the similarity principle that grounds the current conceptions of animal rights. I argue that the similarity principle arrogates the human at its determinative center and measures

animals against a standard of humanness, thereby not only (re)instating an anthropocentric human/animal hierarchy, but also creating a pecking order amongst animals based on their proximity to humanness. At an ontological level the similarity principle functions around reductive disengagements that privilege selfness over otherness and appropriates the Other as a reflection of the self, thereby disavowing alterity and collapsing the ethical relation into absolute symmetry.

In chapter 5 I expose the ontology of similarity underlying rights theory as absorbedly related to the metaphysics of subjectivity by uncovering the genesis, development and completion of the metaphysical tradition as the founding and unfolding of cognate conceptions of subjectivity that increasingly situate man as the relational center of all that is. The main purpose of this chapter is to (re)turn the discourse of animal rights to its dependency on the event of subjectivity through a modest and focused engagement with the most fundamental pre-condition of rights: the question of the subject. To this end, the first part of this chapter undertakes a critical analysis of (the history of) subjectivity through an exposure of the metaphysical and anthropocentric quasi-transcendental conditions that guide the unfolding conceptualization and concluding identification of man as subject. I locate a critical moment for the metaphysical subject in the work of Martin Heidegger which, whilst sadly not sustained in his later writings, provides a point of departure for an examination of the significance that animality plays in the metaphysical tradition and its constitutive relation to the construct of subjectivity. Heidegger identifies the question of Being (or *Seinsfrage*) as the guiding question of philosophy and critiques the metaphysical tradition for developing theses on the meaning of Being that progressively obfuscate its original sending by passing over the question of Being itself. I further problematize the Heideggerian critique of the metaphysics of subjectivity by approaching it from an interdependent,

but differentiated vantage point, shifting the focus from the implications of the human becoming *subject*, to the significance of the human becoming subject. By recognizing that human(ity) was consistently juxtaposed to animal(ity) throughout the development of Western metaphysics, we can begin to reflect on the anthropomorphic hegemony of subjectivity and its implications for discourses and institutions that evoke this construct. By assimilating animals to the traditional model of subjectivity, I argue, animal rights theorists paradoxically re-construct the classical humanist subject of metaphysics and re-establish the subject-centered system that silences the call of the animal Other. In the second part of this chapter I examine how we can address, incapacitate and move beyond this schemata of power through a rigorous deconstruction of the partitions that institute the subject and how deconstruction clears a space for a *de novo* determination of the animal “subject” that can proceed from different sites of nonanthropocentric interruption. The duty inherent to the practice of deconstruction inheres at precisely this level, namely the level of thinking through and beyond the limits of the anthropocentric (sub)structures that we have inherited. I argue that this problematic is pronounced in its translation into the subject-centered model of law, as animal rights theorists are ultimately forced to establish rights for animals *as subjects* by assimilating a human-like subjectivity, thereby (re)producing another iteration of anthropocentric subjectivism and extending the legitimacy of a discourse and mode of social regulation that is fundamentally anthropocentric. I accordingly accentuate my call for a critical engagement with law at a conceptual level.

Chapter 6 offers a critical discussion of a recent decision by the highest court in South Africa in order to illustrate the significant theoretical and ethical difficulties accompanying the utilization of law as a channel for animal liberation. Whilst interpreting the right of a statutory body to privately prosecute cases of animal cruelty, the Constitutional Court in *National Society*

for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another [2016] ZACC 46 made significant pronouncements that destabilize the ground of the animal's legal status. The court does however not consistently maintain this position and, by entangling ideologies that I have argued to be fundamentally discordant in chapter 3, delivers a ruling that is puzzling and paradoxical. The court's struggle to logically metabolize its construction and destruction of the animal is a symptom of the anthropocentric constraints that inhere in legal institutions and the challenges accompanying the representation of animals in a (legal) system that is fundamentally anthropocentric. Despite reinforcing the object or utility status of animals in certain parts of the judgment, the court also recognizes that animals are individuals with intrinsic value and suggests that the foundation for animal protection has shifted from an external utilitarian calculus towards an understanding of animals as individuals whose experiential lives fare well or ill for them independent of their usefulness to others. Whilst the most obvious implication of the court's pronouncements concerns a destabilization of the (human) subject/(animal) object dichotomy entrenched in law, the judgment foregrounds the sobering reality that full legal emancipation of animals requires the utilization of legally digestible constructs that will have to be stripped of the very presuppositions that constituted and continues to ground them. This inherent characteristic of the law, I continue to argue, necessitates a rigorous problematization of law and right(s) and should make animal ethicists very cautious of how, and indeed whether, they utilize law.

Having articulated a series of interrelated issues that foreground the ways in which standard philosophical and legal approaches to the question of the animal foreclose certain ethical possibilities, chapter 7 reflects on the capacity of literature to problematize the authority of traditional philosophical and legal discourses and circumvent some of the theoretical and ethical constraints that they pose. The potential of literature to destabilize

meaning and challenge the authority of a singular interpretation are central to the argument being developed here. I examine what literature brings to law through the lens of literary theorist Mikhail Bakhtin's writings on the dialogical properties of the novel and I offer reflections on ways in which literature might begin to open up new potentialities and risks for thought in relation to the question of the animal (in law). The ethics of the novel proceed from a relational structure where identity is in flux and neither the self nor the Other is solely human, allowing us to employ literature as a vehicle to ethically "write" the animal and "read" her response that is silenced by the law. A Bakhtinian approach to the relationship of law and literature de-emphasizes the role and importance of literary content or subject matter in favor of increased attention to the style and structure of the novel, which is fundamental to understanding the nature of literature and its implications for other discourses. Bakhtin calls the novelistic structure that allows for the expression of diverging views through a multiplicity of voices the *polyphonic* novel, and identifies the genre of Socratic dialogue as originating the artistic prose composition from which the novel evolved. Bakhtin accordingly advances a notion of literature as communal process in which meaning is pluralistically conversed and collectively constructed by multiple voices that subsist in a constant relation of dialogicality and resist interpretative closure. For Bakhtin, the structural instability that is generated by the novel's style and structure not only leans towards a problematization of any pontifical authority, but also places the novel's own authority in question. This characteristic, I argue, holds great ethical value in the face of unequal power relations, as its volatile nature and susceptibility to interruption and inversion is revealed. I advance a reading of J.M. Coetzee's *The Lives of Animals* as polyphonic novel through an interpretation of the protagonist as Socratic figure and voice of refusal. My reading is grounded in van Marle's reflections on a politics of refusal as a mode of abnegation that destabilizes traditional ways of theorizing and engaging politics and law. This chapter explores

how a politics of refusal is fundamentally engaged in the task of exposing a limit, in turn preserving the possibility of an alternative thought of human-animal relationality and ultimately another law. In considering the relevance of the insights and subversive force that literature brings to law, I turn to van Marle's notion of a *risking law* and tentatively reflect on the capacity of literature to gesture a decentered and humbled law that is challenged in its ignorant complacency and realistically approached as a method with both advantageous and pernicious consequences.

TOWARDS AN ETHICAL RELATION TO THE NONHUMAN OTHER: DECONSTRUCTION, VEGANISM AND THE LAW

JAN-HARM DE VILLIERS*

ABSTRACT

This article explores the ethical significance of deconstruction for law and advances veganism as a form of deconstruction that exposes and resists the anthropocentric character of social and legal configurations. The article engages with Jacques Derrida's project of deconstructing the (human) subject and draws on Drucilla Cornell's reconception of deconstruction as the *philosophy of the limit*. By examining the philosophical foundations of justice and deconstruction, the article exposes justice as the limit to a system of law and investigates the capacity of deconstruction to advance the ethical relation (to the nonhuman Other).

Justice? – you get justice in the next world, in this world, you have the law.¹

I INTRODUCTION

To assert that law and justice are not synonyms is no longer a controversial statement. The impotence of a system of positive law, as a mechanism to bring about a realm of even-handedness, has been widely illustrated and criticised.² It was believed, not too long ago, that blacks were naturally born into a destiny of slavery,³ that women were physiologically and psychologically inferior and lesser beings than their male counterparts⁴ and that homosexuality, like cancer, was a disease that necessitated medical treatment.⁵ Not surprisingly, the law reflected these dogmas and by doing so engaged in a process of 'othering', by creating a protagonist-antagonist dualism and ultimately facilitating subordination. Laws relating to animals are also a direct manifestation of the philosophical presuppositions that underpin the way we perceive the nonhuman Other. What is needed, is a deconstruction of the system that fails to embrace that which is other to the system. In the first part of this article, I examine the philosophical foundations of and reciprocation between justice and deconstruction. Drawing on Drucilla Cornell's reconception of

* LLM (Legal History, Comparative Law and Legal Philosophy) student under the guidance of Prof Karin van Marle, University of Pretoria. An abridged version of this article was delivered at The Society of Law Teachers of Southern Africa Conference in 2011.

1 W Gaddis *A Frolic of his Own* (1994) 1.

2 L Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard LR* 630; A Hutchinson 'A Postmodern's Hart: Taking Rules Sceptically' (1995) 58 *The Modern LR* 788.

3 J Walvin *Questioning Slavery* (1996).

4 JS Mill *The Subjection of Women* (1869).

5 J D'Emilio *Sexual Politics, Sexual Communities* 2 ed (1998).

deconstruction as the *philosophy of the limit*, I illustrate the ethical significance of deconstruction for law in the second part. Relying on this notion of ethics, I finally demonstrate the deconstructive capacity of veganism and argue that veganism plays an important role in exposing and resisting anthropocentric configurations that perpetuate the subservient position of the nonhuman Other.

II DECONSTRUCTION AND THE LAW

A search for and demand of justice is often accompanied by the problematic (and ultimately unattainable) task of defining justice. The inevitable certainty of pluralism and consequential challenge of identifying just substantive principles, force us to confront a reality wherein my ideal of justice will more often than not differ from, if not directly rival, that of my neighbour. But as Jacques Derrida reminds us, justice is a transcendent, incalculable experience and consequently ‘one cannot speak *directly* about justice, thematize or objectivise justice, say “this is just”, and even less “I am just”, without immediately betraying justice, if not law’.⁶ Subscription to this insight can however generate noteworthy concerns: If we are not able to recognise and concretise certain minimal standards as just, what are we (or should we be) striving for? Is an ethical critiquing of law not an exercise in futility, a postponement of the inevitability of equating justice *to* law? Such reasoning is however clearly not in accord with Derrida’s insistence on reserving ‘the possibility of a justice, indeed of a law that not only exceeds or contradicts law but also, perhaps, has no relation to law, or maintains such a strange relation to it that it may just as well demand law as exclude it’.⁷

This excess of justice over law and calculation, this overflowing of the unrepresentable over the determinable, cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state, between institutions or states.⁸

Derrida’s fundamental argument that justice exceeds law is based on Michel de Montaigne’s insight (in turn followed by Blaise Pascal) into the naissance of the law. Law, not originating from justice or reason, is built on custom. That, according to Montaigne, is the ‘mystical foundations of the authority of laws’:

Custom creates the whole of equity, for the simple reason that it is accepted. It is the *mystical foundation* of its *authority*. Whoever carries it back to first principles destroys it.⁹

Montaigne argues that law has not been constructed in a way that allows for the embodiment of justice. We abide by the law not ‘because they are just, but because they have authority’.¹⁰ Here, I deliberately use the word ‘constructed’, as the notion of law as a self-generating construct propelled by inherent

6 J Derrida ‘Force of Law’ in G Anidjar (ed) *Acts of Religion* (2002) 230, 237.

7 Ibid 233.

8 Ibid 257.

9 Quoted in Derrida (note 6 above) 239.

10 Ibid 240.

force, is fundamental to Derrida's insistence that the law is deconstructable. Employing the idiomatic expression 'to enforce the law' as point of departure, Derrida exposes the inevitable force that lies at the core of law. Whilst there are certainly laws that are not enforced, 'there is no law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior ...'.¹¹ Without this force, any system's claim to be law would be redundant. This act of force central to the genesis of any legal system, endow the system with legitimacy. Since this constitutive force 'cannot by definition rest on anything but themselves, they are themselves a violence without ground. This is not to say that they are in themselves unjust, in the sense of "illegal" or "illegitimate". They are neither legal nor illegal in their founding moment'.¹² By understanding that the law is primarily 'a fictional creation which self-perpetuates' and that there is no higher charge behind law, we can in turn understand that any attempt to conflate justice and positive law will inevitably result in naive legal positivism – a falsely held belief that justice can be found within the rights and remedies provided by an existing legal system.¹³ We can never completely attain justice by merely imparting a decision that is in accord with legal rules. Justice, as we will later see, is the limit to any legal system. Here, it is worth noting the ethical dimension to Derrida's deconstructive thought. By exposing the mythological structure underlying the authority of law, he accentuates the risk involved in safeguarding existing ideals as unquestionable truth.¹⁴

Before I turn to an analysis of Derrida's conceptualisation of Justice as *Aporia*, I would like to highlight a nexus between justice and deconstruction that Derrida evokes in *Force of Law*, namely the potential of deconstruction to destabilise the (arbitrarily constructed) limits that we erect to lead us in ascertaining which entities are worthy of being subjects of justice. History bears witness to numerous examples of marginalisation, and the focus of our concern for justice continues to be limited. Derrida argues that the violence of injustice is only applicable to humans, more specifically 'man as a speaking animal'.¹⁵

[O]ne would not speak of injustice or violence toward an animal, even less toward a vegetable or a stone. An animal can be made to suffer, but one would never say, in a sense said to be proper, that it is a wronged subject, the victim of a crime, of a murder, of a rape or a theft, of a perjury.¹⁶

The exclusion of groups deemed inferior, Derrida argues, is however not restricted to nonhumans, as 'there are still many "subjects" among humankind who are not recognised as subjects and who receive this animal treatment'.¹⁷

11 Ibid 233.

12 Ibid 242.

13 D Litowitz 'Derrida on Law and Justice: Borrowing (Illicitly?) from Plato and Kant' (1995) 8 *Canadian J of Law and Jurisprudence* 325, 330.

14 D Cornell *The Philosophy of the Limit* (1992) 10.

15 Derrida (note 6 above) 246.

16 Ibid.

17 Ibid.

The barrier between those worthy of justice ('subjects of justice') and those not worthy ('non-subjects of justice') is thus unstable.¹⁸

But what is the significance of identifying and exposing this (unstable) anthropocentric barrier that excludes the nonhuman animal from our sphere of concern for justice? This generates the opportunity for animal liberation scholars to deconstruct the barrier and challenge the exclusion of nonhumans as possible subjects of justice, as membership to a specific species should not be the decisive criterion granting moral citizenship to a subject.¹⁹ The potential of deconstruction to challenge these barriers embodies the corollary of re-setting the boundaries and, ultimately, ethically embracing the nonhuman Other. As Derrida argues:

[B]y deconstructing the partitions that institute the human subject (preferably and paradigmatically the adult male, rather than the woman, child, or animal) at the measure of the just and the unjust, one does not necessarily lead toward injustice, nor to effacement of an opposition between just and unjust but, in the name of a demand more insatiable than justice, leads perhaps to a reinterpretation of the whole apparatus of limits within which a history and a culture have been able to confine their criteriology.²⁰

(a) Conceptualising justice as aporia

For Derrida, the very notion of justice embodies impossibility, a set of aporias that cannot be dissolved without paradoxicalising justice. This impossibility, as I have already argued, should not hinder our struggle for justice. We always owe justice to the Other and although this 'incalculable' demand can never be satisfied, the strive for justice nevertheless imposes a limitless responsibility, a 'bottomless duty to the Other'.²¹

Derrida articulates three unsurpassable aporias to formulate his argument that justice is 'the experience that we are unable to experience'. The first aporia, the *epokhē* of the rule, delineates the impossibility accompanying any attempt to generate a just outcome to a scenario whilst also adhering to prescribed legal doctrine. To act justly, according to Derrida, one must necessarily be free, because 'one will not say of a being without freedom, or at least of one who is not free in a given act, that its decision is just or unjust'.²² A judge acting within the parameters of the law is however caught in a paradox: bound by rules and precedent on the one hand, the individualism of each case requires a *de novo* approach on the other, 'an absolutely unique interpretation which no existing coded rule can or ought to guarantee absolutely'.²³ Monotonous adherence to and application of a rule cannot be equated to making a just decision, or even *any* decision.

18 J Balkin 'Transcendental Deconstruction, Transcendent Justice' (1994) 92 *Michigan LR* 1131, 1143.

19 For an exposition of speciesism and the belief that only human life is sacrosanct, see P Singer *Animal Liberation* (2009) 18–23.

20 Derrida (note 6 above) 247.

21 Litowitz (note 13 above) 328.

22 Derrida (note 6 above) 251.

23 Ibid.

To obtain justice through law, the judge needs to simultaneously judge the law, and judge by means of the law. A just decision will 'be both regulated and without regulation', it will 'preserve the law and also destroy or suspend it enough to have to reinvent it in each case'.²⁴ To act in conformity with a legal principle might result in a decision that is unjust, whilst a just outcome might have no grounding in law. Thus, we clearly see 'justice run up against the limitations of law, and law run up against the impossibility of justice'.²⁵

The second aporia is absorbedly related to the first and reveals the paradoxical relation between (a decision following the) law and justice. The 'haunting of the undecidable', which is caught in every legal decision, demarcates decision-making with calculation and illustrates why justice cannot exist with or without a decision. This undecidability is more than the mere pressure facing a judge when confronted with two or more decisions, it represents the experience of being caught in an unsurpassable moment of undecidability whilst taking cognisance of legal rules.

We need to clearly distinguish decision-making from calculation, 'for if calculation is calculation, the *decision to calculate* is not of the order of the calculable, and it must not be so'.²⁶ Whilst a decision not passing 'the test and ordeal of the undecidable' can never be a free decision, but only 'the programmable application ... of a calculable process', it is not possible to establish whether the judge went through this test and ordeal before rendering her decision.²⁷ Because there is no recipe or prescription for justice, we can never formulate or construct a 'just' law. But whilst justice is foreign to encapsulation, a decision still needs to be made.²⁸ This decision might be in accordance with the law and thus legal, but not just. The moment of undecidability, although being a necessary stride in arriving at a 'just' decision, will not in itself bring about justice either, 'for only a decision is just'.²⁹ To attain justice through law thus requires the (impossible) amalgamation of an incalculable experience with a calculable, rule governed construct. Ultimately, there can be no justice without a decision and no decision can effectively capture justice. This leads Derrida to arrive at the conclusion that a decision can never 'be said to be presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule'.³⁰

With the third aporia, Derrida illustrates how the immediacy and urgency that characterise justice, impedes deliberative practice. Because the demand for justice is always immediate, it obstructs the horizon of knowledge, which is 'both the opening and the limit that defines either an infinite progress or a waiting and awaiting'.³¹ The infinite demand for justice does not allow

24 Ibid.

25 Litowitz (note 13 above) 332.

26 Derrida (note 6 above) 252.

27 Ibid.

28 Litowitz (note 13 above) 332.

29 Derrida (note 6 above) 253.

30 Ibid.

31 Ibid 255.

for a subsequent engagement with ‘the infinite information and unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it’.³² By making a decision, we bring an untimely halt to an attempt at rendering bottomless justice to the Other, which is why justice is always ‘to come’: ‘[Justice] remains *by coming*, it *has* to come, it *is* to come ... it deploys the very dimension of events irreducibly to come’.³³

These three interrelated aporias demonstrate why law is inaccessible to justice: trying to deposit an incalculable duty (justice) into calculable rules (law) is like trying to fit a square into a circle. But what is the reciprocity between law and justice? Whilst Derrida explicitly distinguishes law from justice, he does not place the two at counter-ends of a binary dualism. Derrida illustrates the reciprocal action through the notion of ‘undeconstructability’. Both the deconstructability of law and the undeconstructibility of justice, makes deconstruction attainable. Deconstruction therefore subsists in the space that divides law, which as a construct will always be deconstructable, from the undeconstructability of justice. We thus see a symbiotic relationship ultimately ending in mutual reinforcement – ‘Justice undermines law and law undermines justice’.³⁴ We also see a clear nexus between justice and deconstruction, in fact Derrida goes as far as saying ‘*deconstruction is justice*’.³⁵ For the purposes of this article I will not further examine this statement on the several levels needed to do justice to Derrida’s thought. My focus is rather on problematising and destabilising a legal system that’s claim to authority rests on nothing but its own functioning and it is through deconstruction that we expose and resist the faults imbedded in the system.

III RECONCEIVING DECONSTRUCTION AS THE *PHILOSOPHY OF THE LIMIT*

By renaming deconstruction the *philosophy of the limit* Cornell, ‘driven by an ethical desire to enact the ethical relation’, allows us to better comprehend the philosophical foundations of deconstruction and its implications for a legal system.³⁶ The philosophy of the limit refocuses our attention on the limits that hinder philosophical understanding and subsequently highlights two aspects of deconstructive theory that are vital to comprehending philosophical perspectives on legal problems. Firstly, deconstruction seen as the *philosophy of the limit* reserves the possibility of ethical engagement within deconstructive thought. By juxtaposing a view of deconstruction as an exercise ultimately generating an ‘unreconstructable litter’ with a notion of deconstruction as a philosophy that limits, Cornell illustrates that deconstructive tradition allows for the discovery and preservation of standards for ethical conduct and the capacity of deconstruction to advance the ethical relation is thus emphasised.

32 Ibid.

33 Ibid 256.

34 M Valverde ‘Derrida’s Justice and Foucault’s Freedom: Ethics, History, and Social Movements’ (1999) 24 *Law and Social Inquiry* 655, 659.

35 Derrida (note 6 above) 243.

36 Cornell (note 14 above).

The focus of Cornell's project is rather on 'expos(ing) the quasi-transcendental conditions that establish any system, including a legal system as a system'.³⁷ This shift in focus emphasises a '*beyond*' intrinsic to any system, that which is excluded from the system.

Secondly, deconstruction seen as a limit captures the ineptness that inevitably accompanies any attempt to grasp meaning. In critiquing Hegelian idealism, Charles Pierce employs the notion of *secondness* to indicate that we will always be left with a residue after an attempt to conceptualise, something that 'resists', because we can never interpret reality in its totality.³⁸ This restriction to a system of meaning emphasises the subjective nature of reality and impinges on our relationship to the Other, as it 'demands our attention to what is outside ourselves and our representational schema'.³⁹ Understanding the sphere of *secondness* is thus foundational to any attempt at advancing the ethical relation to the Other.

This attempt to heed the call of the Other should however not be seen as an effort to incorporate that which is other into the system. There will always be an Other to the system, as the functioning of *différance*⁴⁰ impedes any system from integrating its other into the system. A nonviolative relation to the Other is not founded in forced unity, but in the recognition of the Other's particularity and ensuing difference. Paradoxically, an instance of sameness emanates from this very recognition. Amidst this ethical asymmetry, we find phenomenological symmetry by recognising that the Other, also being an 'I' just as I am an 'I', is simultaneously different from me and the same as me.⁴¹ Unity stems from our singularity and this interplay between ethical asymmetry and phenomenological symmetry is pivotal to heeding the call of the Other. As Derrida explains, 'without the phenomenon of other as other no respect would be possible. The phenomenon of respect supposes the respect of phenomenality. And ethics, phenomenology'.⁴²

With this interpretation of the ethical relation, we firstly see another ethical dimension to Derrida's deconstructive thought. Derrida attempts to reserve the prospect of a nonviolative relationship by showing that the Other should be regarded as the 'unsayable', as 'one cannot speak of the ethical as the beyond to metaphysics other than in the language of ontology'.⁴³ Secondly, Derrida's insight requires that we acknowledge the ethical relation as an aspiration and not a possibility, as 'the possibility of the ethical lies in its impossibility; otherwise, the ethical would be reduced to the actual, to the totality of what

37 Ibid 1.

38 Ibid.

39 D Cornell 'Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation' (1988) 136 *Univ of Pennsylvania LR* 1135, 1198.

40 Cornell describes *différance* as 'the "truth" that "being" is presented in time and, therefore, there can be no all encompassing ontology of the "here" and "now"'. D Cornell *Beyond Accommodation* (1991) 108.

41 Cornell (note 14 above) 55.

42 J Derrida *Signéponge* (1984) 121.

43 Cornell (note 14 above) 83.

is'.⁴⁴ Deconstruction protects the ethical relation from being reduced to 'the mere Other of Ontology', an appropriation that denies the otherness of the other. Deconstruction then exposes the limit to the achievable. It is, as Cornell reconceptualises the practice, a philosophy that limits. This limit of impossibility, as with the impossibility of justice, does however not relieve us from our limitless responsibility:

There is [always] disruption of totality. The Other cannot be completely eliminated in any given representational system. The Other survives. In this sense, the ethical is a necessity as well as an impossibility – a necessity in that the remain(s) cannot totally be evaded even if they need not be heeded. The Other remain(s). The call to responsibility is prior to our subjectivity, prior to our choice. We may not answer, but we are not free to simply silence the call.⁴⁵

In answering the question whether deconstruction enacts the ethical relation, Cornell thus reminds us that we ultimately enact the ethical relation through aspiration and not actualisation.⁴⁶

IV VEGANISM AND DECONSTRUCTION

In *Comment ne pas manger – Deconstruction and Humanism*,⁴⁷ David Wood formulates various arguments to substantiate his assertion that, despite an attempt to address and advance the ethical relation to 'the animal' through the deconstruction of the (human) subject, Derrida's thought is haunted by a humanist predilection. For Wood, Derrida's critique of Heideggerian thought as constrained by 'a certain anthropocentric or even humanist teleology'⁴⁸ is ironic and paradoxical because Derrida himself fails to recognise and advance the relation between (the) deconstruction (of the human subject) and vegetarianism.

Whilst I agree with Wood that there is deconstructive capacity inherent to our resistance to nonhuman sacrifice through physical consumption, I do not subscribe to the notion that we can oppose anthropocentric configurations by merely renouncing the consumption of flesh. Rather than commensurating deconstruction with vegetarianism, what is needed is a deconstruction of vegetarianism. My primary aspiration here is to expose the undercurrents of sacrifice and anthropocentrism that underlie vegetarianism and to illustrate why deconstruction, if recognised as a vehicle through which we respond to our ethical responsibility to (nonhuman) otherness, should rather be identified with veganism.

It needs to be noted from the onset that the scheme of domination that has come to be synonymous with the (human) subject spans the entire spectrum of our existence, with various institutions maintaining this ideology of

44 Ibid.

45 Ibid 84.

46 Ibid.

47 D Wood 'Comment ne pas manger – Deconstruction and Humanism' in H Steeves (ed) *Animal Others: On ethics, Ontology and Animal Life* (1999) 15.

48 J Derrida *Of Spirit: Heidegger and the Question* (1989) 55.

sacrifice. Derrida's objective of deconstructing the (human) subject as a being that sacrifices is obvious. One of the nuances to Derrida's deconstructive undertaking that might not be so apparent, is his concomitant exposure of the role of law as facilitator of this sacrificial behaviour. Our anthropocentric cultural constructs cannot be separated from the (legal) system that allows for the 'non-criminal putting-to-death' of animals, as the law (being a human construct) will reproduce and perpetuate prevailing social structures. To this extent, any rigid separation between our aspiration towards 'formal' justice in the public sphere and 'informal' justice in the sphere of socio-ethical relations will ultimately prove to be fictitious, as sustainable transformation in the one sphere is dependent on transformation in the other.⁴⁹ As any destabilisation of species hierarchy will thus inevitably be observed by the law, our resistance of anthropocentric social configurations also exposes and resists the anthropocentric character of the law. This reciprocity between and challenge to the private/public division needs to be borne in mind as I advance veganism as a practice that deconstructs anthropocentrism. But let me first sketch the background to Wood's critique on Derrida.

(a) The (human) subject and sacrifice

In an interview with Jean-Luc Nancy entitled "*Eating Well*", or the Calculation of the Subject⁵⁰ Derrida deconstructs the notion of subjectivity by engaging with the question 'Who comes after the subject?'. Derrida destabilises the question from the onset and broadens the scope of his deconstructive undertaking (to include 'the animal') by alluding to the segregative nature of the pronoun 'who' as facilitator of a problematic 'human'/'animal' dualism. Despite Nancy's effort to delineate the 'who' in his question as a sphere transcending subjectivity, as a 'place "of the subject" that appears precisely through deconstruction itself',⁵¹ Derrida remains adamant that the 'substitut[ion] [of] a very indeterminate "who" for a "subject" overburdened with metaphysical determinations is perhaps not enough to bring about any decisive displacement' of subjectivity.⁵²

Derrida then goes on to draw a nexus between the 'who' and the notion of 'sacrifice' and it is here where Derrida, according to Wood, 'parts company with vegetarianism'. Derrida starts off by saying:

I would still try to link the question of the 'who' to the question of 'sacrifice'. The conjunction of 'who' and 'sacrifice' not only recalls the concept of the subject as phallogocentric structure, at least according to its dominant *schema*: one day I hope to demonstrate that this *schema* implies carnivorous virility.⁵³

49 Cornell (note 14 above) 174.

50 J Derrida & J-L Nancy "'Eating well", or the Calculation of the Subject: An Interview with Jaques Derrida' in E Cadava (ed) *Who Comes After the Subject* (1991) 96.

51 Ibid 98.

52 Ibid 100.

53 Ibid 113.

Derrida depicts this schema of domination in ‘the whole canonised or hegemonic discourse of Western metaphysics or religions’,⁵⁴ which he calls carnophallogocentrism, as:

[a] matter of discerning a place left open, in the very structure of these discourses (which are also ‘cultures’) for a noncriminal putting to death. Such are the executions of ingestion, incorporation, or introjections of the corpse. An operation as real as it is symbolic when the corpse is ‘animal’.⁵⁵

Wood focuses on the difference between symbolic and actual sacrifice and argues that Derrida ‘interiorize[s] the actual eating of animals inside the symbolic eating of anything by anyone’, thereby convoluting this distinction in an attempt to amalgamate the two manifestations of sacrifice.⁵⁶ As a degree of symbolic sacrifice seems inevitable to Wood, he argues that this superficial amalgamation allows us to simultaneously accept this fate and congruently evade our ethical responsibility to take steps that could eradicate actual sacrifice. Wood argues as follows:

First [Derrida] assimilates – there is no other word for it – real and symbolic sacrifice so that real sacrifice (killing and eating flesh) becomes an instance of symbolic sacrifice. With this change of focus, the question of eating (well) can be generalized in such a way as to leave open the question of real or symbolic sacrifice. And to the extent that in this culture sacrifice in the broad (symbolic sense) seems unavoidable, there would seem to be little motivation for practical transformations of our engagement in sacrificial behaviour.⁵⁷

The practical transformation that Wood refers to is of course the ethically motivated espousal of a vegetarian existence. Vegetarianism, Wood argues, can be seen as a deconstructive practise insofar as it ‘can become a finite symbolic substitute for an unlimited and undelimitable responsibility – the renegotiation of our Being-toward-other-animals’.⁵⁸ Wood’s assertion is thus that vegetarianism circumvents real sacrifice and, as the symbolic manifestations of sacrifice are inescapable, vegetarianism thus provides an adequate pragmatic foundation for advancing the ethical relation to the nonhuman Other. And this is where his argument becomes problematic. It is a dangerous and violent appropriation to place only the actual killing of a nonhuman animal in the register of real sacrifice and all other forms in the register of symbolic and consequently unavoidable sacrifice. Here, I would like to comment on Wood’s interpretation of Derrida’s exposition of the inevitability of symbolic sacrifice and his assertion that vegetarianism proliferates resistance to anthropocentric schemata of domination.

(b) Symbolic sacrifice as secondness

In his interview with Nancy, Derrida argues that a sort of symbolic violence is a general inevitability of life and that ‘vegetarians, too, partake of animals,

54 Ibid 112.

55 Ibid.

56 Wood (note 47 above) 30.

57 Ibid 31.

58 Ibid 32.

even men. They practice a different mode of denegation'.⁵⁹ Derrida has elsewhere argued that 'a certain cannibalism remains unsurpassable' and that he consequently does not believe in 'absolute vegetarianism':

[V]egetarians, like everyone else, can also incorporate, symbolically, something living, something of flesh and blood – of man and of God.⁶⁰

These assertions, I believe, are consistent with Derrida's argument that the ethical relation is an impossible possibility, impossible because we cannot condense the ethical to the actual and thereby realise the relation. As is the case with (the impossibility of) justice, this does however not relieve us of our ethical responsibility to strive towards an ethical relation to the nonhuman Other. Clearly, the inevitable violence and denegation that Derrida speaks of does not refer to the actual killing of animals for consumption, or to any form of violence that can be avoided for that matter.

The inevitability lies in the impossible, that which always resists our attempt to heed the call of the Other. Symbolic sacrifice, therefore, dwells in the sphere of secondness; it is the manifestations of sacrifice that resists concretisation, encapsulation and eradication. This form of sacrifice cannot be concretised because there will always be a surplus to our system of meaning that resists an attempt to interpretively harmonise any 'sign'⁶¹ with the suffering. This manifestation of sacrifice cannot be semeiotically encapsulated either because there is no enclosed circle in which interpretation of the sacrifice takes place, 'the sign itself always points us to another sign beyond the repetition implicit in self-reference'.⁶² This sacrifice is analogous to what Cornell refers to as 'the irreducible exteriority of suffering'; neither past nor future instances of this manifestation of sacrifice can be 'interpreted away'.⁶³ Symbolic sacrifice is the residue that evades internment by any system of signs. With this in mind, let me now turn to the problematical aspects of Wood's assertion that vegetarianism deconstructs humanist predilections.

(c) The anthropocentric predilection of vegetarianism

The argument that vegetarianism is a form of deconstruction that resists actual sacrifice and anthropocentric configurations falls short on two levels. Firstly, we need to clearly delineate the disparity between symbolic and actual sacrifice. If we are to subscribe to my argument that symbolic sacrifice stems from inevitable violation and real sacrifice from violative conduct that can be avoided, we will see why vegetarianism does not circumvent real sacrifice.

59 Derrida & Nancy (note 50 above) 114–5.

60 J Derrida & E Roudinesco *For what Tomorrow* (2004) 67–8.

61 For Pierce, a 'sign' is something that carries extended meaning, something through which we 'know something more'. See T Zick 'Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography' (2004) 45 *William and Mary LR* 2261, 2330.

62 Cornell (note 39 above) 1198.

63 Ibid 1170.

For the animals that produce the by-products that form part of a vegetarian diet, life is anything but natural and nonviolative. After being debeaked to avoid the cannibalistic behaviour that would otherwise ensue from the overcrowded conditions, layer hens are confined to battery cages so small that they are denied even the most basic desire to spread their wings. Layer hens endure these circumstances until they are no longer physically able to produce enough eggs to outweigh the costs of keeping them alive. They are then usually sold to low-income households for home slaughter or killed.⁶⁴ Sadly, the reality that accompanies the dairy that we consume is not any rosier. Predestined for a lifetime of pregnancies and milking, cows are fed an artificially manipulated diet and hormones that promote lactation, resulting in ten times the milk production of a cow under natural conditions. After an abnormally short life of three to five years, the cows are sent to the slaughterhouse where they are killed and processed into meat for consumption.⁶⁵ It is hard to accept Wood's implicit argument that the sacrifice typifying these animals' lives are merely symbolic. The sacrifice is very real and can, more importantly, be avoided by adopting a vegan lifestyle.

There are some that may argue that the lives of these animals need not be so violative, that we can circumvent these harsh conditions by rearing animals in 'free-range' environments and implementing welfare strategies to better their overall life conditions. It is not my goal to address the false promises and pragmatic impracticalities of these 'free-range' conditions and welfarist approaches.⁶⁶ I'd rather like to demonstrate that, even if we accept the possibility of raising and utilising these animals in a way that is completely natural and nonviolative, vegetarianism as a form of deconstruction will still fail to resist anthropocentric configurations.

Secondly, vegetarianism is underscored by the notion that human beings have the right to freely take and use the by-products of nonhuman animals as we see fit. Granted that nonhuman animals are not directly killed for this purpose, they still occupy a dimension as sacrificial beings; they are seen as means to a (human) end. This anthropocentric approach places man in the position of the dominant subject with the nonhuman animal being denounced to subservient Other. No degree of 'humane' treatment or loving affection can eliminate this anthropocentrism inherent to vegetarianism. The slave working under reasonable or even plush conditions is still exactly that: a slave, an individual having no other alternative than being servant to her master. The argument that vegetarianism can deconstruct and subsequently resist our anthropocentric way of dealing with and thinking about other animals is consequently internally paradoxical. It is true that:

64 M Pickover *Animal Rights in South Africa* (2005) 153.

65 Ibid 149.

66 For more on 'free-range' conditions see J Safran Foer *Eating Animals* (2009) 61.

carophallogocentrism is not a dispensation of Being toward which resistance is futile; it is a mutually reinforcing network of powers, schemata of domination, and investments that has to reproduce itself to stay in existence.⁶⁷

These schemata of domination can and should furthermore be resisted, but by attempting to resist one anthropocentric institution with another one, we run the risk of perpetuating the system we seek to eradicate.

V CONCLUSION

This article should by no means be misconstrued as a critique of animal welfarism or vegetarianism as such. It should go without saying that vegetarianism is indeed a more ethical way of being than a carnivorous existence, resisting (if nothing else) the killing of so many of our fellow earthlings. By exposing the anthropocentric values woven into the supposedly unprejudiced fabric that constitute vegetarianism, I have merely tried to argue that it would be philosophically inconsistent to associate vegetarianism with the deconstruction of carophallogocentrism as there can fundamentally be no ensuing displacement of the (human) subject as dominant figure.

My primary aspiration was to advance veganism as a way of being that allows us to move towards the enactment of the ethical relation to the nonhuman Other. To this end, I started off by examining the interaction between law, justice and deconstruction. Through Derrida's conceptualisation of justice as a state of puzzlement that cannot be resolved, we saw that justice serves as a limit to any system of law. The second part of this article was devoted to an engagement with Cornell's project of reconceiving deconstruction as *the philosophy of the limit*, a project that exposed the ethical force behind deconstruction and protected the ethical relation from being degenerated into symmetry and the Other being denied her otherness. The philosophy of the limit also showed us that the ethical relation can never be realised, it remains an impossible possibility. The question then, is what mode of being will enable me to foster a nonviolative relationship to the (nonhuman) Other? In answering this question, I exposed the inherent anthropocentric and sacrificial character of vegetarianism and advanced veganism as a way of being that allows us to criticise and resist subjugation of the (nonhuman) Other.

Ethical philosophy, it seems, fulfils an important critical function. It exposes ill-conceived formulations and schematisations and depicts ensuing limitations. No one can claim a just existence or actualise the ethical relation to the nonhuman Other, not even the vegan. Justice (and the realisation of the ethical relation) might, sadly, indeed only come in the next world. But it simultaneously also poses a test to our humanity, daring us to engage in a battle that is both a necessity and an impossibility.

⁶⁷ Wood (note 47 above) 33.

Animal rights theory, animal welfarism and the 'new welfarist' amalgamation: A critical perspective

*Jan-Harm de Villiers**

Abstract

Adherents of the 'new welfarist' approach advocate welfare reforms as essential short-term steps *en route* to the ultimate ideal of animal rights. A critical engagement with the ideological underpinnings of animal welfare theory and animal rights theory illustrates the contrasting moral spaces that the animal occupies in these theories and that the 'new welfarist' approach is philosophically unsound in assuming that these approaches are ideologically compatible. Karin van Marle's 'jurisprudence of slowness' and Jacques Derrida's exposition of the sacrificial logic underlying Western culture's exclusion of animals from the 'thou shalt not kill' proscription provides a framework within which to illustrate and engage with the ideological purview that separates these theories.

1 Introduction

Humans' relationship with other animals has proven to be a complex, confusing and disconcerting one, often exposing the capacity to arbitrarily discriminate, marginalise and enslave. Through centuries of denouncing animals as objects to be used as we see fit, we have normalised the torture, exploitation and killing of our fellow earthlings. We embody a set of assumptions wherein animals occupy a space as sacrificial beings unworthy of moral concern, making our actions seem rational. This exclusionary logic is maintained by a complex network of relations and traditions. Jacques Derrida uses the term 'carnophallogocentrism' to illustrate the complexity of the various axes that configure the sacrificial structure characterising 'the (human) subject' and the hegemony that typifies our interaction with animals. He delineates carnophallogocentrism as:

*BComm (Law) (Cum Laude) LLB (Cum Laude) LLM (Jurisprudence) (Cum Laude). Senior Lecturer, Department of Jurisprudence, University of South Africa. I gratefully acknowledge the financial assistance of the College of Law Research and Innovation Committee, University of South Africa.

The whole canonized or hegemonic discourse of Western metaphysics or religions, including the most original forms that this discourse might assume today ... [being discourse that is] a matter of discerning a place left open, in the very structure of these discourses (which are also 'cultures') for a noncriminal putting to death. Such are the executions of ingestion, incorporation, or introjections of the corpse. An operation as real as it is symbolic when the corpse is 'animal'.¹

A deconstruction of carnophallogocentrism, for Derrida, fundamentally necessitates an interrogation of our (anthropocentric) conceptualisation of animality and the ethical, political and legal consequences thereof. Whilst the question of animality 'is difficult and enigmatic in itself, it also represents the limit upon which all the great questions are formed and determined, as well as all the concepts that attempt to delimit what is "proper to man", the essence and future of humanity, ethics, politics, law, "human rights", "crimes against humanity", "genocide", etc'.² Derrida engages with these (de)limitations by questioning the way in which the human-animal distinction is drawn in Western metaphysical discourse as an oppositional cut. By juxtaposing the human (subject) and animal (object), the differences between humans and animals are conceptualised as a contradiction and our hegemony is maintained. I have previously argued that we need a deconstruction and ensuing displacement of the human subject as phallogocentric structure and patriarchal centre of beings and that we need to embrace a mode of being that allows us to promote an ethical relation to the animal Other. To this end, I explored the possibility of justice, specifically in relation to the animal, and advanced veganism as a form of deconstruction and one ethical way of being that allows us to criticise and resist anthropocentric configurations that maintain and perpetuate subjugation of the animal Other.³

Destabilisation of the human-animal oppositional distinction however not only challenges the anthropocentric order in which the human claims a position as patriarchal centre of beings, but opens up a space for a further deconstruction of traditions and institutions that are founded on, and maintain such distinction, like the *de jure* legitimisation of animal exploitation and sacrifice. The law has always facilitated and legitimised a culture of animal sacrifice, excluding animals from the status of being full subjects of the law and denying them basic legal protection. The anthropocentric constraints that limit and shape traditional legal discourse and the way in which the concept of legal subjectivity has historically been constituted, raises several important issues with regard to the question whether

¹Derrida and Nancy "'Eating well" or the calculation of the subject: An interview with Jacques Derrida' (trans Connor and Ronell) in Cadava, Connor and Nancy (eds) *Who comes after the subject?* (1991) 112.

²Derrida and Roudinesco *For what tomorrow ... A dialogue* (trans Fort) (2001) 63.

³See De Villiers 'Towards an ethical relation to the nonhuman Other: Deconstruction, veganism and the law' (2012) *SAJHR* 18.

legal institutions can (at all) be reformed in order to embrace animals as full legal subjects. Issues pertaining to juridical images of personality or personhood, reproduction and representation where the law marks genealogies of different kinds of being, the 'lawful' space of the animal and the function of law as an instrument of social change and institution all warrant serious critical engagement.⁴

My focus in this article is a more modest one: I will consider law's relation to animal subjugation, both as facilitator of animal sacrifice and as possible enabler of animal liberation, by philosophically examining the relationship between the two most prominent theories intended to address the plight of the animal. I will illustrate how the animal advocacy movement has since its genesis been broadly divided into two camps, one advocating for the 'humane' treatment of animals and the other for the complete abolition of human (ab)use of animals. The distinction and interaction between these approaches, respectively known as animal welfarism and the rights based approach, has been muddled in recent years by intellectual and practical efforts. This has led to the emergence of 'new welfarism', an approach that sees welfarist reforms as essential short term steps *en route* to the ultimate ideal of animal rights. My main aim in this article is to explore the ideological foundations underlying animal welfare and animal rights theory and to illustrate that these approaches are based on contrasting and irreconcilable ideologies, rendering an amalgamation of the approaches highly problematic and detrimental to the ideal of animal liberation.

To the extent that the (present) attempt at synthesising a welfarist- and rights based approach finds its point of departure in a (past) conflict period, I am of the opinion that an engagement with the historical-ideological trajectory of the animal defence movement is vital to understanding and thinking about the problem of animal oppression that we face. History, as Douzinas and Gearey aptly note whilst commenting on the value of slow reflection, 'is not the nightmare from which we must awake, but the process which we must slow down and understand'.⁵ I will accordingly start off by briefly sketching the history of the animal advocacy movement and highlighting the developments that facilitated the divergence of the welfare- and rights based approaches. I will then examine the rationale and assumptions underlying the new welfarist position and argue that this approach constitutes an uncritical 'privileging of the present' that is ultimately

⁴For a comprehensive engagement with these issues and other related themes, see Otomo and Mussawir (eds) *Law and the question of the animal: A critical jurisprudence* (2013); Haldar 'Law and animalities' (2009) *Law and Humanities* 71; Haldar 'Zoologian jurisprudence' (2011) *International Journal for the Semiotics of Law* 291; Braverman *Zooland: The institution of captivity* (2012); Braverman 'Animal mobilities: The regulation of animal movement in the American city' (2013) *Humanimalia* 104.

⁵Douzinas and Geary *A Critical jurisprudence: The political philosophy of justice* (2005) 255.

to the detriment of the ideal that animal rightists strive to realise. I will draw on Karin van Marle's jurisprudence of slowness to argue that we need to create a (moment of) thinking that is able to address the plight of the animal and meaningfully reflect on the way in which we utilise the law to facilitate the transformation towards animal liberation. By following Van Marle's deconstructive approach, which she connects with 'slowness, lingering and greater attention',⁶ we can reflect on the fundamental ideological discrepancy between the welfare- and rights based approaches that makes a theoretical and strategic amalgamation highly problematic. In order to illustrate this ideological dissonance I will engage with Derrida's thesis that humans maintain a conceptual human-animal divide by failing to embrace animals in the proscription 'thou shalt not kill' and examining how this prohibition translates into the respective theories.

2 The history of the animal advocacy movement

The history of a united attempt at addressing the interests of animals in the Western world can be dated back to the eighteenth century. After a sixty year period that saw several works critiquing the widespread brutality towards animals, the 1800s subsequently saw a united effort take shape in England to address the plight of animals.⁷ These literary works *inter alia* denounced sadistic practices like cock throwing, critiqued the cruel treatment of horses used by carters and advanced the notion that the murderous behaviour of criminals stems from society's failure to suppress all forms of cruelty.⁸ Whilst these works did not enjoy mainstream readership and were generally regarded as 'super sensitive or even eccentric', they played an important role in gradually sensitising the general public to change: 'the writers were, so to speak, the artillery bombarding a position from a reasonably safe distance; the brunt of the fighting had to be done by the Members of Parliament'.⁹

This struggle began in 1800 when Sir W Pulteney introduced a bill in the English Parliament that was aimed at the prevention of bull-baiting, a cruel form of 'entertainment' that had steadily decreased in popularity amongst the upper classes in the years following the reign of Queen Elizabeth. Despite the decreasing popularity of bull baiting, the majority of the Parliament found that the bill interfered with the amusement of the people and opposed the bill.¹⁰ Led by Lord Thomas Erskine, a more detailed and inclusive bill aimed at prohibiting cruelty to domestic animals was introduced nine years later and passed in the

⁶Van Marle 'Law's time, particularity and slowness' (2003) *SAJHR* 239 at 245.

⁷Silverstein *Unleashing rights: Law, meaning and the animal rights movement* (1996) 30.

⁸Niven *History of the humane movement* (1967) 53-54.

⁹*Id* 55.

¹⁰*Id* 57-58.

House of Lords before it was rejected in the House of Commons. A new era of benevolence had to wait until 1822 when we saw the first instance of a legislature regulating and criminalising cruelty to an animal with the adoption of the Ill Treatment of Cattle (or Martin's) Act.¹¹

During this time, structured efforts began to grow outside the realm of the legislature and in 1824 Richard Martin and other English humanitarians organised the Society for the Prevention of Cruelty to Animals (SPCA).¹² The SPCA is regarded as the first animal protection organisation and is credited with laying the foundations for what would eventually become the animal welfare movement.¹³ The SPCA struggled in the early years after its formation and would only gain noteworthy momentum in 1840 when, after becoming Queen, Victoria ordered the organisation to add the prefix 'royal' to its name. This gave the organisation great leverage and enabled the RSPCA to establish additional associations in Ireland, Germany, Austria, Belgium and Holland.¹⁴

Whilst the welfare movement in England initially focused exclusively on cruelty to domesticated animals, a new branch of animal protection was born in the 1860s when the antivivisection movement formed.¹⁵ With this, the focus expanded to include animals used in scientific experimentation. The formation of the antivivisection movement would bring about the first split in the larger animal advocacy movement. Whilst some proponents of the movement sought to minimise the suffering imposed on animals used in experimentation, others advocated the complete abolition of vivisection. These ideological inconsistencies divided the animal advocacy movement into the antivivisection camp and the welfare camp.¹⁶ Notwithstanding these ruptures, the new branch of animal advocacy achieved notable success. The British Cruelty to Animals Act passed in 1976, securing a foundation for the regulation of animal use in laboratories.¹⁷

The animal welfare movement soon moved to the United States, a country that had tremendous world influence. After retiring as the secretary of the American legation to Russia, Henry Bergh returned to the United States with the ambition of introducing the idea of animal protection and organising an American equivalent of the RSPCA.¹⁸ Supported by humanitarians like Abraham Lincoln, Bergh's efforts lead to the first anticruelty statute being passed in the State of New York in 1866. A few days before the act was passed, parliament also

¹¹Nash *The rights of nature: A history of environmental ethics* (1989) 25.

¹²*Ibid.*

¹³Silverstein (n 7) 31.

¹⁴Carson *Men, beasts and gods: A history of cruelty and kindness to animals* (1972) 54.

¹⁵Silverstein (n 7) 31.

¹⁶*Ibid.*

¹⁷Nash (n 11) 26.

¹⁸*Id* 46.

chartered a humane society. The American Society for the Prevention of Cruelty to Animals, headed by Bergh, was the first of its kind in the Western hemisphere. Enjoying delegated police powers, the ASPCA was able to prosecute numerous incidents of animal cruelty.¹⁹

2.1 *The shift from welfarism to rights*

After the death of Bergh, the American humane movement gradually lapsed into 'a dog and cat concern'. Whilst several factors contributed to this shift, the most prominent factors included the location of the welfare organisations in the cities, where the majority of animals were domesticated animals, and limited city funds being allocated to address doorstep issues like stray animals.²⁰

The World Wars and worldwide industrialisation amplified this shift and animal welfare issues were gradually pushed to the periphery. Consequently, the welfare movement lost momentum during the first half of the century.²¹ The 1960s brought a steady revival of animal welfare concerns, but it would not be until the 1970s that the intellectual efforts of scholars like Peter Singer would revitalise the movement and initiate a shift towards rights talk. It is important to note that, whilst Singer's approach to animal liberation is grounded in utilitarian theory and not rights theory, his work has nevertheless provided a philosophical foundation for animal rights theorists and played a pivotal role in the creation of many animal rights organisations, including People for the Ethical Treatment of Animals (PETA), the world's largest animal rights organisation.²² The re-born movement rapidly gained momentum during the 1980s and established popularity as the 'animal rights movement', advocating the philosophy that animals should be included in the community of rights-holders.²³

The emergence of the rights movement was accompanied by inevitable tension and conflict with the animal welfare movement, whose approach to animal advocacy differed in 'focus, philosophy, language and tactics'.²⁴ By now, the welfare movement focussed almost exclusively on companion animals and turned a blind eye to the plight of farm animals and animals used in experimentation. As Helena Silverstein notes, 'it was not uncommon for board members of humane organisations to support hunting and meat consumption. Moreover, welfare groups held that treatment of animals should be guided by compassion: animals deserve *some* protection, deserve to be treated humanely, but do not have

¹⁹Carson (n 14) 96.

²⁰Niven (n 8) 109.

²¹Silverstein (n 7) 32.

²²*Ibid.*

²³*Ibid.*

²⁴*Id* 33.

rights'.²⁵ The focus of welfarists has always been one of reform. Animal welfarists seek the implementation of legislation that improves the lives of the animals that we utilise and not a basic shift in the way we see and relate to animals.

Conversely the animal rights movement rejects human utilisation of animals, irrespective of the degree of 'humaneness' accompanying the use. Animal rightists contend that a desire for meat consumption, leather products, hunting or entertainment cannot validate or justify the emanating suffering imposed on animals and therefore seek a radical shift in the way we relate to animals. For the rightists, this shift will not stem from mere compassion but requires the extension of rights to animals.²⁶

Whilst the chasm between the welfare camp and the rights camp remains, recent years have seen the gap shrink and in some cases even disappear. The reason for this narrowing, as we will see, has been both practical and theoretical. Some welfare societies have started to expand their focus to the plight of animals used in food production and experimentation and some rightists believe that welfare strategies should be employed *en route* to the extension of rights to animals. Some theorists see (ideological) common ground between these two approaches and argue that there can consequently be no meaningful separation.

The consequence of this is that 'animal rights' has become a generic term that refers to a wide range of views and approaches to the protection of animals. Tom Beauchamp, for instance, sees the distinction between the two camps as 'a crude tool for dividing up the world of protective support for animals' and rejects the use of 'animal rights' as a polarising term that suggests that there is 'inherent conflict or an inseparable gulf between "rightists" and "welfarists"'.²⁷ Rather, he argues that 'the many theories that afford protection to animals are better analysed as a spectrum of accounts spread across a continuum that ranges from, on one end, a minimal set of human obligations to animals (eg, "do not treat animals cruelly" and "do not slaughter inhumanely") to, on the other end, a maximal and prohibitionist set of human obligations to animals (eg, "do not kill animals" and "do not utilise animals in laboratories")'.²⁸ These hybrid approaches maintain a new welfarist stance that supposes the possibility of mutually reinforcing reciprocity between welfarism and rights theory.

In the remainder of this article I will argue that this continuum account of animal advocacy theories and the hybrid approach of new welfarism are theoretically unsound and counterproductive. The welfare- and rights based approaches rest on fundamentally incompatible views on the place of animals in

²⁵ *Ibid* (own emphasis).

²⁶ See Regan *The case for animal rights* 2 ed (2004).

²⁷ Beauchamp 'Rights theory and animal rights' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 200-201.

²⁸ *Id* 201.

our moral community and are therefore indeed, in my opinion, separated by an ideological gulf. This gulf, I will furthermore argue, needs to be maintained if we are to circumvent some of the violent and reductive aspects of the law relating to animals and ultimately facilitate the much needed shift in the way we view animals.

3 The amalgamation of welfarism and rights

The new welfare approach regards adherence to welfare measures that aim to address the suffering of animals as important incremental steps towards the ultimate goal of animal rights, animal welfare is seen as the short term means towards the long term goal of animal rights. As Gary Francione explains, 'it appears as though the new welfarists believe that some causal connection exists between cleaner cages today and empty cages tomorrow, or between more "humane" slaughter practices today and no slaughtering tomorrow'.²⁹ The consequence of this approach is that the 'animal rights' movement 'temporarily' pursues an ideological and practical agenda that concurs with the approach followed by those who condone the utility status of animals.³⁰

The rationale behind the new welfarist approach is twofold. Firstly, welfarist reforms are seen as bringing about positive change to the conditions in which animals live and die by reducing their suffering and it is believed that these types of improvements can incrementally lead to the eradication of all animal (ab)use. Secondly, the extension of rights to animals is seen as a 'utopian' ideal that can only (possibly) be realised in the long-term. Consequently, the new welfarists argue, we need concrete normative guidance in the form of welfare policies to inform the way we interact with animals on a day to day basis *en route* to the ideal of animal liberation.³¹

As Francione argues, a certain confusion regarding the micro and macro levels of moral theory preoccupies the reasoning of the new welfarists.³² Ingrid Newkirk, co-founder and current president of PETA, sees welfare reform as something that 'can only bring us closer to our ultimate goal' of animal rights.³³ Newkirk uses the example of a statute requiring that a thirsty cow awaiting slaughter be provided with water to illustrate her support of welfare legislation. Newkirk criticises animal rights advocates who refused to support such a statute

²⁹ Francione 'Animal rights and animal welfare' (1996) *Rutgers LR* 397 at 399.

³⁰ *Ibid.*

³¹ *Id* 399-400. Animal rights theorists Steven Wise and Susan Hankin also argue in favour of an incremental approach to ultimately secure rights for animals; see Wise *Drawing the line: Science and the case for animal rights* (2002); Hankin 'Not a living room sofa: Changing the legal status of companion animals' 2007 *Rutgers Journal of Law and Public Policy* 314.

³² Francione (n 29) 422-426.

³³ *Id* 423.

on the basis that it maintains the utility status of animals, arguing that she 'cannot imagine how those vegetarians with clean hands, who declined to help, could explain their politics to the poor cows, sitting in the dust with parched throats'.³⁴

I have little doubt that most people, and I include meat eaters as well as ethical vegetarians and vegans, will feel a moral imperative to give water to a thirsty cow awaiting slaughter and will act on this belief when having the opportunity to do so. The point is, of course, that it is not a matter of *either* supporting welfare reform *or* turning a blind eye to the cow's suffering. It is possible to feel morally obligated to minimise her suffering without supporting an animal welfare stance merely because it also strives to lessen suffering. In fact, there is good reason to oppose welfarism if you believe that it perpetuates the institutionalisation of animal exploitation that lies at the very core of the suffering that the cow awaiting her slaughter has to endure.³⁵

Francione uses a hypothetical scenario to forcefully deconstruct Newkirk's argument and expose the interconnectedness between the suffering of exploited animals, which presents only one interest that warrants consideration and protection, and the enabling ideological foundations of the schemata of domination in which that suffering occurs. Francione asks that we place ourselves in the position of 'a guard working in a prison in which completely innocent people are being tortured and jailed by government security forces for no reason other than that they have political views that differ from those of the government'.³⁶ As you disagree with the way in which the prisoners are treated, you take all the steps that someone in your position can to minimise the suffering of the prisoners. This means that you refrain from directly partaking in the infliction of torture and physical ill-treatment of the prisoners and provide hungry and thirsty prisoners with food and water when you are able to do so.³⁷

Upon deciding that you not only disagree with the institutionalised violation of the prisoners' basic rights but that you want to eradicate the system of political persecution and bereavement of other interests 'that together define the minimal conditions of what it means to not be treated exclusively as a means to an end',

³⁴*Ibid.* For an adaptation of Ingrid Newkirk's thirsty cow story to illustrate how the pursuit of welfare reform is detrimental to the animal rights movement, see DeCoux 'Speaking for the modern Prometheus: The significance of animal suffering to the abolition movement' (2009) *Animal Law* 9.

³⁵Taimie Bryant shares Francione's view that the property status of animals, which is maintained and perpetuated by welfarism, is foundational to the problem of animal exploitation. Bryant argues 'the reason that the legal status of animals as the property of humans has such a dramatic effect is that it rests so firmly on the ideology of humans' presumed superiority to animals and humans' presumed centrality in the natural world'. Bryant 'Sacrificing the sacrifice of animals: Legal personhood for animals, the status of animals as property, and the presumed primacy of humans' (2008) *Rutgers LJ* 247.

³⁶Francione (n 29) 423.

³⁷*Ibid.*

you resign from your position as guard and form an organisation that seeks to destabilise the regime.³⁸

This pursuit of destabilisation can be approached from at least two perspectives. Firstly you can seek the enactment of legislation requiring that the prisoners periodically be given water and food, except under circumstances that the warden deems it 'necessary' that food and water be withheld in the interest of state security. This can be followed by another law requiring that prisoners be tortured 'humanely', except under circumstances wherein it is necessary to deviate from this directive. Alternatively you can aim your efforts at the foundation of the institutionalised exploitation, at the government that condones and facilitates the imprisonment and torturing of people for the regime's self-benefit. You might raise public awareness on the existence of such practises through demonstrations or protests and lobby for political change.³⁹

These two approaches differ significantly in focus. The first approach exclusively addresses the prisoner's interest in not suffering and seeks that legislative reform concretise at macro level what the guard, whilst working in prison, did at micro level. Whilst the second approach continues to address the prisoner's pain and suffering, it acknowledges this pain and suffering as an outgrowth of the system of institutionalised exploitation in which people are treated as a means to an end and aims to destabilise the hegemonic foundation rather than alleviating the symptoms.⁴⁰

The guard faced by a hungry and thirsty prisoner decides on an issue of morality at a micro level that concerns a course of action in response to another person's suffering that stems from a socially and legally sanctioned deprivation of her interests. The guard's response and approach at macro level is an entirely different issue: 'it is not the case that the decision to offer water to the prisoner requires that the guard try to secure laws to achieve that reduction of suffering on an institutional basis by, for example, providing a glass of water to each prisoner on the way to execution'.⁴¹ Whilst the interest in not suffering is certainly one that warrants protection, there are other interests at stake that need to be recognised as well.⁴² The interest in not suffering is in fact secondary to the interest in not being treated instrumentally in a system of institutionalised exploitation when the

³⁸*Ibid* 424.

³⁹*Ibid.*

⁴⁰The premise of Francione's argument pertaining to institutionalised animal exploitation is that the animal is maintained in a subordinate and vulnerable position due to her legal categorisation as 'a thing' or property. For the view that the recalibration of animals' property status poses a challenge to 'humans' primacy at the top of a hierarchical world order', see Bryant (n 35).

⁴¹Francione (n 29) 425.

⁴²For a critique on the centrality of suffering in the utilitarian approach, see Diamond 'Eating meat and eating people' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 93-107.

suffering emanates from that very utilisation: 'after all, even if the prisoner was not tortured, or subjected to thirst and hunger – that is, even if the interest in pain and suffering was respected completely – the prisoner would still be a prisoner'.⁴³

I want to argue that the welfare-rights amalgamation is akin to an attempt at mixing oil and water. The discordant ideological foundations of welfare theory and rights theory renders a consolidation disagreeable for the same reason that the molecular structure of water and oil makes suffusion impossible. Welfarism accepts the utility status of animals and maintains the anthropocentric framework in which it functions, whilst rights theory seeks the total abolition of human use of animals and attempts to displace this hegemonic structure. The constituent parts of new welfarism are thus fundamentally at odds, rendering the approach internally fissured and philosophically unsound.

4 The theoretical foundations and internal paradoxes of new welfarism

As stated before, my main aim in this article is to illustrate the ideological inconsistencies regarding the place of animals in our moral community that inheres in the space that separates welfare- and rights based approaches, and not to elaborate on the theories underlying the respective approaches. A brief exposition of the theoretical foundations of these approaches is however necessary to elucidate and facilitate the following discussion.

4.1 *Utilitarianism*

The philosophical grounding of animal welfarism can be traced back to the writings of scholars like Jeremy Bentham and John Stuart Mill, whose work provides a framework for a utilitarian defence of animal interests. Up until the late-twentieth century Mill's views were almost regarded as a canonical expression of utilitarian theory, with utilitarian thought not undergoing any major changes in the hundred years since Mill's contribution.⁴⁴ Mill's views provided a model that approaches utilitarian theory as 'consequentialist, welfarist, aggregative, maximising, and impersonal'.⁴⁵ His views were consequentialist insofar as the rightness or wrongness of an act depended on the goodness or badness of its consequences. His views were welfarist in that rightness was seen as a function of goodness, the goodness being understood as counting the welfare of both humans and animals. The impersonal and aggregative dimensions of this model

⁴³Francione (n 29) 426.

⁴⁴Frey 'Utilitarianism and animals' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 172-197.

⁴⁵*Id* 172.

stem from the view that rightness should be determined through the neutral assessment of the increase and reduction in the welfare of all influenced by the act, and that the increases should be calculated across all subjects affected. Lastly his views were maximising in that the principle of utility was formulated, in light of welfarist considerations, as 'always maximise net happiness'.⁴⁶

It was however Bentham who had a greater impact on utilitarian theory as a foundation for animal welfare. Bentham claimed that a being's capacity to suffer is a sufficient condition for moral consideration. The question, he argued, 'is not Can they *reason*? nor Can they *talk*? But, Can they *suffer*?'⁴⁷ With this, Bentham included animal suffering in the social utility function and almost all the utilitarians after Bentham, including Robert Nozick and most prominently Peter Singer, would follow suit.⁴⁸ It is not hard to see what effect this emphasis on suffering has on the utilitarian argument, 'it simply seizes upon the pain involved, weighs it against the pain on the other side (though the method of doing so is not obvious and hardly ever discussed), and decides accordingly what ought to be done'.⁴⁹ It thus comes down to a utilitarian balancing: the right action will be the one that produces the largest summative balance of pleasure over pain.⁵⁰

4.2 Moral rights

Animal rightists, on the other hand, reject utilitarian balancing and believe that the rightness of an act towards an animal requires the recognition of moral rights. The theoretical underpinnings of animal rights can be found in natural law and natural rights theory.⁵¹ Human rights developed from these theories and provided a framework that was adapted to advance rights theories that can accommodate animals. Consequently the term 'rights' fundamentally has the same meaning in both human- and animal rights paradigms.

In order to claim that animals have rights within a natural rights theory, theorists advance different views on what (exact criterion) grants an animal moral citizenship or standing. Whilst there is no consensus on this point, they commonly employ an interest theory to assert that animals share one or more attributes or interests that we regard as fundamental to being human and that merit protection by rights. These attributes or interests, they all agree, grant animals the rights to

⁴⁶ *Id* 172-173.

⁴⁷ Singer *Animal liberation* 4 ed (2009) 7.

⁴⁸ For an alternative engagement with the Benthamite idea of suffering – as provoking a reversal in the way we consider animals in terms of their capacities to considering their embodied exposure and vulnerability – see Derrida *The animal that therefore I am* (trans Wills) Mallet (ed) (2008).

⁴⁹ Frey (n 44) 175.

⁵⁰ Nussbaum 'The capabilities approach and animal entitlements' in Beauchamp and Frey (eds) *The Oxford handbook of animal ethics* (2011) 228-251.

⁵¹ Silverstein (n 7) 27.

inter alia life, liberty and bodily integrity. The most comprehensive theory of animal rights was developed by Tom Regan, who primarily relies on subjective consciousness to argue that animals are, like humans, 'subjects of a life' and that this grants animals rights that cannot be violated for the sake of human interests. Regan argues as follows:

[Animals] bring the mystery of a unified psychological presence to the world. Like us, they possess a variety of sensory, cognitive, conative, and volitional capacities. They see and hear, believe and desire, remember and anticipate, and plan and intend. Moreover as is true in our case, what happens to them matters to them. Physical pleasures and pain – these they share with us. But they also share fear and contentment, anger and loneliness, frustration and satisfaction, and cunning and imprudence; these and a host of other psychological states and dispositions collectively help define the mental lives and relative well-being of those humans and animals who ... are 'subjects of a life'.⁵²

Steven Wise grounds his argument for animal rights on Immanuel Kant's philosophy of dignity and proposes a neo-Kantian test to determine which animals possess 'practical autonomy' and subsequent moral rights.⁵³ Wise's approach is related to Regan's insofar as Wise argues that practical autonomy 'is not predicated on the ability to reason, but on a being's possession of preferences, the ability to act to satisfy them, and the sense that it is she who wants and seeks satisfaction'.⁵⁴ Rights theorist Gary Chartier also argues that animals possess moral rights and draws on natural rights theory to advocate for (legal) animal rights.⁵⁵

By regarding animals as possessing moral rights, these theorists bestow a distinctive moral status on animals. This moral status cannot be harmonised with a view of animals as utility objects or the property of their owners, a view that welfarists readily accept. Animal rightists see animals as possessing inherent value separate from their usefulness to humans. The new welfarist attempt at synthesising animal welfare and rights dissolves this progressive ideological foundation that undergirds animal rights theory into general rhetoric that serves to justify our continued containment of animals in a subordinate position, thereby entrenching the *status quo* and indefinitely postponing the striving for justice. The water cannot eventually infuse with the oil to create a new substance. But in order to understand why welfarism will not serve the ideal that the animal rights

⁵²Regan *Defending animal rights* (2001) 42-43.

⁵³Wise 'Animal rights, one step at a time' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 19-50.

⁵⁴Goodman 'Animal ethics and the law' 2006 *Temple LR* 1291 at 1301.

⁵⁵See Chartier 'Natural law and animal rights' (2010) *Canadian Journal of Law and Jurisprudence* 33.

movement strives to realise, we need to critically reflect on the philosophical foundations, the 'molecular structure', of these theories rather than thoughtlessly yielding to the here-and-now anthropocentric legal disposition in the hope that minor changes in the way we abuse animals now will one day bring about animal rights.

The latter approach amounts to what Van Marle calls a 'privileging of the present' that counteracts 'visions of a future, a not-yetness that is never present, always postponed'.⁵⁶ We focus so intently on the present, the fact that we do not have any animal rights today and will not have any animal rights tomorrow, that we do not take the time to critically examine the approach we employ in (re)'negotiating the past, present and future'.⁵⁷ I believe Van Marle's call to attentiveness and her proposal of slowness is needed to create 'a thinking' and an instant from which we can critically (re)consider the new welfare approach to animal liberation.

5 The need for a moment of slowness and reflection amidst chaotic violence towards animals

The questions of time and memory lie central to Van Marle's jurisprudence of slowness. Milan Kundera's reflection on the ecstatic slowness of the motorcyclist, cut off from both the past and the future in the instant of his flight, provides Van Marle with a starting point from which to contemplate the law and (legal) interpretation and their relation to time. From here, Van Marle takes on the task of creating an approach of slowness in the midst of chaotic movement.

Law's chronology is one of inescapable speed, inescapable because of the very nature of law. 'Law, because of its rule-bound nature, and judgements, because of their over-emphasis on calculation, excludes the needs of the particular and ... "closes the door of the law"'.⁵⁸ This means that the (needs of the) particular moment become enveloped in the general and therein lies the violence of the law: 'the violence (and reductive nature) [of the law] refers to law's tendency to make the particular general and the concrete abstract'.⁵⁹ Whilst this intrinsic characteristic of the law and legal judgement is inescapable, it should always be borne in mind as we engage in legal reading and interpretation. We cannot eradicate this inherent characteristic of the law, but an approach of slowness can help us circumvent some of its reductive tendencies.⁶⁰

⁵⁶Van Marle (n 6) 245.

⁵⁷*Id* 255.

⁵⁸*Id* 242.

⁵⁹*Ibid*.

⁶⁰*Id* 243.

Slowness calls for a disruption and a suspension to create a moment from which we can (re)consider. 'Law's present is always that of the need to establish, to distinguish, and to create sure foundations. The present can only be redeemed by affirming a time that is not one of resolution; rather, a holding open of many versions of events, of differently inflected truths'.⁶¹ These inflected truths reside in the past of collective memory. Memory as 'a support of an embodied and embedded recollection' constitutes disruption in itself, for, as Van Marle reminds us, 'memory ... is a construction and in this sense the traditional concepts of linear and chronological time are disrupted'.⁶² Here we see why the past is as significant for Van Marle in 'de-privileging the present' as the future is. Legal interpretation's relation with the past and future illustrates a paradox:

Because we employ our past experiences when we imagine and our imagination when we remember, the paradox of imagining the past and remembering the future is created. Time, memory and imagination accordingly become part of a more complex configuration than a mere linear or chronological remembering or projection.⁶³

This relation exposes multiple voices, differences and manifold notions of truth. The question that Van Marle poses acknowledges and seeks to address this complexity: how do we listen to these voices and engage with these truths to and from the here and now? Or, (re)turning to my focus in this article, how do we interpret and relate the 'imagined' past and continuing violence towards animals and the only present legal recourse of welfare reform against a postponed and 'remembered' future of animal liberation?

The multiplicity of voices and truths cannot be heard in (law's) speed. We are called to slow down and firstly acknowledge and contemplate the spirit of complexity peculiarising the specific situation which, as Van Marle reminds us, is situated in the past, present and future. In order to adequately address these different dimensions, she calls for 'a disruption of a chronological and linear conception of time' so that we can embrace the nuances of the situation.⁶⁴ Van Marle uses artistic passages to illustrate how such a disruption can come about. She specifically engages with Martin Hall's archaeological investigation that offers two contrasting approaches to the contemplation of time and memory, a short story by Paul Auster that highlights the relevance of attention to detail and particularity, and an animated film by William Kentridge in which memory is portrayed in a manner that fractures and problematises conventional conceptions of time.⁶⁵

⁶¹Douzinis and Geary (n 5) 254.

⁶²Van Marle (n 6) 241.

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵*Id* 245-250.

Van Marle then translates the notion of attentiveness that we find in these artistic events into a deconstructive approach to the law and (legal) interpretation. With this, she is not suggesting that a new method of law and legal interpretation be followed, but rather urging a reconsideration, 'an approach which, if embraced by legal scholars, lawyers and judges, could have an effect on how we understand and do law in the long run'.⁶⁶ Her main aim is to investigate the time aspect intrinsic to deconstruction and to illustrate how this deconstructive approach can assist in providing an interpretation (of a text or situation) that is regardful of particularity and the fluidity of meaning. Such an approach 'embraces both a disruption of chronological time – and accordingly multiple notions of truth and fluidity of meanings – and a slowness or dwelling (strategy of delay)'.⁶⁷ This strategy of delay firstly underlines the ethical imperative of deconstruction by acknowledging the limits of any attempt at interpretation, 'that which cannot be known, that which escapes',⁶⁸ thereby recalling the Peircean notion of 'secondness' and the limits and impossibility of (the) law as justice that I have elsewhere examined.⁶⁹ This approach furthermore remains, at its very core, a call to 'read and reread, interpret and re-interpret without hastening to a final end', thereby postponing law's time and speed that generalises and universalises.⁷⁰ Slowness becomes synonymous with (critical) reflection and, more than just a call to *think*, the challenge to engage in *a thinking* that can adequately address the problems that we face.⁷¹ I believe that by taking up this challenge, we can hold open the possibility of a transformation in our thinking about the question of violence and compassion towards animals and the channels and strategies we employ in the pursuit of animal liberation.

Derrida calls attention to an important recent change in the human-animal relation. The past two centuries have witnessed both an exponential increase in violence perpetuated against animals, and an accompanying upsurge in the presence of an 'organized disavowal of this torture' by the animal advocacy movement. The movement is comprised of 'minority, weak, marginal voices, little assured of their discourse within the law, as a declaration of rights'.⁷² For Derrida, the war between the animal protection movement and industrialised overpopulation and the accompanying violence against animals is clearly 'an

⁶⁶*Id* 254.

⁶⁷*Id* 250.

⁶⁸*Id* 251.

⁶⁹See De Villiers (n 3).

⁷⁰Van Marle (n 6) 255.

⁷¹Van Marle recalls her approach of slowness and attention in her later work in which she reflects on women's lives and deaths, a politics of refusal and a jurisprudence of generosity. See Van Marle 'Laughter, refusal, friendship – thoughts on a "jurisprudence of generosity"' in Van Marle (ed) *Refusal, transition and post-apartheid law* (2009) 15-28.

⁷²Derrida (n 48) 26.

unequal struggle', the former being the marginal force in this struggle.⁷³ Derrida's hypothesis, however, is that regardless of the inequality of this war, we are nevertheless passing through a complex moment wherein this struggle has become 'uncircumventable for thought'.⁷⁴

This war ... is passing through a critical phase. We are passing through that phase, and it passes through us. To think the war we find ourselves waging is not only a duty, a responsibility, an obligation, it is also a necessity, a constraint that, like it or not, directly or indirectly, no one can escape. Henceforth more than ever. And I say 'to think' this war, because I believe it concerns what we call 'thinking'.⁷⁵

Derrida's reference to 'thinking' is a call for an alternative approach and thought in regard to the question of the animal, one that can think through and critically reflect on the underlying assumptions and anthropocentric constraints at work in the resources we use to address the plight of the animal. It is in this vein that Van Marle's approach of slowness emphasises the need 'to address the new times; to be up to the challenges that they present'⁷⁶ and provides a framework through which we can pause and critically reflect on the new welfare approach, its underlying assumptions and theoretical foundations; thereby preserving the possibility of transforming the juridicism and sacrificial logic that underpins our thinking and the legal institutions that reinforce our sacrificial practices. Such a transformation would require that we embrace a spirit of continuity, keeping in mind the complexity of the moment as a configuration of the anthropocentric structures of law's past, present and future, rather than collapsing time into the speed of the present instant only.

It is along these lines that I would now like to 'take the time' to meaningfully reflect on the internal ideological incoherency of the new welfarist position by turning to engage with Derrida's argument that humans maintain their hegemony and a view of animals as sacrificial beings by failing to embrace animals in the 'thou shalt not kill' prohibition. To be clear, Derrida's argument is not aimed at critiquing animal welfarism, at least not directly. Nor does it in any way constitute a support of animal rights theory. It does however provide a suitable platform from which to illustrate and engage with the ideological inconsistencies between the welfare- and rights-based approaches that, in my opinion, demand a conceptual separation of the two paradigms.

⁷³*Id* 28.

⁷⁴Calarco *Zoographies: The question of the animal from Heidegger to Derrida* (2008) 113.

⁷⁵Derrida (n 48) 29.

⁷⁶Douzinas and Geary (n 5) 253.

6 Thou shalt not kill (the human)

I firstly need to contextualise Derrida's argument as part of a bigger project aimed at deconstructing the privileging of the human (subject) within an anthropocentric sacrificial structure. For Derrida, this privileging stems from the entrenched binary human-animal opposition that has been constructed in Western metaphysical discourse. Derrida finds this juxtaposition problematic and urges that we rethink the dissimilarities between humans and animals through the logic of *différance*, rather than an oppositional distinction.⁷⁷ This project requires an in-depth investigation and questioning of the place of animality in Western metaphysics, a task that Derrida customarily approaches through a rigorous reading of Martin Heidegger's texts:

Can the voice of a friend be that of an animal? Is friendship possible for the animal or between animals? Like Aristotle, Heidegger would say: no. Do we not have a responsibility toward the living in general? The answer is still 'no,' and this may be because the question is formed, asked in such a way that the answer must necessarily be 'no' according to the whole canonised or hegemonic discourse of Western metaphysics or religions ...⁷⁸

One of the most pervasive ramifications of this oppositional human-animal divide is the problem of sacrifice. The way in which we view the killing of animals within this hegemonic structure, as necessary carnivorous sacrifice, rests on an ideology that assumes the superiority of humans over animals and the centrality of humans in the natural world: 'through our conduct we define the "other-than-human" (animal) as the means to human ends'.⁷⁹ The (human) killing of animals is not seen as murder but remains, to use Derrida's phrase, a 'noncriminal putting to death'. With these assumptions, we avoid taking any moral responsibility for the animal. As Derrida explains:

The subject is responsible for the other before being responsible for himself as 'me'. This responsibility to the other, for the other, comes to him, for example (but this is not just one example among others) in the 'Thou shalt not kill'. Thou shalt not kill thy neighbour. Consequences follow upon one another, and must do so continuously: thou shalt not make him suffer, which is sometimes worse than death, thou shalt not do him harm, thou shalt not eat him, even a little bit, etc ... But the 'Thou shalt not kill' is addressed to the other and presupposes him. It is destined to the very thing that it institutes, the other as man. It is by him that the

⁷⁷Calarco 'Deconstruction is not vegetarianism: Humanism, subjectivity, and animal ethics' (2004) *Continental Philosophy Review* 175 at 189.

⁷⁸Derrida and Nancy (n 1) 112.

⁷⁹Bryant (n 35) 296.

subject is first of all held hostage. The 'Thou shalt not kill' – with all its consequences, which are limitless – has never been understood within the Judeo-Christian tradition ... as a 'Thou shalt not put to death the living in general'. ... the other, such as this can be thought according to the imperative of ethical transcendence, is indeed the other man: man as other, the other as man.⁸⁰

Derrida draws a link between the scope of the term 'murder' and the 'category of others-to-whom-we-owe-responsibilities'.⁸¹ If animals can only be killed and not murdered, they are excluded from the category of others-to-whom-we-owe-responsibilities. The implication is also that the killing of an animal cannot be unjust or unlawful, as it is the element of wrongfulness that characterises the distinction between killing and murdering. 'Thus, the hegemony of humans is sustained by both the act of casual killing and its conceptualisation as not murder'.⁸² A displacement of this hegemony, for Derrida, requires that we 'sacrifice sacrifice':

Discourses as original as those of Heidegger and Levinas disrupt, of course, a certain traditional humanism. In spite of the differences separating them, they nonetheless remain profound humanisms *to the extent that they do not sacrifice sacrifice*.⁸³

It is important to keep Derrida's thesis on the inescapability of a sacrificial existence in mind when interpreting this passage. Derrida is adamant that certain manifestations of sacrifice inevitably remain in the impossibility of its delimitation, that 'one eats [the Other] regardless and lets oneself be eaten by him'.⁸⁴ The unwillingness to 'sacrifice sacrifice', for Derrida, refers to an unwillingness to question dominant discourse that sees the killing of animals as noncriminal and to adapt our (un)ethical response to animals accordingly.⁸⁵ Before such a discursive shift can take place, however, we need to reflect on the importance of this very logic (of sacrifice) in understanding why we humans construct and engage in a culture of animal sacrifice.

Derrida tracks and deconstructs this culture of sacrifice along the finest threads.⁸⁶ Linking the Genesis tale of Adam and Eve's nudity and shame, the effect of the animal's presence on Cain and Abel's fraternity, Prometheus' act of stealing fire to compensate for man's nakedness and Bellerophon's sense of

⁸⁰Derrida and Nancy (n 1) 112-113.

⁸¹Bryant (n 35) 298.

⁸²*Ibid.*

⁸³Derrida and Nancy (n 1) 113.

⁸⁴*Id* 114.

⁸⁵Calarco (n 77) 181.

⁸⁶See Derrida (n 48).

modesty, shame and reticence, Derrida argues that biblical and Greek myth is united in a problematic understanding of man's privilege over the animal. This 'invariable schema', for Derrida, is the following:

What is proper to man, his subjugating superiority over the animal, his very becoming-subject, his historicity, his emergence out of nature, his sociality, his access to knowledge and technics, all that, everything (in a nonfinite number of predicates) that is proper to man would derive from this originary fault, indeed, from this default in propriety, what is proper to man as default in propriety – and from the imperative necessity that finds in it its development and resilience.⁸⁷

This passage is fundamental to understanding Derrida's thesis on 'the autobiographical animal' and the interconnectedness between autobiography and truth, 'that the question of truth in general, and *my* truth in particular is also structured by this logic of restitution, paying back, making good, putting right, correcting an original fault'.⁸⁸ Man is unique in his awareness of his nakedness and resultant attempt at compensation and supplementation, whilst the animal organism simply lives out its life. To sacrifice the animal is to affirm our superiority, privilege and domination over the being of the animal. 'Animals, then, are slaves and sacrificial offerings to our need for ritual symbolic confirmation of our peculiar self-understanding ... the (external) animal we eat stands in for the (internal) animal we must overcome'.⁸⁹ This carnivorous violence demarcates our civilization, indirectly legitimising a whole schema of violence. Understanding and addressing this nuanced culture of sacrifice is essential to achieving a much needed shift in the way we relate to the animal. My ongoing concern is the way in which the legal approaches we utilise in the pursuit of animal liberation paradoxically entrenches, rather than destabilises, our 'proper' position at the top of an (anthropocentric) value hierarchy and continue to facilitate this culture.

6.1 *Sacrificing the animal*

We have seen that animal welfarists acknowledge that animals possess interests that warrant consideration, most notably the interest in not suffering. But this interest is qualified and can best be described as an interest in not suffering *unnecessarily*. The utilitarian approach does not seek to eradicate suffering, but to balance the (animal) suffering against the (human) pleasure derived from the utilisation (of the animal). We can immediately identify limitations to the balancing process itself. From a methodological perspective the measuring of pleasures

⁸⁷*Ibid* 45.

⁸⁸Wood 'Thinking with cats' in Calarco and Atterton (eds) *Animal philosophy* (2004) 139.

⁸⁹*Ibid*.

and pains is severely problematic, especially across species. But we can take another step back and ask what is pleasure and what is pain? As Martha Nussbaum argues, these very touchstones of utilitarianism are disputed concepts.⁹⁰ These limitations become even more apparent, and confusing, when we examine the legal translation and concretisation of the animal welfare approach.

Animal welfarists seek to address their concerns through the enactment of animal protection legislation that regulates the conditions in which animals live and die. This legislation aims to reduce the suffering of animals whilst confirming the status of animals as property to be used to the benefit of their owners. The Animals Protection Act 71 of 1962 aims 'to consolidate and amend the laws relating to the prevention of cruelty to animals'. A deconstructive reading of the act exposes the need for clarification and qualification of its purpose. Like most animal protection legislation this one is also under-inclusive and vague. The word 'unnecessarily' or 'unnecessary' appears at least eight times in section two alone. Section 2(1)(b) only forbids confinement or tethering that causes the animal 'unnecessary' suffering and similarly, section 2(1)(c) prohibits only the 'unnecessary' starving, under feeding or withholding of water or food from any animal. This means that it is conversely necessary and permissible to sometimes starve the animal. As 'unnecessary' is not defined in the act, standard practices constitute the norm and 'necessity'. Ultimately only acts of gratuitous violence are recognised as contravening the act: 'as long as an individual or entity can justify as necessary the infliction of suffering on animals, that infliction of suffering is beyond the reach of state anticruelty laws, regardless of the type and degree of suffering the animals experience'.⁹¹

In *S v Gerwe*⁹² the appellant was *inter alia* charged with contravening the Animal Protection Act by stabbing a dog in the neck. The relevant section of the act in terms of which the appellant was charged read that 'any person who cruelly overloads, overdrives, overrides, beats, kicks, goads, ill-treats, neglects, infuriates, terrifies, tortures or maims any animals shall, subject to the provisions of this act ... be guilty of an offence'. The appeal court grappled with the word 'cruelly' and in trying to make sense of this proviso shunned the particular and reverted to general, abstract legal doctrine, thereby clearly illustrating Van Marle's argument on the limits of the law and 'the violence that is brought into institutionalised legal readings and interpretations'.⁹³ The court forced a conclusion to a particular dispute through the imposition of general law. Acting Judge King held that 'the word "cruelly" indicates that *mens rea* in the form of

⁹⁰Nussbaum (n 50) 236.

⁹¹Bryant (n 35) 248.

⁹²1977 3 SA 1078 (T).

⁹³Van Marle (n 6) 243.

intention is required. It is not enough to show objectively ill-treatment; subjectively it must be shown that the accused intended to "torture and maim". The appeal court found that the stab wounds to the dog's neck did not provide sufficient 'evidence' that the dog was tortured or maimed and overturned the conviction of the court *a quo*.

The approach that the court followed in this case is a clear indication of the way in which the law views animals. The dog was not seen as an individual subject or as a party to the litigation that could be wronged in any way, but a mere object that could (possibly) be damaged. The most palpable trace of the court's (and law's) view of the dog is arguably its reference to the dog as an 'it', as if the dog was not a living, sentient creature with a particular sex and breed, let alone a name. The court's approach and outcome of the case begs a questioning into the role and effectiveness of the Animals Protection Act, which is supposed to promote the welfare of animals and 'prevent cruelty to animals'. We however find the same view of animals in this very act. The act throughout refers to the 'destruction'⁹⁴ of an animal, once again inculcating the view of animals as inanimate things and perpetuating a binary human-animal, subject-object opposition. The animal is denied the dignity of being able to 'die' and denounced as an object that can only be destroyed. Derrida has also engaged with the notion of dying and the way that it is used in discourse to appositionally define 'the human' and 'the animal'. He complicates and destabilises this distinction by arguing that:

[o]ne could point to a thousand signs that show that animals also *die*. Although the innumerable structural differences that separate one "species" from another should make us vigilant about any discourse on animality or bestiality *in general*, one can say that animals have a very significant relation to death, to murder and to war (hence to borders), to mourning and to hospitality, and so forth.⁹⁵

Derrida once again asks that we be mindful of the 'innumerable structural differences' between humans and animals, that we approach the partitions and separations as *différance* rather than an oppositional limit. Van Marle's proposal of slowness comes into play here, as it is through a strategy of delay that we can explore difference and particularity and circumvent the universalisation and generalisation brought about by law's speed. The Animals Protection Act however maintains an oppositional dualism and, 'as every opposition does, effaces the differences and leads back to the homogenous'.⁹⁶ Through this dualism we

⁹⁴See *inter alia* sections 3(1)(a), 4(3)(b), 5(1).

⁹⁵Derrida *Aporias: Dying – awaiting (one another at) the limits of truth* (trans Du Toit) (1993) 75-76.

⁹⁶Derrida 'Geschlecht II: Heidegger's hand' (trans Leavey) in Sallis (ed) *Deconstruction and philosophy: The texts of Jacques Derrida* (1987) 174.

maintain our hegemony and exclude animals from our sphere of moral consideration. It comes as no surprise, then, that courts have on several occasions found that animal welfare legislation is not aimed at protecting animals at all, but rather to protect humans and their property. In *R v Moato*⁹⁷ the court considered the purpose of the Prevention of Cruelty to Animals Act⁹⁸ and found that the purpose of the act was not to endow animals with legal personhood or to protect animals. Rather, the purpose was to forbid legal persons to act so cruelly towards animals that it would negatively impact the emotional well-being of society. This *ratio* was upheld in *S v Edmunds*⁹⁹ when Judge Miller stated that the object of the act 'was not to elevate animals to the status of human beings but to prevent people from treating animals in a manner which would offend the finer sensibilities of society'. In the minority judgement of *NCSPCA v Openshaw* Judge Cameron departs from this view, arguing that

... though not conferring rights on the animals they protect, the [Societies for the Prevention of Cruelty to Animals Act 169 of 1993 and the Animals Protection Act 71 of 1962] are designed to promote their welfare. The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment.¹⁰⁰

Cameron however follows this passage by unambiguously reiterating that 'like slaves under the Roman law, [animals] are the objects of the law, without being its subjects'.¹⁰¹ Scholars have argued that Cameron's statements, whilst representing progression from preceding cases on the legal status of animals, nevertheless remain puzzling and paradoxical.¹⁰² Whilst recognising that animals' capacity to suffer constitutes a ground for protection against cruel treatment, Cameron also asserts that animals are objects without any legal rights. If humans have duties towards animals that stem from their interest in not suffering, one can argue that such duties, in terms of a Hohfeldian conception of rights, do indeed confer correlative rights upon the animals to be free from human abuse.¹⁰³

Wesley Hohfeld published his famous article on the fundamental distinctions between different types of legal rights in 1913. Hohfeld's analysis was the

⁹⁷ 1947 1 SA 490 (O).

⁹⁸ 8 of 1914.

⁹⁹ 1968 2 PH H398 (N).

¹⁰⁰ (462/07) 2008 ZASCA 78 (RSA) para 38.

¹⁰¹ (462/07) 2008 ZASCA 78 (RSA) para 39.

¹⁰² See Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' 2009 *SAJHR* 38.

¹⁰³ *Id* 48-49.

culmination of an extensive body of analytical jurisprudence on the basic differences between legal liberties and legal rights.¹⁰⁴ Hohfeld identified a set of eight basic legal rights consisting of four primary legal entitlements (rights, privileges, powers and immunities) and their opposites (no-rights, duties, disabilities and liabilities). 'Rights' are state enforceable claims that others operate in a certain manner in relation to the holder of the right. 'Privileges' permit the holder to act in a certain manner without being accountable for damages to others and without others having redress to state powers for the prevention of those acts. 'Powers' reflect the ability to, through state-enforcement, alter the legal entitlements possessed by oneself or others and 'immunities' protect one's entitlements from being altered by others.¹⁰⁵ Correspondingly, the four opposites reflect the absence of such entitlements. One has 'no-right' when one does not have the power to beckon the state to direct the conduct of others and 'duties' reflect the absence of permission to act in a certain manner. 'Disabilities' refer to the absence of the ability to alter legal entitlements and 'liabilities' reflect the absence of protection from having one's entitlements being altered by others.¹⁰⁶

Hohfeld illustrated the internal relationships between the different fundamental legal rights by arranging them in terms of opposition and correlativity. The jural opposites are structured as rights/no-rights, privilege/duty, power/disability and immunity/ liability. The jural correlatives are structured as right/duty, privilege/no-right, power/ liability and immunity/disability.¹⁰⁷

Hohfeld used the concept of 'opposites' to express that one must have one or the other right, but not both (of the opposites). As the opposites contradict one another on the same subject, they cannot exist in the same person.¹⁰⁸ The concept of correlativity is more complex. The Hohfeldian analysis emphasises that advantages are just one side of the legal rights coin. At the same time that an advantage is conferred on one citizen, a vulnerability is necessarily constructed on the part of others: 'legal rights are not simply entitlements, but jural relationships'.¹⁰⁹ The notion of correlativity is used to express a single legal relation from the perspective of the two parties:¹¹⁰

¹⁰⁴Pacewicz 'Human rights in the state of nature: Indeterminacy in the resolution of the conflict between security and liberty' (2011) *University College London Jurisprudence Review* 34 at 37.

¹⁰⁵Singer 'The legal rights debate in analytical jurisprudence from Bentham to Hohfeld' (1982) *Wisconsin LR* 975 at 986.

¹⁰⁶*Ibid.*

¹⁰⁷Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) *Yale LJ* 16 at 30.

¹⁰⁸Wise 'Hardly a revolution – The eligibility of nonhuman animals for dignity-rights in a liberal democracy' 1998 *Vermont LR* 793 at 801.

¹⁰⁹Singer (n 105) 987.

¹¹⁰*Ibid.*

If X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.¹¹¹

A duty that X owes Y translates into Y having a right against X. The expressions are counterparts, rights are fundamentally duties placed on others to act in a specific manner.¹¹² Likewise, privileges and no-rights are also correlatives:

Whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.¹¹³

Relying on this view of rights as claims based on duties, David Bilchitz critiques Cameron for not translating his recognition that we have a duty (not to inflict suffering on an animal) into a right (to not be subjected to suffering by human beings):

A duty towards animals to avoid treating them cruelly would logically entail that they have a correlative right not to be subjected to cruel treatment. Even if we reject a strict correlativity between duties and rights in some cases (such as those involving general positive obligations upon individuals), it appears clear that such correlativity does hold where general negative obligations are involved. A duty to avoid inflicting suffering on an animal applies to every animal one comes into contact with: thus, every animal can claim a right to avoid having suffering inflicted upon it.¹¹⁴

Whilst there is certainly merit in this argument, I do not wish to comment on Cameron's unwillingness to think through the implications of his assertions on the status of animals in terms of the correlativity of duties and rights. Some readings and explications of Hohfeldian theory indeed support granting rights to animals¹¹⁵ whilst others are not favourable to extending rights to animals.¹¹⁶ Rather, I want to argue that Cameron's judgement reflects a characteristic welfare perspective and indeed a very progressive interpretation and application of this approach, his (minority) judgement thereby clearly highlighting the limits and inability of this approach to 'sacrifice sacrifice'. Cameron departs from an exclusively human-

¹¹¹Hohfeld (n 107) 32.

¹¹²Singer (n 105) 987.

¹¹³Hohfeld (n 107) 32.

¹¹⁴Bilchitz (n 102) 48-49.

¹¹⁵See Francione *Animals, property and the law* (1995); Wise (n 108).

¹¹⁶See Wellman *Real rights* (1995); Sumner *The moral foundation of rights* (1987).

centric approach to animal welfare legislation, arguing that 'the interests of the animals' should be taken into account when the question of granting an interim interdict in terms of the act is considered. Welfare theory does indeed acknowledge that animals have an interest in not suffering, but maintains the object-status of animals. This should not come as a surprise if we consider the theoretical foundations of animal welfarism. The utilitarian aggregation of consequences does not recognise every individual life as an end in itself, but allows for lives to be utilised as means for the ends of others.¹¹⁷ If the pleasure-and-pain scale tips one way, the utilisation is permissible and the animal may be sacrificed. If it tips the other way the animal may not be utilised, at least not under those specific circumstances.

Peter Singer makes extensive use of images and narratives to vividly describe the almost unthinkable suffering that animals endure on factory farms and in laboratories. As Singer argues that the pleasure derived from these practices cannot possibly outweigh the suffering, he holds that the utilitarian pleasure-and-pain scale holds great value for the plight of the animal.¹¹⁸ The ongoing suffering of animals in these environments, despite a long history of animal welfare advocacy and legislation, unfortunately suggest otherwise. But even if this was the case and we could eradicate large scale industrial factory farming through a utilitarian balancing of pleasures and pains, the scale would not tilt in favour of the animals in cases where traditional farming practices are appropriately adjusted and an appeal to the collective good outweighs the (reduced) suffering accompanying the utilisation of the animal.¹¹⁹

It is this utilisation and view of animals as sacrificial beings that rights theorists seek to eradicate. If animals possess rights, the argument goes, these rights will obstruct appeals to the aggregated human good from outweighing the interests of animals and humans would not be allowed to (ab)use animals as they see fit.¹²⁰ Here we see a fundamental ideological dissonance between the welfarist and rights-based approach. Animal welfarism cannot 'sacrifice sacrifice', because the animal is categorised as a sacrificial being. The real problem with utilitarian animal welfare theory 'has nothing essentially to do with pain and suffering, even if they are intrinsically evil. The right starting place is that we are using animal lives for our own purposes and often using them up. Whether pain is or is not inflicted in the process, we are still using and often using up these lives'.¹²¹ Animal rightists reject this view of animals and demand that we view animals as inviolable subjects with intrinsic worth and abolish all human use of animals.

¹¹⁷Nussbaum (n 50) 237.

¹¹⁸See Singer (n 47).

¹¹⁹Frey (n 44) 176.

¹²⁰*Ibid.*

¹²¹*Id* 178.

These fundamental discrepancies render welfarism incapable of advancing the ideal of animal liberation, if by animal liberation we understand the emancipation of animals to be free from human exploitation. Animal welfarism cannot displace or destabilise the view of animals as subordinate utility objects, but conversely reinforces the property status of animals. The necessity of human (ab)use of animals as such is never questioned; within a welfarist framework 'only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals' are addressed.¹²² Consequently, human-animal interaction and conflict arising from competing interests is conceptualised in a way that means the interests of humans will inevitably prevail. Within this framework, a mere concern for the interest of animals in not suffering will not 'eventually' translate into emancipation. Emancipation requires the destabilisation of this anthropocentric sacrificial structure that accepts and maintains the subordinate status of animals. Rights theorists strive to bring about this destabilisation through the extension of rights to animals.

7 Conclusion

I have argued in this article that there is inherent conflict between the animal welfare approach and animal rights approach. The same ideological incongruencies that caused the initial split between the antivivisectionists and welfarists during the 1860s remain to this day. This divergence stemmed from incompatible views on the moral status of animals, which not only render the two approaches contradictory, but makes an amalgamation detrimental to the ideals that animal rights theorists strive to realise. Animal welfarists accept and operate within a sacrificial anthropocentric structure that entrenches a human-animal binary opposition by conceptualising the dissimilarities between humans and animals as an oppositional cut. The utility status of animals as sacrificial beings is thereby perpetuated and not displaced, such displacement being the (opposing) aim of the animal rights movement.

I proposed that we follow Van Marle's deconstructive approach of slowness to interpret and reflect on the new welfarist amalgamation of utilitarian-based welfare theory and rights theory. By proposing a 'strategy of delay' and 'de-privileging of the present', Van Marle is not denying the here-and-now, but on the contrary supporting an approach to (legal) interpretation that allows us to better understand the complexities that configure the *status quo*. By relying on Van Marle's deconstructive insights and Derrida's argument that humans maintain their hegemony by excluding animals from the 'thou shalt not kill' prohibition, I tried to not only illustrate the contrasting moral spaces that the animal occupies

¹²²Bryant (n 35) 249.

in animal welfare theory and rights theory, but that the interim employment of welfare strategies to pursue the more liberal future goal of animal rights is the result of an uncritical privileging of the here and now and leads to an indefinite postponement of the striving for justice.

By highlighting the dissonance between the approaches, my aim was to illustrate that (animal) rights theory can and should be celebrated as pursuing a more progressive ideal of animal liberation than its welfarist predecessor. The emanating question, then, is whether the extension of rights to animals will indeed realise this ideal and liberate them from oppression? I have previously undertaken a theoretical problematisation of animal rights by examining the development and theoretical conditions of existence of animal rights and arguing that the theoretical premises of contemporary (animal) rights discourse does not allow for the realisation of its emancipatory ideal, as it paradoxically entrenches relations of subordination by negating plurality and difference and solidifies an anthropocentric hierarchical structure.¹²³ To critique the theoretical presuppositions of animal rights theory does however not by the fact itself constitute a critique of its underlying ideological values. The ultimate aim of my deconstructive project, driven by a desire to retrieve the emancipatory power of animal rights, is to articulate a response to the question of what it might mean to return 'animal rights' to its ethical substrata and I believe that a clear understanding of its ideological premise is foundational to this project. I aimed to illustrate that such a project requires the implementation of critical tools that can adequately address the challenges with which the question of the animal (in law) presents us and introduced a possible framework within which to philosophically examine and call into question the way we relate to animals and the dominant approaches we utilise to facilitate a transformation of the human-animal relation.

¹²³ De Villiers 'Examining the similarity principle and language of (animal) rights as a foundation for animal liberation' (2012) *SAPL* 40.

Examining the similarity principle and language of (animal) rights as a foundation for animal liberation^{*}

Jan-Harm de Villiers^{**}

1 Introduction

With the animal liberation movement gathering academic steam I believe it is more important than ever that proponents of the movement ask themselves the same question that Alice in Wonderland asks the Cheshire cat upon reaching a fork in the road: 'Would you tell me, please, which way I ought to go from here?' The cat replies: 'That depends a good deal on where you want to get to'. Upon answering that she does not much care where she is going, so long as she gets somewhere, the cat's response to Alice is quite insightful: 'Then it doesn't matter which way you go ... you're sure to do that if you only walk long enough'.¹

In this passage Lewis Carroll calls attention to the importance of critically reflecting on the route you choose to travel to your final destination and the reciprocity between a course of action and the emanating outcome. If the ultimate aspiration of the animal liberation movement is to free animals of human domination and exploitation and to develop an ethical relationship to the animal Other, we need to ask ourselves if the approach we utilise is consistent with, and allows for, such an outcome.

Within a society characterised by an uneven balance of power and ensuing oppression and domination, we find various approaches that seek to remedy this structure and strive towards the ideal of 'equality'. The most prominent approach is grounded in rights theory and aims to reach a state of equality by allocating certain rights to subjects. The modern concept of animal rights was developed less

^{*}This article is based on research conducted for my LLM dissertation entitled 'Thinking outside the cage: Sacrifice, equality and the plight of the animal' for which I am currently registered at the University of Pretoria under the supervision of Prof Karin van Marle.

^{**}BComm (Law) (Cum Laude) LLB (Cum Laude) (Pretoria). Lecturer, Department of Jurisprudence, Unisa.

¹Carroll *Alice's adventures in wonderland and through the looking glass* (1993) 52.

than 40 years ago and finds theoretical, ethical and philosophical grounding in the pioneering work of scholars like Peter Singer,² Steven Wise,³ Gary Francione⁴ and Tom Regan.⁵ Although an approach based in rights theory is easily distinguishable from a more conservative welfarist theory, the rights movement has inherited the human rights movements' continuing battle to advance a united, terse conception that captures the essence of the rights advocacy movement. Whilst it may not be possible to provide a single coherent definition of animal rights, the approach is undeniably characterised by a leitmotif of 'similarity' or 'same-as', the argument that animals should be granted legal rights because they share certain human traits or characteristics that warrant consideration and protection. The rationale behind the similarity argument is that animals who possess capacities and characteristics similar to that of humans should receive equivalent protection, as a just society requires that similar entities be treated alike.⁶

The similarity argument is problematic, as it is essentially anthropocentric and manifests in a hierarchical ordering of animals based on their perceived similarity to humanness. In this article I will examine the way that animal rights talk has developed, specifically focussing on the same-as characteristic as facilitator of a human/animal dualism that deprecates the animal to subhuman Other and supports the continued disfranchisement of animals. As an appreciation of animal rights requires an understanding of the concept of 'rights' in general, the first part of this article will be devoted to a short philosophical discussion of the notion of rights. In the second part I will argue that the current conception of animal rights precludes the possibility of an ethical encounter with the animal Other and manifests in a hierarchical ordering of animals. Finally I will illustrate why this approach to animal liberation is irreconcilable with the ideals it strives to realise and consequently internally paradoxical.

Firstly, a note on terminology. Although the term 'animal' strictly speaking refers to all beings belonging to the kingdom Animalia and thus includes human beings, for the purposes of this article the term 'animal', unless otherwise stated, will be used to denote animals that are not human. I have come to reject the term 'nonhuman animal' that is commonly used in literature on animal ethics, due to the subordinate connotation that the term engenders.

The term 'animal rights', and specifically the phrase 'animal rights movement', is often used loosely to depict any attempt at addressing and

²See Singer *Animal liberation* (1975).

³See Wise *Rattling the cage: Toward legal rights for animals* (2000) and Wise *Drawing the line: Science and the case for animal rights* (2002).

⁴See Francione *Animals, property and the law* (1995) and Francione *Rain without thunder: The deology of the animal rights movement* (1996).

⁵See Regan *The case for animal rights* (1983) and Regan *Defending animal rights* (2001).

⁶Bryant 'Similarity or difference as a basis for justice: Must animals be like humans to be legally protected from humans?' (2007) 70 *Law and Contemporary Problems* 207 at 207.

bettering the plight of animals. For the purposes of this article the terms 'animal rights' and 'animal rights movement' specifically refers to a theory or approach based on the notion that animals should be rights-bearers in order to entitle them to (legal) protection against violation. In reference to the social movement aimed at liberating the animal, irrespective of the underlying theoretical or philosophical foundation, I will use the phrase 'animal liberation (movement)'.

2 The language of rights

We need firstly to understand why it is indeed possible to extend rights to animals. As we will see, the very nature and make-up of rights which allow for animals to be rights-bearers also poses a challenge to the conceptualisation of an equable animal rights theory. The notion of rights is part of the symbolic order of language and law and it is within this sphere that the scope and capacity of rights is determined. Rights do not stand in concrete relation to any specific thing or entity but rather comprise of legal and linguistic signs, words, symbols and ideals.⁷ Consequently, 'no person, thing or relation is in principle closed to the logic of rights [and] any entity open to semiotic substitution can become the subject or object of rights; any right can be extended to new areas and persons, or, conversely, withdrawn from existing ones'.⁸ Accordingly, we have seen civil rights being extended to socio-economic rights, and further to cultural and environmental rights and what were once the rights of the white, heterosexual males can now also be claimed by blacks, homosexuals and women. Anything that's accessible to language can become the object of rights and as Costas Douzinas jokingly remarks, 'the right to free speech or to annual holidays can be accompanied by a right to love, to party or to have back episodes of Star Trek shown daily'.⁹

It is thus clear that it is indeed possible to extend rights to animals. But what would be the basis of animal rights? Who would be entitled to them? What is an animal? Despite just quoting Douzinas on the possibility of ceaselessly expanding rights, my questions here are not meant to echo the superficial and ill conceived critique that the realisation of animal rights would require that we grant animals the right to vote and marry. Of course it is a *non sequitur* to argue that the extension of *some* existing rights to animals requires the extension of *all* existing rights. I am not concerned with the specific rights that animals would (or should) have and what the scope of these rights would be. The question of including animals in the community of rightsholders should not be confused with (related, yet distinguishable) issues pertaining to the scope of rights.

Rather, I want to argue that we need to think through the implications of using terms like 'human' rights and 'animal' rights, each inherently embodying a

⁷Douzinas 'The end(s) of human rights' (2002) 26 *Melbourne Univ LR* 445 at 456.

⁸*Ibid.*

⁹*Ibid.*

problematic generalisation that affects the way we define our relationship with the Other. Just as the term 'human' includes men and women and absorbs racial, historical and gender differences, 'animal' refers to everything from lions to caterpillars, chimpanzees to mice.¹⁰ These terms bring about instability, 'not just because of species diversity, but because its obvious supposed unimportance makes us realise that these terms are, to put it bluntly, metaphysical categories requiring all sorts of police work, and not simply useful conceptual tools, biological generalisations, etc'.¹¹ The point, as David Wood articulates it, is that 'there are no animals "as such", rather only the extraordinary variety that in the animal alphabet would begin with ants, apes, arachnids, antelopes, aardvarks, anchovies, alligators, Americans, Australians ...'.¹²

Reference to the 'animal' of rights already connotes a problematic disengagement that perpetuates a human/animal dualism. The philosopher Jacques Derrida has also rejected rights language as a way of advancing our relation to animals and emphasised that rights theory signifies an attempt to separate ourselves from other animals and even disavow our own animality:

The axiom of the repressive gesture against animals, in its philosophical form, remains Cartesian, from Kant to Heidegger, Levinas or Lacan, whatever the differences between these discourses. A certain philosophy of right and of human rights depends on this axiom. Consequently, to want absolutely to grant, not to animals but to a certain category of animals, rights equivalent to human rights would be a disastrous contradiction. It would reproduce the philosophical and juridical machine thanks to which the exploitation of animal material for food, work, experimentation etc, has been practiced (and tyrannically so, that is, through an abuse of power).¹³

Having no fixed, concrete meaning, the 'animal' of rights, just as the 'human' of rights, is a floating signifier, 'a word and discursive element that is neither automatically nor necessarily linked to any particular signified or meaning' and consequently 'it cannot be fully and finally pinned down to any particular conception because it transcends and overlaps them all'.¹⁴ As there is no undeviating connection between signifier and signified, meaning constantly shifts as it is passed on from one signifier to another. Rights therefore do not belong to humans or animals, but rather construct humans and animals.¹⁵ Within the rhetoric of rights, a human 'is someone who can successfully claim human rights',¹⁶ and the same holds true for the 'animal' of animal rights. And therein lays

¹⁰Wood 'Comment ne pas manger – deconstruction and humanism' in Steeves (ed) *Animal others: On ethics, ontology and animal life* (1999) 16.

¹¹*Ibid.*

¹²*Id* 29.

¹³Derrida and Roudinesco *For what tomorrow: A dialogue* (2004) 71.

¹⁴Douzinis (n 7) 456.

¹⁵*Id* 457.

¹⁶*Id* 456.

a major challenge for the proponents of the rights movement. Rights theory needs to be conceived in a manner that is inclusive, respects difference and advances the ethical relation without perpetuating hierarchy. The current conception, I will argue, unfortunately has several shortcomings in this regard.

3 Rights theory, the ethical relation and hierarchy

The current conception of animal rights theory is founded on the same idea that propelled the civil rights movement, women's rights movement and disability rights movement: The idea that the striving towards the ideal of justice requires that similar entities are treated alike.¹⁷ As Gary Francione explains, the idea of animal rights is underpinned by the notion that (at least some) animals possess rights that normatively correspond to the rights possessed by humans.¹⁸ The rationale supporting this inference is at least twofold:

First, there is no characteristic or set of characteristics that is possessed by all humans (whom we regard as persons) that is not possessed by at least some animals. To put the matter a different way, those who support animal exploitation argue that animals are qualitatively different from humans so animals can be kept on the 'thing' side of the 'person/thing' dualism; animal rights advocates argue that there is no such difference because at least some nonhumans will possess the supposedly 'exclusive' characteristic while some humans will not possess the characteristic ... There is another related, more 'positive', reason to view animals as persons. Although there will undoubtedly be borderline cases, it is clear that at least some animals possess the characteristics that we normally associate with personhood.¹⁹

From this exposition we can identify two tenets that are central to the current concept of animal rights. Firstly, the human (and personhood) is the standard against which animals are to be measured to determine their worthiness of rights. Secondly, only 'some animals' that embody and exhibit the essential humanlike characteristics will be included in the community of rights holders. There are several problematic consequences to this approach and I will henceforward discuss three of these repercussions; the disavowal of otherness, the perpetuation of hierarchy and the tension emanating from the dissonance between the practical implications of this approach and the philosophy underlying animal liberation.

3.1 *The animal as symmetrical Other*

Drucilla Cornell defines the ethical relation as 'the aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her

¹⁷Bryant (n 6) 207.

¹⁸Francione 'Ecofeminism and animal rights: A review of *Beyond animal rights: A feminist caring ethic for the treatment of animals*' (1996-1997) 18 *Women's Rights Law Reporter* 95 at 98.

¹⁹*Ibid.*

difference and singularity'.²⁰ An ethical encounter requires that we transcend the self and engage with the otherness of the Other from outside a framework that employs the self as central point of reference. The Other is not similar to me and she is not the opposite of me, we are absolutely separated. This means that I cannot articulate my relationship to the Other in terms of sameness or opposition, the Other exists outside of myself and my egocentric understanding of the world. We are not of the same genus and consequently 'I cannot compare [the Other] to anything that I know, because then [the Other] would be in relation to me and denied its absolute otherness'.²¹ Rather than centralising the self, the focus should be on the Other and her qualities of singularity and otherness.

Because the Other is an irreducible individual entity, the distance separating the self and the Other is characterised by asymmetry. We can never eradicate this distance, as it is this otherness of the Other that makes her other. Emmanuel Levinas describes this asymmetrical characteristic of the Other as alterity. Respect for the alterity of the Other requires that we not identify with her in terms of the self, as this would 'neutralise' and reduce the Other to an object that cannot affect me and create a state of 'totality'.²² The Other has an individual face that resists possession and it is this characteristic which, for Levinas, is fundamental to being other: 'Stranger means the free one. Over him I have no power. He escapes my grasp by an essential dimension, even if I have him at my disposal'.²³

In advocating that (some) animals are worthy of legal protection in the form of rights, proponents of the rights movement articulate their claims by drawing comparisons between the capacities of these animals and those of humans. Steven Wise, for instance, argues that the test for personhood should be an enquiry into three criteria, namely whether the person '(1) can desire; (2) can intentionally act to fulfill her desires; and (3) possesses a sense of self sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it'.²⁴ As apes possess the mental capacities that allow them to meet these criteria, Wise argues that they should be regarded as persons under the law. As we have seen, Francione also refers to the characteristics that some animals embody that are associated with personhood and Peter Singer finds common ground when it comes to a human's and animal's ability to suffer. Following in the footsteps of fellow utilitarian thinker Jeremy Bentham, Singer argues that 'the nervous system of animals evolved as our own did [and that it is] surely unreasonable to suppose that nervous systems that are virtually identical

²⁰Cornell *The philosophy of the limit* (1992) 62.

²¹Smith 'Incommensurability and alterity in contemporary jurisprudence' (1997) 45 *Buffalo LR* 503 at 523.

²²Shepherd 'Face to face: A call for radical responsibility in place of compassion' (2003) 77 *Saint John's LR* 445 at 484.

²³Levinas *Totality and infinity* (1969) 39.

²⁴Wise *Rattling the cages: Toward legal rights for animals* (2000) 32.

physiologically, have a common origin and common evolutionary function, and result in similar forms of behaviour in similar circumstances should actually operate in an entirely different manner ...'²⁵

Bentham's famous call for the equal consideration of animals based on their capacity to suffer is a golden thread that runs through literature on animal ethics. For Bentham, a being's ability to suffer is a precondition for having any protectable interest.²⁶ The question, he argued, 'is not Can they *reason*? nor Can they *talk*? But, Can they *suffer*?'²⁷ This threshold requirement is clearly more inclusive than a criterion of sex, race, sexual orientation or membership to a specific specie, criteria used to marginalise women, blacks, homosexuals and animals. The problem is that Bentham's contribution is weakened when applied as the basis of a comparative appraisal. The question 'Can they suffer?' can only be meaningful when the suffering is registered on the sufferer's terms.²⁸ Animals do not suffer like humans do, they suffer like animals do. And that should be enough to grant them equal moral consideration.

In drawing these comparisons between the self and the Other, these theorists fail to respect the asymmetry that characterises the ethical relation and consequently preclude the possibility of an ethical encounter:

Once I attempt to impose a logical relation between myself and the other, I will have connected the other to me within my schematic thought. Once this connection, this grasping, is made, I hold the other hostage by denying its very qualities of otherness or alterity. I renounce its identity as other. In order to be other, it must be wholly other, without relation or connection to me. Once I introduce a relation to the other, I exterminate its identity as an other by rendering it an object of phenomenon within my world. In order to preserve alterity, the terms I and Other cannot be brought together.²⁹

The Other is thus absolutely other to the self. In order to appreciate this otherness, I firstly need to recognise and conceptualise myself as an individual and thereafter grant the Other the same recognition. The interplay between ethical asymmetry and phenomenological symmetry that I elsewhere³⁰ articulated is once again evident and emphasises that 'I' am the point of departure to the ethical

²⁵ Singer *Animal liberation* (2009) 11. It is important to note that, whilst Singer's approach to animal liberation is grounded in utilitarian theory and not rights theory, his work has provided a moral foundation for animal rights theorists and played a vital role in the creation of many animal rights organisations, including People for the Ethical Treatment of Animals (PETA), the world's largest animal rights organisation.

²⁶ Singer (n 25) 8.

²⁷ *Id* 7.

²⁸ MacKinnon 'Of mice and men' in Sunstein and Nussbaum (eds) *Animal rights: Current debates and new directions* (2004) 271.

²⁹ Smith (n 21) 524.

³⁰ See De Villiers 'Towards an ethical relation to the nonhuman Other: Deconstruction, veganism and the law' (2012) 1 *SAJHR* 18.

relation. As Levinas explains, 'alterity is possible only starting from *me*'.³¹ This does not mean, however, that 'I' am the central point of reference for my relation to the Other. To relate to the (animal) Other in terms of the (human) self is to appropriate the Other and disregard the absolute distance separating the self and the Other. The other cannot be minimised to an articulation of the self, because 'what is absolutely other does not only resist possession, but contests it'.³²

Simone de Beauvoir has emphasised the dangers of women being subjugated to man's Other 'from being considered not positively, as she is for herself, but negatively, such as she appears to man'.³³ For De Beauvoir, this strips the woman of her singularity and denounces her to an object that is 'devoid of meaning without reference to the male'.³⁴ Similarly, animal rights theory appropriates animals as man's Other by defining animals in relation to humans. When we ground our ethical responsibility in the likeness between the (human) self and (animal) Other, we 'privilege similarity over difference and selfness over alterity' and thereby fail to heed the call of the Other.³⁵ Ultimately we do not recognise the singularity of the Other but rather appropriate her as a reflection of the self and thereby collapse the ethical relation into absolute symmetry. The ethical relation should rather, as Levinas emphasises, remain 'a relationship to the other as other, and not a reduction of the other to the same. It is transcendence'.³⁶ Otherwise the question becomes: Is the Other like me? The dominant figure becomes the norm and 'that women are like men and animals are like people is thought to establish their existential equality, hence their right to rights'.³⁷ To be clear, I am not disputing that there are similarities between humans and animals. The question, rather, is why do animals have to be like us to escape the gross acts of barbarity that we inflict on them? The recognition of women's rights on male terms has done little to recalibrate the social status of women as sub-male and one can ask how much being seen as sub-human will benefit the animal liberation movement?³⁸

3.2 Hierarchical ordering

An approach that measures animals against a standard of humanness is clearly anthropocentric as it reflects a deeply imbedded perception that we are the centre and most important creatures on earth, the measuring-stick against which all other creatures' needs, interests and abilities are to be measured. The hierarchy

³¹Levinas (n 23) 40.

³²*Id* 38.

³³De Beauvoir *The second sex* (2009) 167.

³⁴*Id* 6.

³⁵Lopez Lerma 'Law in high heels: Performativity, alterity and aesthetics' (2011) 20 *Southern California Interdisciplinary LJ* 290 at 300.

³⁶Levinas *Entre Nous: Thinking-of-the-Other* (1998) 173-174.

³⁷MacKinnon (n 28) 267.

³⁸*Id* 271.

emanating from this approach manifests on various levels: humans occupy a space at the top tier of the speciesist ladder with other animals being subordinately ranked below us. The similarity argument however also creates a pecking order amongst animals based on their proximity to humanness, thereby perpetuating both a human/animal divide and an inter-species hierarchy.

Catherine MacKinnon argued some eight years ago that animal rights, like women's rights, 'are poised to develop first for a tiny elite' because of the 'like us' analysis.³⁹ In retrospect her words were prophetic, as recent legal developments realised her prediction. The Spanish parliament passed a resolution in 2008 which granted legal personhood to the Great Apes. The resolution makes the killing of an ape,⁴⁰ our closest nonhuman relative, a crime and bans their use in medical experiments, circuses and films and television commercials. Whilst the resolution brings about a vital crack in the species barrier that we have erected between ourselves and other animals, it also illustrates the hierarchical materialisation of the similarity argument.

Once we deem certain animals to be 'more equal than others' based on their propinquity to humanness, we can forecast the outcome. George Orwell illustrated the dire consequences of that mindset in *Animal farm* more than half a century ago.⁴¹ That was a contradictory ending to the egalitarian uprising in the book and, likewise, it will be an antithetical ending to the animal liberation movement. After decades of research the Great Apes (or at least the few that are lucky enough to find themselves within the Spanish borders) enjoy legal protection similar to humans, because they have been proven to be similar enough to humans to merit such protection. One can only wonder how long the road for dogs, rabbits, chickens and fish will be, how long it will take to prove that they are sufficiently similar to humans to be granted rights.⁴²

The extension of rights to dogs, rabbits, chickens and fish is of course not a definite progression of animal rights theory under the same-as characteristic. Because no specific (human) characteristic is logically prescribed the choice remains arbitrary and can be changed to include or exclude certain animals as we see fit. The same argument used to grant rights to some animals, can thus be used to deny others of the same protection:

Animals may feel pain, but cognitively process it differently or manage it more effectively. Animals may think, but not in the way humans do. If an animal lacks self-consciousness or the cognitive ability to anticipate his life in the future, the loss of his life may be deemed less meaningful than the loss of a human's life because humans do have self-consciousness and can project themselves into the future.⁴³

³⁹*Ibid.*

⁴⁰Includes gorillas, chimpanzees, bonobos and orangutans.

⁴¹Orwell *Animal farm* (2004).

⁴²Bryant (n 6) 216.

⁴³*Id* 211-212.

When animals are proven to possess certain (humanlike) characteristics that are not valued by humans, this can even have an adverse effect. In a patriarchal society that favours masculinity over femininity and everything that is traditionally associated with this, the ability to suffer might actually be seen as a sign of weakness and not of communality that puts animals on equal footing with humans.

Ultimately then, it seems there are right (and wrong) capacities to possess and a right (and wrong) way of feeling, being and thinking. JM Coetzee accurately illustrates the absurdity of this anthropocentric way of valuing animals. Through his alter ego, Elizabeth Costello, Coetzee gives a fictional account of the story of Sultan, one of the apes used by psychologist Wolfgang Köhler in his experiments into the mental capacities of primates.⁴⁴ After being caught on African soil and shipped overseas to participate in a scientific experiment, the apes underwent a process of training aimed at humanising them.⁴⁵ To this end, Sultan was placed in a cage and one day, without warning or any apparent reason, deprived of the food that he was previously fed at regular intervals. A wire was then spun over his cage and bananas attached to the wire. After being supplied with three wooden crates, he was left to his own devices:

Sultan knows: Now one is supposed to think. That is what the bananas up there are about. The bananas are there to make one think, to spur one to the limits of one's thinking. But what must one think? One thinks: Why is he starving me? One thinks: What have I done? Why has he stopped liking me? One thinks: Why does he not want these crates any more? But none of these is the right thought. Even a more complicated thought – for instance: What is wrong with him, what misconception does he have of me, that leads him to believe that it is easier for me to reach a banana hanging from a wire than to pick up a banana from the floor? – is wrong. The right thought to think is: How does one use the crates to reach the bananas?⁴⁶

Realising this, Sultan positioned the crates under the dangling bananas, stacked them on top of the other, climbed to the top and brought down the bananas. After passing the first test, Sultan was faced with an increased challenge the next day. The exercise was repeated but this time the crates were filled with heavy rocks, rendering them immovable. Once again Sultan had to respond:

One is not supposed to think: Why has he filled the crates with stones? One is supposed to think: How does one use the crates to get the bananas despite the fact that they are filled with stones?⁴⁷

Sultan then emptied the crates and repeated the process of stacking the crates so that he could reach the bananas. It was clear to Sultan that he was

⁴⁴Coetzee *The lives of animals* (2001).

⁴⁵*Ibid.* 27.

⁴⁶*Ibid.* 28.

⁴⁷*Ibid.*

being tested and it was a test that he had to pass if he wanted to silence his hunger. The test was of course not over and the next day, the bananas were placed a metre outside of his cage and a stick thrown into his cage.

The wrong thought is: Why has he stopped hanging the bananas on the wire? The wrong thought (the right wrong thought, however) is: How does one use the crates to reach the bananas? The right thought is: How does one use the stick to reach the bananas?⁴⁸

These tests, as Coetzee remarks, propelled Sultan away from interesting, speculative thought and towards lower, practical reason.⁴⁹ What he (really) thought or wanted to think was not only indeterminable, but irrelevant. What mattered is that he thought and acted as Köhler wanted him to. Sultan's value was measured against his ability to demonstrate a predetermined capacity possessed and valued by humans. That predetermined capacity, in this case the ability to transfer insight and solve a problem, is of course arbitrary and can be changed to one that animals cannot possess.

Through this deconstruction of Köhler's experiment, Coetzee firstly illustrates the pragmatic limitations of research into the cognitive capacities of animals.⁵⁰ This approach of measuring and comparing animals is thus fundamentally unstable, as there can be no definitive data upon which to ground any affirmative or dissenting conclusion of similarity. Secondly, Coetzee highlights how this approach can, depending of the capacity employed for comparison, as easily be used to prove dissimilarity to animals as it can be used to prove similarity. Finally, Coetzee also exposes an internal contradiction to an approach that seeks to liberate animals by way of a *modus operandi* that requires that research be done on animals. In her closing remarks on Sultan, Coetzee has Costello say the following:

In his deepest being Sultan is not interested in the banana problem. Only the experimenter's single-minded regimentation forces him to concentrate on it. The question that truly occupies him, as it occupies the rat and the cat and every other animal trapped in the hell of the laboratory or the zoo, is: Where is home, and how do I get there?⁵¹

4 The same-as characteristic and animal experimentation

The use of animals for the purpose of research has always been a concern of animal advocates. Yielding to public outcry against the inhumane treatment of animals in laboratories, Britain adopted the first anti-vivisection law in 1876 and

⁴⁸*Id* 29.

⁴⁹*Ibid.*

⁵⁰Bryant (n 6) 213.

⁵¹Coetzee (n 44) 30.

the anti-vivisection movement formed soon after during the 1880s.⁵² The use of animals in science remains a primary concern of animal rights organisations to this day. *People for the Ethical Treatment of Animals (PETA)* is synonymous with the landmark 'Silver Spring monkeys' case, a battle against animal exploitation that gained momentum and transformed a group of friends committed to animal liberation into the world's largest animal rights organisation.⁵³

The similarity argument requires that research be done on animals in order to prove that they are sufficiently similar to humans to warrant protection. The dissonance between this approach and the goal of freeing animals from exploitive research is obvious. Mere observations of animals avoiding painful stimuli and limping have in the past not been seen as sufficient evidence to prove that animals experience – and react to – pain in a way similar to humans.⁵⁴ If we furthermore consider the probable consequences of the realisation of animal rights⁵⁵ coupled with the high value that society places on data stemming from research that is done under 'controlled conditions', it is clear why mere observations of animals in their natural surroundings will not suffice as satisfactory proof of similarity.⁵⁶ Captivity and exploitive research are inescapable ramifications of the similarity argument.

Past use of animals in scientific research paints a gruesome picture of mice being irradiated to cause lung cancer, rabbits being injected in their knee joints to induce chronic inflammation and electric shocks being administered to the tooth pulp of dogs, to name but a few examples.⁵⁷ Experiments conducted to determine animals' ability to feel pain have not been any less invasive and what is of even more concern, is that the findings of these experiments have not provided conclusive insight into the cognitive processing of pain by animals.⁵⁸ There is still room for debate and more painful research.

But even if there was a humane way to determine animals' capacity to feel pain, we need to bear in mind that they cannot meaningfully consent to being participants in these experiments aimed at advancing 'an idea of "chimpanzee-ness" or "goldfishness" or "animalness"'.⁵⁹ Whilst the motives behind these

⁵²Garvin 'Constitutional limits on the regulation of laboratory animal research' (1988) 98 *Yale LJ* 369 at 371.

⁵³This case lead to the first raid of a research laboratory in the USA on 1981-09-11, with police confiscating 16 Macaques monkeys and one Rhesus monkey. Dr Edward Taub was charged with 17 counts of animal cruelty and found guilty on six counts on 1981-11-23. The convictions were later reversed. See Pacheco 'The Silver Spring monkeys' in Singer (ed) *In defence of animals* (1985) 135-147.

⁵⁴Bryant (n 6) 214.

⁵⁵This would ultimately require that we abjure the use of all animal products and lead a vegan lifestyle.

⁵⁶Bryant (n 6) 220.

⁵⁷See Ryder 'Speciesism in the laboratory' in Singer (n 53) 81-82.

⁵⁸Bryant (n 6) 213 - 214.

⁵⁹*Id* 221.

experiments might be noble, this approach ultimately preserves a view of animals as objects and consequently perpetuates the very mentality it seeks to rupture.

5 Conclusion

Whilst Douzinas describes rights as ‘one of the noblest liberal institutions’ he also regards their triumph as the ideology of postmodernity to be something of a paradox, reminding us that ‘our era has witnessed more violations of their principles than any of the previous and less “enlightened” epochs’.⁶⁰ For Douzinas, this paradox is the result of a historical and theoretical gap, one that he addresses and fills almost entirely in his body of work.⁶¹ I had neither the capacity nor the intention to tackle such a mammoth task in this article. My goal, rather, was to specifically focus on the similarity characteristic of the current concept of animal rights which I believe renders it theoretically and philosophically inconsistent with the ideal of animal liberation.

To this end I started off by examining the make-up of rights and its expansive potential that paves the way for animals to be the bearers of rights. I also highlighted the challenge that this poses to proponents of the movement in the formulation of an inclusive theory of rights. In the second part of this article I examined the human/animal interaction from the perspective of an ethical relation and illustrated what recognition of – and respect for – the otherness of the Other demands. I argued that the same-as approach denies the otherness of the Other and amounts to a reduction of the (irreducible) animal Other to a symmetrical reflection of the self which, as Levinas reminds us, is evidence of a fundamental ethical failure.⁶²

The similarity argument also facilitates the formation of hierarchies according to the degree to which animals possess arbitrarily identified human characteristics. As illustrated by the degree to which animal rights are currently recognised, the nature of this approach allows for it to be as easily employed for the discountenance of some animals as for the protection of others. Finally I highlighted the practical limitations and ideological inconsistencies of the same-as approach and illustrated why this course is incongruent with the ultimate goal of animal liberation.

In conclusion I would like to emphasise that I share the view that animals will, despite the problematic aspects of the current conception, undoubtedly be better off with rights than without them.⁶³ The road of rights will indeed take us ‘somewhere’, and that place will be better than the one animals find themselves in

⁶⁰Douzinas (n 7) 446.

⁶¹See *inter alia* Douzinas ‘The end of human rights’ (2000) and Douzinas ‘Human rights and empire: The political philosophy of cosmopolitanism’ (2007).

⁶²See Levinas (n 23).

⁶³MacKinnon (n 28) 271.

now. But just as the present concept of rights has not, to date, been able to significantly change the social status of women and adequately address the emanating oppression, I do not believe that the current approach to the idea of animal rights allows for the realisation of the ultimate goal of the animal liberation movement. As long as our anthropocentric outlook persists and we employ humanness as the exclusive reference point from which to establish similarity and an ensuing right to rights, animals will without fail be subjugated; just as blacks will always, despite being rights bearers, be othered when whiteness is the norm, women when maleness is the measure and homosexuals within a heteronormative configuration.

Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights

J-H de Villiers*

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Jan-Harm de Villiers

Affiliation

University of South Africa

Email

dvillj@unisa.ac.za

Date of submission

11 July 2018

Date published

12 December 2018

Editor Prof C Rautenbach

How to cite this article

De Villiers J-H "Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights" *PER* / *PELJ* 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a5320>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a5320>

Abstract

This article undertakes a critical analysis of subjectivity and exposes the metaphysical and anthropocentric quasi-transcendental conditions that give rise to the construct(ion) of the Subject. I locate a critical moment for the metaphysical Subject in the work of Martin Heidegger which, whilst sadly not sustained in his later writings, provides a point of departure for an examination of the significance that animality plays in the metaphysical tradition and its constitutive relation to the construct of subjectivity. I discern this relation to be violent and sacrificial and draw on Jacques Derrida's nonanthropocentric ethics against the background of Drucilla Cornell's ethical reading of deconstruction to construct a critique of approaches that assimilate animals to the traditional model of subjectivity in order to represent their identity and interests in the legal paradigm. The main argument that I seek to advance is that such an approach paradoxically re-constructs the classical humanist subject of metaphysics and re-establishes the subject-centred system that silences the call of the animal Other, thereby solidifying and extending the legitimacy of a discourse and mode of social regulation that is fundamentally anthropocentric. I examine how we can address, incapacitate and move beyond this schemata of power through a rigorous deconstruction of the partitions that institute the Subject and how deconstruction clears a space for a *de novo* determination of the animal "subject" that can proceed from different sites of nonanthropocentric interruption. What follows is a call to refuse the mechanical utilisation of traditional legal constructs and I argue in favour of an approach to the question of the animal (in law) that identifies and challenges *anthropocentrism* as its critical target. I ultimately propose a critical engagement with the underlying metaphysical support of animal rights at a conceptual level, rather than simply utilising the law pragmatically as an instrument of immediate resolution.

Keywords

Animal rights theory; animal ethics; anthropocentrism; deconstruction; law and rights; limitrophy; metaphysics of subjectivity.

A face in front of
one
neither now any more subject
only
reference
intangible
and fixed.¹

1 Introduction

Animal liberation theorists' engagement with the law has largely been a depthless and uncritical one. Relying on scientific accounts of animals to uncover and support claims about their moral standing and legal subjectivity, scholars have been turning to existing legal constructs and frameworks in an attempt to bring animals into the realm of legal consideration and protection. Rather than questioning the way in which the law (in its most general sense) continues to exercise anthropocentric power and silence the call of the animal Other, animal rights discourse labours under the unexamined supposition that existing legal constructs provide a suitable framework within which to effect changes in our thinking and relation with animals. There has, rather paradoxically, been little sustained engagement with the philosophico-juridical register of animal rights and a larger jurisprudential positioning of the animal in law and right(s). Whilst a plethora of moral and ethical philosophies on animal rights provides refined arguments in favour of the expansion or reformation of humanist liberatory discourse to ground the animal's moral and ethical agency, there has been a glaring neglect of engagement with the complexity of the *subject*, the being whose interests are to be protected through right(s). In short, the animal subject has been neglected in jurisprudence.

Whilst I am aware that there are multiple theoretical-philosophical approaches to animal rights theory and consequently don't wish to claim the existence of a single model, there are indeed recurring structural tenets that undergird the salient current models.² Most notably for the purpose of my focus in this article, they all ultimately revert to a subject-centred model that functions at the junctures of highly problematic homogenising categorisations (human / animal, subject / object, owner / property, rational / irrational) that validate and sustain the anthropocentric and carno-phallogocentric

* Jan-Harm de Villiers. BCom (Law) (*cum laude*) LLB (*cum laude*) LLM (Jurisprudence) (*cum laude*) (UP). Senior Lecturer, Department of Jurisprudence, University of South Africa. E-mail: dvillj@unisa.ac.za.

¹ Poem by Friedrich Rolf Huber quoted in Cornell *Philosophy of the Limit* 142.

² See Regan *Case for Animal Rights*; Regan *Defending Animal Rights*; Wise *Drawing the Line*; Francione *Animals as Persons*.

metaphysical structure from which the very notion of subjectivity not only emanates, but upon which it is reliant.

The main purpose of this article is to (re)turn the discourse of animal rights to its dependency on the event of subjectivity through a modest and focussed engagement with the most fundamental pre-condition of rights: the question of the Subject. What follows is a call to refuse the mechanical utilisation of traditional legal constructs and to argue in favour of an approach to the question of the animal (in law) that identifies and challenges anthropocentrism as its critical target. It is a call to engage with the underlying metaphysical support of animal rights at a conceptual level, rather than simply to utilise the law pragmatically as an instrument of immediate resolution. I am thus reiterating a previous call for a critical approach of slowness.³ Animal rights theorists' eagerness to simply add animals into existing legal frameworks in the hope of effecting immediate change is understandable, given the almost unimaginable suffering that millions of animals endure every day. My project, however, stems from the premise that animal liberation will, unfortunately, inevitably be a slow and gradual process. Any approach that fails to take on the laborious, time-consuming task of confronting metaphysical anthropocentrism will foreclose the possibility of destabilising and moving beyond the very interpretation of the human (as subject) that lies at the heart of animal subjugation.

This article can roughly be divided into two parts, and unfolds as follows: In the first part I undertake a critical philosophical analysis of the subjectivity that undergirds rights, specifically focussing on the metaphysics of subjectivity and presence. I argue that the construct of subjectivity inevitably requires that the animal be assimilated to the prototypical and ground symbolic of the (hu)man of rights, ultimately reinforcing the containment of the animal in an identification as sub-human Other. In the second part of the article I examine how deconstruction clears a space for a re-conceptualisation of the animal "subject" in terms of subjection, substitution, hostage, and ultimately responsibility. I draw on Derrida's deconstructive gestures against the background of a previous engagement with Cornell's reconceptualisation of deconstruction to illustrate that deconstruction exposes a limit, in turn preserving the possibility of another thought of relation and ultimately another law. As such, I regard a deconstructive approach as vital to unweaving the anthropocentrism woven into the fabric of legal constructs and holding open the possibility of a post-subjective space that is non-anthropocentric.

³ See De Villiers 2015 *SAPL*.

2 The anthropomorphic hegemony of subjectivity

Animal rights theorists effectively seek a displacement of the line that separates the (legal) subject from the (legal) object so that animals can be endowed with the substratum of (legal) subjectivity from which rights and correlative legal protection flow. Legal rights are internally linked with the metaphysics of subjectivity in its chronological conception and complementarity; rights are the legal validation of the metaphysics of subjectivity.⁴ Metaphysics – *meta* (over or beyond) *ta physica* (the physical material world) – is the study of that which lies beyond the immediate physical realm. Metaphysics aims to describe and make sense of the disorder that unknowables (like existence and possibility) confront us with, and to master finitude, which, as Heidegger⁵ remarks, "is not some property that is merely attached to us, but is *our fundamental way of being*".

We find the foundation of metaphysics in the classical Greek philosophers' reversal between the sensible and the intelligible, reaching its completion in Plato; the phenomenal world reflected as shadows against the dim wall of the cave and true reality existing in the sunlit world of ideas and forms. Beyond chaotic nature, which abounds with phenomena and appearances, lies the truth, which can be approached through philosophical dispositions of reason or *logos*.⁶ For Heidegger,⁷ the origin of metaphysics overlaps with the establishment of a certain humanism in which the human "move[s] into a central place among beings". Here human beings are defined, within a metaphysically established system of beings, as *animal rationale* and lead "to the liberation of their possibilities, to the certitude of their destiny, and to the securing of their 'life'".⁸

Heidegger⁹ finds in Plato's thinking "a change that becomes the history of metaphysics". For Heidegger, Plato relinquishes the essence of "unhiddenness" and initiates a shift in the essence of truth. No longer is truth understood as the unhiddenness or unconcealment of beings themselves, but unhiddenness becomes "harnessed in a relation to looking, apprehending, thinking, and asserting".¹⁰ Truth is sequentially re-located in the correct narration and depiction of "objects" by the human "subject". If this understanding of truth finds its genesis in Plato, we see it reach its grand

⁴ Douzinas *End of Human Rights* 241.

⁵ Heidegger *Fundamental Concepts of Metaphysics* 6.

⁶ Douzinas *End of Human Rights* 202.

⁷ Heidegger "Plato's Doctrine of Truth" 181.

⁸ Heidegger "Plato's Doctrine of Truth" 181.

⁹ Heidegger "Plato's Doctrine of Truth" 181.

¹⁰ Heidegger "Plato's Doctrine of Truth" 182.

finale in Decartes' search for a *fundamentum absolutum inconcussum veritatis* - an absolute, unshakeable foundation of truth - which he locates in the self-present human subject.¹¹

The word subject stems from the Latin *subjectum*, literally meaning "that which is thrown under". The subject thus designates a fundamental stratum for the affirmation of qualities, predicates and attributes. The Latin *subjectum* was translated from the Greek *hupokeimenon*, "that which lies under", a term that Aristotle used to refer to "that of which all other entities are predicated but which is itself not predicated of anything else".¹² *Hupokeimenon* ascribes a foundation upon which all entities become intelligible, and a determination of the subject as *hupokeimenon* is a claim to the meaning of Being – defined as the foundation upon which entities are grasped as such. Heidegger pointed out that every conceptualisation of the subject, irrespective of its affirming substantialisation, continuously postulates an *ultimum subjectum* or absolute foundation, rendering any determination of subjectivity fundamentally metaphysical.¹³ Decartes' *cogito ergo sum* placed this foundation on humanity and, according to Heidegger, decisively turned classical metaphysics into anthropology by identifying the *subjectum* with the human subject, the final point of reference and ultimate ground of all that exists.¹⁴ Nietzsche punctuated and solidified the infection of rationality. For Heidegger, Nietzsche's inverting figuration of the human as *animal rationale* simply reinforces the metaphysical framework within which human subjectivity is constructed. Rather than moving beyond a metaphysical determination of the subject, Heidegger argues that Nietzsche's thought remains grounded in a subjectivist understanding of values and his re-prioritisation of man's animality (over rationality) merely signals an inversion of the classical metaphysical definition and, with that, the closure of the metaphysical tradition's potentiality.¹⁵ At this closure, where "the Being of being human is exclusively presented in terms of the conscious subject, who sets the world forth and understands it through reduction of being to (self)-representation", we find the human as the relational centre of all that is.¹⁶

Heidegger understood that metaphysics has *ab initio* been concerned with one guiding question, namely what is an entity (in its Being)? Critchley¹⁷ notes

¹¹ Calarco 2004 *Cont Philos Rev* 178.

¹² Critchley *Ethics, Politics, Subjectivity* 51.

¹³ Critchley *Ethics, Politics, Subjectivity* 52.

¹⁴ Douzinas *End of Human Rights* 204.

¹⁵ Calarco *Zoographies* 32.

¹⁶ Douzinas *End of Human Rights* 205.

¹⁷ Critchley *Ethics, Politics, Subjectivity* 52.

that metaphysics is not a regional ontology that asks after the Being of a region of entities like living things (biology) or physical matter (physics), but rather concerns itself with the question of the Being of an entity *as such*. The question of Being (or *Seinsfrage*) is thus the guiding question of philosophy for Heidegger and the philosophical tradition stretching from Plato to Nietzsche involves the unfolding of theses on the meaning of Being that progressively obfuscate its original sending.¹⁸ Metaphysics has thus always been a metaphysics of the subject to the extent that philosophy has always sought to designate the *subiectum*, the ultimate foundation from which entities become intelligible. In this sense, all the master words of pre-modern metaphysics (*eidos*, *ousia*, *causa sui*) are subjects and the subject is also always the subject of metaphysics.¹⁹

For Heidegger, the metaphysical tradition is guilty of a forgetfulness or oblivion of Being. This forgetfulness is embodied in a failure to ask the question of Being (in itself) and a synchronal development and determination of a concept of subjectivity. As explained above, the history of philosophy can be seen as a meditation on the *subiectum* as foundation for an understanding of entities and what is at stake in this tradition, for Heidegger, is a displacement of this metaphysical foundation. No longer residing in a form, substance or deity, the foundation is ultimately found in the human understood as subject.²⁰ He writes:

The *Meditationes de prima philosophia* provide the pattern for the ontology of the *subiectum* constructed from the perspective of a subjectivity defined as *conscientia*. Man has become the *subiectum*. He can, therefore, determine and realize the essence of subjectivity – always according to how he conceives and wills himself.²¹

Heidegger ultimately forces us to reflect on the significance of the metaphysical baggage accompanying the unfolding conceptualisation and concluding identification of man as subject. I would like to further problematise this schema by approaching it from an interdependent, but differentiated vantage point, shifting the focus from the implications of the human becoming *subject*, to the significance of the *human* becoming subject. Recalling Critchley's assertion that metaphysics is concerned with the question of the Being of an entity *as such*, to what extent, if at all, is the metaphysical tradition concerned with the particular question of the animal's

¹⁸ Critchley *Ethics, Politics, Subjectivity* 52.

¹⁹ Critchley *Ethics, Politics, Subjectivity* 53.

²⁰ Critchley *Ethics, Politics, Subjectivity* 53.

²¹ Heidegger "Age of the World Picture" 84.

Being? What significance does animality play in the metaphysical tradition and in what relation does it stand to the construct of subjectivity?

By recognising that human(ity) was consistently juxtaposed to animal(ity) throughout the development of Western metaphysics - from Plato's²² view of humans as creatures "different and more divine, pastur[ing] other kinds of living creatures more lowly than themselves", to Aristotle's²³ acquiescent sentiment that animals are inferior beings that "should be under subjection to man..." and Descartes'²⁴ well-known account of animals as automata or "machine[s] made by the hands of God" - we can begin to reflect on the anthropomorphic hegemony of subjectivity and its implications for discourses and institutions that evoke this construct. My aim is to illustrate that the construct(ion) of subjectivity is a violent, exclusionary process of othering. It is important to note that not only animals occupy a space of marginalisation within the metaphysical tradition, as classical concepts of subjectivity have excluded a plethora of Others. The earlier citation from Aristotle that I suspended with an ellipse highlights another dimension to the conjunctive sacrificial structure of the metaphysical tradition:

... so is it naturally with the male and the female, the one is superior, the other inferior; the one governs, the other is governed... Those men therefore who are as much inferior to others as the body is to the soul, are to be thus disposed of, as the proper use of them is their bodies, in which their excellence consists.²⁵

Aristotle's justification for the appropriation and ingestion of the juxtaposed Other's body has profound significance for the structure of subjectivity, and I will return to this argument below. The point that I am trying to make here, which is not unrelated to the main argument being developed, is that *the subject* has been constituted through various relations of hierarchy, each reflecting a particular form of power. Any challenge to these hegemonic constructs requires a radical re-thinking of the subject so as to avoid the paradox of challenging a form of power whilst accepting its own terms of reference. I am in particular concerned with anthropocentrism as a guiding thread of the metaphysical tradition and its implications for an attempt to assimilate animals to the existing model of legal subjectivity. If, as Heidegger has extensively argued, the metaphysical tradition has failed to adequately attend to the question of Being and the essence of the human is lost in the process of man's being conceived of as subject, what would the implications

²² Plato "Statesman" 313.

²³ Aristotle "Treatise on Government" 17.

²⁴ Descartes "Discourse" 44.

²⁵ Aristotle "Treatise on Government" 17.

be if the philosophical and legal concept of subjectivity were applied to other animals?

Heidegger's writings, specifically his early work, reflect a certain appreciation and consideration of the salience of metaphysical anthropocentrism. Despite his failure to sustain his early challenge to ontotheological anthropocentrism, Heidegger's reflections on the being of animal life nevertheless mark an important critical moment for the metaphysical subject, and the lines of inquiry opened up by his work provide a suitable point of departure for an engagement with the pervasiveness of metaphysical anthropocentrism.

3 Heidegger and metaphysical anthropocentrism

Heidegger's²⁶ first seminal work, published in 1927, provides no more than brief fragmented references to the animal. Yet the question of animal Being, though neither pursued nor explicitly contextualised, lingers as a faceless subtext. Heidegger²⁷ calls for a reciprocal relationship between philosophy and the positive sciences, arguing that an ontological foundation can assist science by "leap[ing] ahead into some area of Being, disclos[ing] it for the first time in the constitution of its Being, and, after thus arriving at the structures within it, mak[ing] these available to the positive sciences as transparent assignments for their inquiry". With this, Heidegger acknowledges the need for projects that determine Being beyond *Dasein*. Later in this text Heidegger²⁸ articulates a concern with beings as a whole and calls for a project on *life*, which would logically once again include other animals, as "a kind of Being in its own right". However, he immediately qualifies and positions the project of developing such an ontology of life as accessible only in *Dasein* and as a site of lack to be interpreted against the absence of qualities that differentiate *Dasein*'s distinct Being. Heidegger insists on a privative interpretation and rejects an ontological definition of *Dasein* as "life... plus something else".²⁹ This ground for analysis exposes more than a delineation of the entry point or scope of Heidegger's project at that specific time; it divulges a subtle yet pervasive anthropocentrism that would guide all his future writings, often in dissonance with his explicit opposition to certain anthropocentric leitmotifs of the metaphysical tradition that shape and legitimise the humanism that he finds so problematic.

²⁶ Heidegger *Being and Time*.

²⁷ Heidegger *Being and Time* 30-31.

²⁸ Heidegger *Being and Time* 75.

²⁹ Heidegger *Being and Time* 75.

The essence of the animal and her specific manner of being enjoy significantly more attention in his lecture course³⁰ delivered shortly thereafter in 1929, and whilst the question of the human/animal distinction is addressed (to varying degrees) in several of his writings,³¹ Heidegger's most sustained engagement with an ontology of animal life is to be found in this text. Here his thesis on the reciprocity between philosophy and science is once again emphasised, complicated and refined, *inter alia* through an engagement with the relationship between Zoology and the philosophical project of determining the animal's essence. His interpretation, Heidegger holds, is valid for the relationship between philosophy and all the sciences and it elucidates an association of communal cooperation and reciprocal enlightening. Heidegger³² calls the relation between metaphysics and the positive sciences "an ambiguous one" and I read this characterisation as a problematisation of the tendency in both philosophy and the sciences to claim absolute autonomy over certain processes and objects of inquiry, a tendency that renders both isolated disciplines wanting. Addressing "the magnitude of difficulties surrounding a *metaphysical interpretation of life*" requires a twofold discursive shift: a repositioning of philosophy seen as a purely transcendental discourse capable of determining the essence of an entity without recourse to biological science and, concomitantly, of science seen as a positivistic uncovering of "facts" without any need for interpretation or ontology. It is through an engagement with the phenomenon of "world" that Heidegger aims to initiate this reciprocal relation and distinguish human *Dasein* from other animals by exposing their respective modes of Being.³³

3.1 Heidegger and the question of world

Heidegger's engagement with the question of world starts with the supposition that humans are not merely part of the world, but moreover *have* world. But what about other beings that are also part of the world, like the animal, plant and stone? Heidegger³⁴ proposes that certain distinctions immediately manifest themselves, "however crudely", upon undertaking a comparative examination:

³⁰ Heidegger *Fundamental Concepts of Metaphysics*.

³¹ See *inter alia* Heidegger *Being and Time*; Heidegger *What is Called Thinking?*; Heidegger *On the Way to Language*; Heidegger "Origin of the Work of Art"; Heidegger *Parmenides*; Heidegger "Letter on 'Humanism'".

³² Heidegger *Fundamental Concepts of Metaphysics* 188.

³³ Lewis 2017 *Cosmos and History* 52-53.

³⁴ Heidegger *Fundamental Concepts of Metaphysics* 177.

[1.] The stone (material object) is *worldless*; [2.] the animal is *poor in world*; [3.] man is *world-forming*.

In explaining his thesis that the animal is poor in world whilst man is world-forming, Heidegger³⁵ insists that this comparison "allows no evaluative ranking" and that it is not founded in the questionable habitual assessment that man has a higher or greater completeness of experiences and accessibility than animals. For Heidegger, anthropocentric hierarchical evaluations of essence and capacities are not only problematic in their denial of the complexities of animal relations (considering, for example, how the falcon's sense of sight and the canine's sense of smell surpass that of the human), such evaluations furthermore preclude an appreciation of the *specificity* of animals' world relations with other beings and are grounded in the very problematic premise that we can indeed compare human and animal world relations through the variegation of collective (dis)similarities.

It is in Heidegger's commitment to a thinking of animality on the animals' own terms that we find his most progressive digression from the metaphysical tradition that he extensively critiqued. Heidegger's³⁶ assertion that the determination of the animal's world relations "cannot be decided by reflections on language *but only by taking a look at animality itself*" signals a radical withdrawal from the anthropocentric prism through which the animal has traditionally been approached in Western philosophy. It is, however, also at this very juncture of trying to distinguish between the human and animal relation to world that Heidegger reasserts some of the most dogmatic and problematic tenets of traditional metaphysical discourse.³⁷

It needs to be noted that Heidegger's entire engagement with animality is aimed at articulating the unique relational structure of *human Dasein* and that his analysis of the animal's world-lessness serves to demarcate, through contrast and comparison, the essence of man's world-forming capacity.³⁸ "World" here designates for Heidegger a relational realm in which entities or beings are reciprocally present and accessible. The stone has no world; it does not "touch" the earth in any proper sense but merely "crops up" wherever it falls, having no relational force or access to the world in which it finds itself.³⁹ The animal, by contrast, does have a relational structure and access of some kind. The lizard basking in the sun has not just cropped up in the world. When removed from the rock on which she is lying, the lizard

³⁵ Heidegger *Fundamental Concepts of Metaphysics* 194.

³⁶ Heidegger *Fundamental Concepts of Metaphysics* 195, own emphasis.

³⁷ Calarco *Zoographies* 22-23.

³⁸ Calarco "Heidegger's Zoontology" 20.

³⁹ Heidegger *Fundamental Concepts of Metaphysics* 197.

will start looking for her stone again, as she is accustomed to doing. The crucial point of differentiation, however, is that the lizard has no mode of being that allows her to penetrate the Being of an entity; to relate to the rock as a rock, or the sun as the sun. It is the lack of this relational "as" structure that, for Heidegger,⁴⁰ renders the animal poor in world and precludes a capacity for ek-sisting:

The manifestness of beings as such, of beings as beings, belongs to world. This implies that bound up with world is the enigmatic 'as,' beings as such, or formulated in a formal way: 'something as something,' a possibility which is quite fundamentally closed to the animal.

For Heidegger,⁴¹ Ek-sistenz is thus inextricably linked to the dis-closive aptitude of *Dasein*; his specific way of relating to himself, others, and "mere possibility as Idea". Heidegger⁴² denotes (such) ek-sistence as "standing in the clearing of being", adding "this way of being is proper only to the human being". Heidegger's conceptualisation of "world" thus ultimately assumes (or perhaps rather subsumes) the ability to ek-sist.⁴³ It is pertinent to reflect on the relevance of Heidegger's insistence that only man ek-sists, for it is a point that he repeatedly accentuates. Whilst it is clear that Heidegger is advancing the thesis that the metaphysical tradition has always been forgetful of Being and ignored what he deems to be man's essence, Heidegger is also solidifying a disconnection between *animalitas* and *humanitas*. Here it is important to recall Heidegger's rigorous critique of Nietzsche's thinking as the fulfilment and closure of the Western metaphysical tradition.

I share the view that Heidegger not only fails to see the critical promise of Nietzsche's ontology, but that his critique furthermore exposes the very blind spot in his own thinking that encloses his project within the confines of metaphysical thought.⁴⁴ Heidegger's critique is articulated against his view of the history and culmination of metaphysics as the subjectivisation of Being. What Heidegger failed to account for, however, is that the history of modern metaphysics is the progressive subjectivisation of (the) *human-Being*. For all

⁴⁰ Heidegger *Fundamental Concepts of Metaphysics* 274.

⁴¹ Heidegger "Letter on 'Humanism'" 249.

⁴² Heidegger "Letter on 'Humanism'" 247.

⁴³ This conceptualisation entrenches the essential gulf or "abyss" that, for Heidegger, separates humans and animals. He states "in any case living creatures are as they are without standing outside their being as such and within the truth of being, preserving in such standing the essential nature of their being. Of all the beings that are, presumably the most difficult to think about are living creatures, because on the one hand they are in a certain way most closely akin to us, and on the other they are at the same time separated from our ek-sistent essence by an abyss". Heidegger "Letter on 'Humanism'" 248.

⁴⁴ For an extensive explication of this position, see Calarco *Zoographies* 31-43.

Heidegger's efforts to uncover the essence of *Dasein* through a clear delineation and demarcation of the chasm that separates man from animal, it is the concretisation, implementation and perpetuation of this metaphysico-anthropocentric axiomatic that frustrates and ultimately obstructs the possibility of moving beyond the metaphysics of subjectivity. Just as the tradition that preceded him, Heidegger's engagement with animals and animality serves to develop an understanding of the human's specificity and essence, and not as beings to be considered in their own right or on their own terms. This is not merely an inescapable modus that accompanies an inquiry that takes the human being as focal point; Heidegger is at pains to conceptualise man's separateness in opposition to the threat that the animal poses to that particularity.⁴⁵ Heidegger's⁴⁶ critique of the metaphysical humanism that "does not set the *humanitas* of the human being high enough" is thus deeply rooted in an essentialist logic of opposition between human and animal, and his project of displacing the metaphysical interpretation of man ultimately leaves us with a more rigorous delimitation of man that is grounded in highly problematic oppositions that remain inadequately questioned. Derrida's⁴⁷ assertion that Heidegger's discourse "disrupt[s]... a certain traditional humanism" whilst ultimately remaining a "profound humanism" should be read from this perspective.

4 Thinking at the limit of the subject

If Heidegger's *Dasein* comes before the (de)domiciling of entities into object and) subject, who or what comes after the subject? In order to elucidate what is at stake in the contestation of this limit, I (re)turn to Nancy's interview with Derrida on the notion of subjectivity that I have previously engaged with.⁴⁸ Responding to Nancy's question "Who comes after the subject?" Derrida immediately delineates two concerns with Nancy's formulation. The first is intended as a response to prevailing criticisms or *doxa* on the "simple liquidation" of the subject and the second as a reproach to the unquestioned anthropocentrism that continues to emblematises the post-humanist tradition.

Derrida firstly argues, contra popular neo-humanist notions, that the discourses of Lacan, Althusser, Foucault, Freud, Marx and Nietzsche present a questioning, re-interpretation and re-positioning of the subject in its historico-cultural complexity. Far from "liquidating" the subject, the radically

⁴⁵ Calarco *Zoographies* 53.

⁴⁶ Heidegger "Letter on 'Humanism'" 251.

⁴⁷ Derrida and Nancy "'Eating Well'" 113.

⁴⁸ De Villiers 2012 *SAJHR*.

decentered subject invites reflection on the consequences of such displacements for various institutions. The call for a "return to the subject" is thus confused in its misunderstanding of the constitution of the subject, as if there *is* indeed a Subject to return to. "There has never been The Subject for anyone", reminds Derrida.⁴⁹ "The subject is a fable... but to concentrate on the elements of speech and *conventional* fiction that such a fable presupposes is not to stop taking it seriously (it is the serious itself)".⁵⁰ There is no authorial-authoritarian subject that is not confronted with a certain disruption or *différance* at its core. The condition of deconstruction is thus not an extraneous thematic that is being imposed on the thinkers of subjectivity, but a fundamental force at work in the authorial functions of the subject.⁵¹ Once the subject has been "re-interpreted, displaced, decentered, re-inscribed", the challenge for thought is firstly to work through the implications for institutions that presuppose the *subjectum* in its Cartesian and post-Cartesian forms, and secondly to attend to the determination of the who or what responding to the question "who" (comes after the subject)?⁵² The latter point, against which Derrida raises his second apprehension, informs my central concern.

Derrida is careful to keep a critical distance from post-humanist theorists who sustain and reproduce an unquestioned anthropocentrism. For Nancy,⁵³ the "who" designates a locus post-subjectivity, "that place 'of the subject' that appears precisely through deconstruction itself" and he elaborates by asking, "What is the place that *Dasein*, for example, comes to occupy?" Derrida⁵⁴ remains highly sceptical of a simple overcoming of the metaphysical closure, warning that the substitution of "a very indeterminate 'who' for a 'subject' overburdened by metaphysical determinations" is not likely to result in a decisive displacement, and Heidegger's all too human *Dasein* remains, for Derrida, enclosed in the occlusion of metaphysical humanism and -anthropocentrism. Derrida⁵⁵ is especially critical of the remnants of self-presence implicit in *Dasein*'s phenomenological (*as such*) relational mode and its function of radically and rigorously separating *Dasein* from other animals. The analytic of *Dasein* invokes conceptual oppositions that have not been adequately interrogated and the critical project of addressing and moving beyond the metaphysical problematic of the subject is located at the

⁴⁹ Derrida and Nancy "Eating Well" 102.

⁵⁰ Derrida and Nancy "Eating Well" 102.

⁵¹ Calarco 2004 *Cont Philos Rev* 186.

⁵² Derrida and Nancy "Eating Well" 98.

⁵³ Derrida and Nancy "Eating Well" 98.

⁵⁴ Derrida and Nancy "Eating Well" 100.

⁵⁵ Derrida and Nancy "Eating Well" 105.

borders of these oppositions. Here we find supposedly essential and exclusive qualities, attributes and phenomena that are fragile, surreptitious and volatile; and a deconstruction of these "propers" opens a space in which we can begin to re-determine and re-articulate the "who" (after the subject). To quote Derrida:⁵⁶

In order to recast, if not rigorously re-found a discourse on the 'subject,' on that which will hold the place (or replace the place) of the subject (of law, of morality, of politics...), one has to go through the experience of a deconstruction. This deconstruction (we should once again remind those who do not want to read) is neither negative nor nihilistic; it is not even a pious nihilism, as I have heard said. A concept (that is to say also an experience) of responsibility comes at this price. We have not finished paying for it. I am talking about a responsibility that is not deaf to the injunction of thought.

The concept and experience of responsibility that Derrida speaks of here have complex relations to questions of animality, time, memory, ethics, law and justice. Derrida is emphasising the responsibility and importance of thought; of "ceaselessly analysing the whole conceptual machinery, and its interestedness, which has allowed us to speak of the 'subject' up to now".⁵⁷ I read Derrida as emphasising that we need to "take responsibility" for the historical trajectory of the subject in all its complexity, for the violence embedded in its historicity, by critically engaging with the borders of the rupture between "this 'I-we' and what we *call* animals",⁵⁸ between the (anthropo-centric) Subject and those beings excluded from being Subject. Derrida⁵⁹ reminds us that the heterogeneous border of this rupture has a complex history, that "one can speak here of history, of a historic moment or phase, only from one of the supposed edges of the said rupture, the edge of an anthropo-centric subjectivity that is recounted or allows a history to be recounted about it, autobiographically...". I have previously illustrated that the borders that institute the subject are unstable and argued that our ethical duty towards other animals demands that we position and include the critical project located at these borders in relation to concepts of time, memory and justice.⁶⁰ A genealogical reflection on the creation and reproduction of these borders not only exposes the inexactness of its constitutive functioning, but also sheds light on the hegemony of the trajectory of subjectivity and the violent spaces that various Others occupy (with)in the subjectile of the rupture and across the divide.

⁵⁶ Derrida and Nancy "Eating Well" 107-108.

⁵⁷ Derrida and Nancy "Eating Well" 109.

⁵⁸ Derrida *The Animal That Therefore I Am* 30.

⁵⁹ Derrida *The Animal That Therefore I Am* 31.

⁶⁰ De Villiers 2012 *SAJHR*.

Derrida's concept of *carno-phallogocentrism* that I previously discussed⁶¹ underlines and further complicates the violence embedded in the partitions that institute the anthropo-centric Subject and highlights another problematic of a superimposed shared subjectivity between humans and animals. I have been arguing that the Subject has been constructed on an underlying foundation of man's non-identity with juxtaposed Others, particularly women and animals. There is, however, also a constitutive scheme of ingestion that underlies the relation between subjectivity and the animal's body. Derrida's neologism "*carno-phallogocentrism*" captures this ingestion of the Other that is intrinsic to the founding and solidification of humanistic subjectivity and emphasises that this operation is both symbolic and real when the body or corpse of the animal is concerned:

I would want to explain *carno-phallogocentrism*, even if it comes down to some sort of tautology or rather hetero-tautology as a priori synthesis, which you could translate as 'speculative idealism,' 'becoming-subject of substance,' 'absolute knowledge' passing through the 'speculative Good Friday': it suffices to take seriously the idealizing interiorisation of the phallus and the necessity of its passage through the mouth, whether it's a matter of words or of things, of sentences, of daily bread or wine, of the tongue, the lips, or the breast of the other.⁶²

Carnophallogocentrism identifies the intentional subject (and the discourse from which he emanates) with constitutive requisites of carnivorousness, masculinity and rationality. My concern is with the violence that cultivates and nourishes the borders of these requisites, both in its symbolic form of "words or sentences" and its materialising expression in the consumption of the "breast of the other". The point at issue is that the actual consumption of the animal is essential to the constitution of subjectivity, "the subject does not want just to master and possess nature actively. In our cultures, he accepts sacrifice and eats flesh".⁶³ Man's becoming-subject derives from historical and continuing violence that extends far beyond the privative space that the animal occupies at the border of the human (subject) / animal (object) rupture. The structure of subjectivity feeds on the animal's flesh. The metaphysics of subjectivity is thus not only a conceptual violence that facilitates and legitimates our continued oppression of the animal Other, but it is fundamentally antithetical to her interests. By attempting to strategically tweak the boundaries and simply add animals into the legal construct of

⁶¹ See De Villiers 2012 *SAJHR*.

⁶² Derrida and Nancy "'Eating Well'" 113.

⁶³ Derrida and Nancy "'Eating Well'" 114. The essential link between carnivorous sacrifice and the structure of subjectivity highlights another dimension to the deconstructive potential of veganism that I previously proposed. See De Villiers 2012 *SAJHR*.

subjectivity in its given state we are not challenging the *status quo*, but rather solidifying and extending the legitimacy of a discourse and mode of social regulation that is fundamentally anthropocentric. My argument is that these theorists and activists are simply re-constructing the classical humanist subject of metaphysics and re-establishing the subject-centered system that silences the call of the animal Other. We can only address, incapacitate and move beyond this scheme of power through a rigorous deconstruction of the partitions that institute the Subject and "a reinterpretation of the whole apparatus of limits within which a history and a culture have been able to confine their criteriology".⁶⁴

It is pertinent at this point to briefly revisit and highlight the ethical significance and positioning of my deconstructive project, specifically in relation to the larger themes of law and responsibility. My previous engagement with Cornell's ethical reading and renaming of deconstruction illustrates how deconstruction seen as a philosophy of limit intimates the quasi-transcendental conditions constituting any system as a system and in turn exposes the inevitability of a "beyond" to a system, that which the system inescapably excludes.⁶⁵ Cornell's project allows us to better understand the philosophical concept of deconstruction and her (re)conceptualisation clarifies the responsibility that deconstruction calls for in relation to a legal system. This responsibility, which Cornell⁶⁶ perhaps more accurately designates as a locus of accountability, relates to our memories and the future that we promote in the act of remembrance. Derrida⁶⁷ repeatedly accentuates the historical and interpretative memory fundamental to deconstruction, reminding us that "this is not only a philologico-etymological task or the historian's task but the responsibility in face of a heritage that is at the same time the heritage of an imperative or of a sheaf of injunctions". Genealogy, then, forms part of judicial integrity and the critical observer holds the tradition or system to task through the remembrance of its exclusions and partialities.⁶⁸ Cornell recalls the history in which women were denied autonomy over their own bodies and, in a similar vein, I am here educating the violent sacrificial relation between subjectivity and animality. The structure of subjectivity (re)presents a very real limit to the striving for justice, specifically in its perpetuation of an anthropocentric order. Any striving for justice demands that we expose the limits of what has come to be instituted as law

⁶⁴ Derrida "Force of Law" 247.

⁶⁵ See De Villiers 2012 *SAJHR*.

⁶⁶ Cornell *Philosophy of the Limit* 149.

⁶⁷ Derrida "Force of Law" 248.

⁶⁸ Cornell *Philosophy of the Limit* 149.

through the preservation of the legal system.⁶⁹ To quote Derrida:⁷⁰

This responsibility before memory is a responsibility before the very concept of responsibility that regulates the justice and appropriateness [*justesse*] of our behavior, of our theoretical, practical, ethicopolitical decisions. This concept of responsibility is inseparable from a whole network of connected concepts (propriety and property, intentionality, will, freedom, conscience, consciousness, self-consciousness, subject, self, person, community, decision, and so forth). All deconstruction of this network of concepts in their given or dominant state may seem like a move toward irresponsibility at the very moment that, on the contrary, deconstruction calls for an increase in responsibility.

Deconstruction reconceived as the philosophy of the limit helps us to better understand justice as the limit to a system of positive law and the attendant increase in responsibility, precisely because it underlines the ethical aspiration behind the exposure of the system's limit and Other. Cornell's reading of deconstruction is grounded in profound insight into the limitrophe nature of deconstruction and the significance of the way in which deconstruction exposes the limit of a system or concept. The limit cannot be positively described as an oppositional cut or self-limitation and thereby reduced to a dichotomy or excess that can be incorporated into the system. The work of deconstruction is not to efface a limit, but rather to complicate the limit(s). Cornell's reading of deconstruction forcefully resonates in Derrida's⁷¹ later claim in relation to the question of the animal, that "*limitrophy* is therefore [his] subject. Not just because it will concern what sprouts or grows at the limit, around the limit, by maintaining the limit, but also what *feeds the limit*, generates it, raises it, and complicates it". It is within the complexity of limitrophy that deconstruction exposes why and how the Other is other to the system and this exposure, as Cornell reminds us, is driven by an ethical aspiration to observe the call of the Other.

The single oppositional man (subject) / animal (object) limit has not only functioned to solidify anthropocentric hegemony, but has eradicated the plethora of existences and relational structures on both sides of the rupture. Beyond the partitions that construct the human lies "a heterogeneous multiplicity of the living", complex relations of organisation that are increasingly difficult to dimidiate.⁷² These relations resist simple dissociation, reductive categorisation and homogenisation, rendering the conflation of the singular animal Other to a generalised occasion of "the Animal" problematic on several levels. On an ethical level, reliance on these metaphysical

⁶⁹ Cornell *Philosophy of the Limit* 150.

⁷⁰ Derrida "Force of Law" 248.

⁷¹ Derrida *The Animal That Therefore I Am* 29.

⁷² Derrida *The Animal That Therefore I Am* 31.

categories embodies inherent violence to otherness. Recalling Cornell's⁷³ description of the ethical relation as "the aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her difference and singularity", we can see how homogenisation and appropriation of "the animal" (or animal in general) betrays the most fundamental characteristic of the ethical relation. As I have also previously argued, subjectivity as building block for rights inherently relies on reductive disengagements that privilege similarity over difference and grounds ethical responsibility in likeness.⁷⁴ The need for a thinking of *différance* rather than opposition is once again emphasised.

On an ontological level, the violent functioning of the metaphysical human / animal dualism necessitates a new non-anthropocentric perspective of singularity that resists reductive and privative accounts of being(s) and strives to embrace animals on their own terms. The genesis of such an alternative thought is, as I have already suggested, located at the border of the human / animal limit and will succeed a rigorous deconstruction of the functioning of the limit and its relation to different concepts and practices. I use the word genesis deliberately as the philosophy of the limit is not simply a disruptive and destabilising exercise that leaves us stranded before an exposed obstruction, but provides us with a space of origin and a mode of formation. It confronts us with an occasion and, more importantly, the responsibility to think (again). "There is a duty in deconstruction", reminds Derrida.⁷⁵ "There has to be, if there is such a thing as duty. The subject, if subject there must be, is to come *after* this".⁷⁶ The deconstruction of metaphysics thus opens up a space for a *de novo* determination of the "subject"⁷⁷ that proceeds from different sites of interruption. There is indeed life following the displacement and decentring of the classical metaphysical subject and the question concerning the "who" inevitably remains.

5 The post-deconstructive "who"

In the same interview with Nancy, Derrida makes the following two intriguing statements towards a possible new determination or location of the who-

⁷³ Cornell *Philosophy of the Limit* 62.

⁷⁴ See De Villiers 2012 *SAPL*.

⁷⁵ Derrida and Nancy "Eating Well" 108.

⁷⁶ Derrida and Nancy "Eating Well" 108.

⁷⁷ Like Derrida, I feel a certain discomfort with the word "subject" and agree that it might "be more worthwhile, once this path [of deconstruction] has been laid down, to forget the word to some extent". Derrida and Nancy "Eating Well" 105.

"subject":

There is another possibility that interests me more at this point: it overwhelms the question [who comes after the subject] itself, re-inscribes it in the experience of an 'affirmation,' of a 'yes' or of an 'en-gage' ... that 'yes, yes' that answers before even being able to formulate a question, that is responsible without autonomy, before and in view of all possible autonomy of the who-subject, etc.⁷⁸

To be brief, I would say that it is in the relation to the 'yes' or to the *Zusage* presupposed in every question that one must seek a new (postdeconstructive) determination of the responsibility of the 'subject.'⁷⁹

Derrida's reference to the *Zusage* stems from his critical reading of Heidegger in *Of Spirit: Heidegger and the Question*,⁸⁰ in which he *inter alia* takes Heidegger to task for his privative account of the animal's relation to "world", as discussed above. Regarding the *Zusage* (promise or pledge), however, Derrida's aim is to locate a dimension of responsibility in language. Even though a comprehensive discussion of this text falls beyond the scope of this article, a brief explanation is needed to contextualise the succeeding discussion and conclusions. For Heidegger, it is clear that language has already been granted *before* any question is put to language. All questioning compels the preceding *Zusage* (pledge) of that which is being put to language and he therefore finds the primary datum of language in *das Hören der Zusage* (listening to the pledge of language) rather than the experience of questioning. Derrida emphasises that Heidegger thus understands the *Zusage* as a moment of affirmation, a "yes".⁸¹ The question is necessarily already a response to and a responsibility for that which is prior to the question and consequently "one might say that the origin of language is responsibility".⁸²

Readers who are familiar with the work of Emmanuel Levinas will likely detect a loud echo of Levinasian ethics in Derrida's words. Levinas' project of displacing the humanist subject of classical metaphysics is already taken up in his first major work in which he critiques the Western philosophical tradition's striving for totalisation. Here Levinas⁸³ focusses on the Other, whose "face" interrupts from a dimension of irreducible "infinity" that interrupts the "totality" of the subject's reductive existence and in doing so gives rise to the subject's inescapable ethical responsibility for the Other. The

⁷⁸ Derrida and Nancy "Eating Well" 100.

⁷⁹ Derrida and Nancy "Eating Well" 105.

⁸⁰ See Derrida *Of Spirit*.

⁸¹ Critchley "Question of the Question" 96.

⁸² Critchley "Question of the Question" 97.

⁸³ See Levinas *Totality and Infinity*.

face does not present itself in the form of evidence to be seen. It breaks with the sensible by soliciting a relationship that resists expression in terms of knowledge. The alterity of the Other, which is not her individual difference but an unencompassable transcendence, remains outside comprehension. Yet despite resisting conceptualisation the face is vulnerable and against its limitless consequences expresses the commandment "Though shalt not kill". To the extent that my subjectivity is founded in and as a response to the Other's ungraspable infinity, Levinasian ethics is the experience of a call to responsibility. An attempt to comprehend and conceptualise the Being of the Other is a negation of her alterity and a rejection of this call. The Other's incomprehensible character resists relations of comprehension and synchronisation to the self and any thought of the Other thus carries within itself an excess that inevitably escapes me; "the infinite is the radically, absolutely, other" and "in thinking infinity the I from the first *thinks more than it thinks*".⁸⁴ Levinas accordingly rejects ontology as a totalising violence that strips the Other of her radical otherness.

It is Levinas' second seminal work, however, which presents a defence of subjectivity that is written from the context of a poststructuralist critique, that bears a closer relation to Derrida's determination of the who-"subject". Indeed, there are scholars⁸⁵ who conjecture that this work can be seen as a re-reading (of his first major work) that responds to Derrida's critique in "Violence and Metaphysics".⁸⁶ Derrida's critique here, in short, concerns Levinas' ineluctable reliance on the language of ontology whilst attempting to move beyond metaphysics. Whereas the point of exteriority that Levinas locates in the face of the Other is initially articulated within the constraints of ontological language, the title of Levinas' second major work, "*Otherwise than Being, or, Beyond Essence*", presents a dual transformative translation of the Platonic Good beyond Being and explicitly identifies the intention of his project to overcome ontology. Here Levinas portrays the radical passivity of subjectivity and primordial exposure to the Other through a distinction between the saying (*le Dire*) and the said (*le Dit*).

For Levinas, there are two dimensions of language. There is a saying or foreword that precedes language before silence is broken by verbal (or written) signs in the said. "Language does not begin with the signs that one gives, with words. Language is above all the fact of being addressed."⁸⁷ The (ethical) saying is therefore a pre-condition of the (ontological) said and I am

⁸⁴ Levinas *Collected Philosophical Papers* 54.

⁸⁵ Bernasconi and Critchley "Introduction" xiii.

⁸⁶ Derrida "Violence and Metaphysics".

⁸⁷ Levinas "Paradox of Morality" 169-170.

already exposed, addressed and dedicated to the Other before I direct myself toward her. For Levinas,⁸⁸ "the responsibility for another is precisely a saying prior to anything said." Very importantly, this being-for-the-Other does not stem from my decision, agreement or autonomy; my responsibility was already there before I discovered it and I am more radically constituted by this unique, infinite response-ability than my autonomy. This infinite responsibility is furthermore inescapable; whilst I may decide not to answer the Other's call that originates responsibility, I cannot silence her. I am hostage to the Other and her interruption derives from a past removed from my consciousness and will, "the core of human subjectivity is the extreme passivity of someone who always comes too late to accept his task and autonomy."⁸⁹

There is clear consonance between Levinas' interpretation of subjectivity as responsibility and Derrida's location of the who-"subject" in the "'yes, yes' that answers before even being able to formulate a question". There is, however, also critical dissonance between the two thinkers on the very question of responsibility, specifically regarding the limits of responsibility. Derrida holds that Levinasian ethics, despite displacing the self-present ego at the core of traditional humanism, ultimately remains tributary of metaphysical humanism in its reliance on anthropocentric metaphysical oppositional limits and carnophallogocentric in its sacrificial structure. The Levinasian discourse that *a priori* institutes the Other as man is firmly grounded in (unquestioned) metaphysical distinctions that guide an anthropocentric determination of animal Being in relation to the human. In remaining uncritically beholden to the dogmatic metaphysical axiom that allows for "a noncriminal putting to death"⁹⁰ of other animals, Levinas fails to "sacrifice sacrifice"⁹¹ and remains bound to the metaphysics of subjectivity that he seeks to displace.

This dogmatic anthropocentrism of Levinas' thought betrays an internal contradiction that he is never able to resolve. When directly provoked with the question of animality, specifically regarding the possibility of the "Thou shalt not kill" commandment being expressed in the face of the animal, Levinas⁹² (rather surprisingly and confusingly) grants that the animal does indeed have a face and goes on to say that "without considering animals as human beings, the ethical extends to all living beings". These statements are surprising considering the anthropocentrism that emblematises his body of

⁸⁸ Levinas *Otherwise than Being* 43.

⁸⁹ Peperzak "Presentation" 62.

⁹⁰ Derrida and Nancy "'Eating Well'" 112.

⁹¹ Derrida and Nancy "'Eating Well'" 113.

⁹² Levinas "Paradox of Morality" 171-172.

work and become increasingly confusing in the light of his ensuing remarks. When asked about the distinctiveness of the human face and the origin of our obligations (if any) towards animals, Levinas makes the following assertions:

One cannot entirely refuse the face of an animal. It is via the face that one understands, for example, a dog. Yet the priority here is not found in the animal, but in the human face. We understand the animal, the face of an animal, in accordance with *Dasein*. The phenomenon of the face is not in its purest form in the dog.⁹³

We do not want to make an animal suffer needlessly and so on. But the prototype of this is human ethics. Vegetarianism, for example, arises from the transference to animals of the idea of suffering. The animal suffers. It is because we, as human, know what suffering is that we can have this obligation.⁹⁴

Levinas' privileging of the human is not only problematic in its unwillingness to "sacrifice sacrifice", but also discordant with his defence of subjectivity as the direct response(ability) to a call preceding my consciousness and any form of conceptualisation that would foreshadow the "transference" of an "idea" in the said. The problematic of the animal and the ethical in Levinas⁹⁵ thought is further complicated when he states that "a more specific analysis is needed" before he can say whether a snake has a face, as if the Other is not wholly other and the face does not express an infinity that resists any appropriation within cognition. Ultimately it is clear that Levinas never rigorously considers the question of animal Being and the provocation to reflect on the place of animals in his work unearths the deeply entrenched metaphysical anthropocentrism that is dogmatically reasserted. The animal is not afforded the alterity that would place her in an asymmetrical relation to the self, her Being is deduced privatively in plurality against the measure of the human. It is this anthropocentrism to which Derrida has been very observant that leads him to claim that Levinas' thinking, like that of Heidegger, remains profoundly humanistic. I want to suggest, however, that Derrida's deconstruction of Levinas can itself be read ethically; as an intervention that directs us to the centre of the subject and aims to guard against the failure to protect the Other's otherness that Levinas' concept of the ethical relation is so attentive of.⁹⁶

To this end, Derrida⁹⁷ is most notably at pains to problematise the oppositional human / animal binary embedded in Western philosophical

⁹³ Levinas "Paradox of Morality" 169.

⁹⁴ Levinas "Paradox of Morality" 172.

⁹⁵ Levinas "Paradox of Morality" 172.

⁹⁶ Drucilla Cornell also proposes such a reading of Derrida's critique of Levinas on related themes. See Cornell *Philosophy of the Limit*.

⁹⁷ Derrida and Nancy "'Eating Well'" 109.

discourse *inter alia* by situating a responsibility that is irreducible to the traditional construct of the Subject, precisely by demonstrating how his disruptive motifs (*différance*, trace, iterability, ex-appropriation, etc.) "are at work everywhere, which is to say, well beyond humanity". Again, Derrida does not simply uncritically expand the Levinasian ethical to include other animals, but provides a framework to think through and overcome the anthropocentric milieu shaped by dominant discourses. Who, then, is the "who" in Derrida's texts and by what right, if any, should we employ this translation?

6 Towards a non-anthropocentric refiguration

The "who" is most importantly a singularity (rather than an individuality or atom identical to itself) "that dislocates or divides itself in gathering itself together to answer to the other, whose call somehow precedes its own identification with itself."⁹⁸ This "who" is en-gaged in responsibility prior to self-presence and autonomy; overwhelmed by the trace, *différance*, ex-appropriation and signature in the affirmation of having already answered to the "yes, yes" in (in)capacity of irreplaceable singularity. The question emanating from this analytic of singularity concerns the appropriateness of its translation into a "who", a question that is particularly complex in its chronological, philosophical and grammatical topology. In continuing to address this issue, I would like to suggest that the question of "Who?" cannot and should not be separated from the deconstruction of the Subject, as if deconstruction is a singular, linear event unaffected and unrelated to the trace. We should thus guide our intervention into the problematic of the Subject by asking to what extent the question "Who?" displaces or conversely re-introduces the structure of the classical Subject.

Derrida's concern is that this thought of singularity might resist translation into the grammatical form "who", because the latter postulates inadequately examined conceptual oppositions that are fundamentally contributory to the very problem at hand and necessitate renewed and ceaseless deconstruction by and of themselves. Any post-deconstructive determination of the "Subject" should guard against positing itself in a way that is naively pre-deconstructive in the reconstitution of "an *illegitimately* delimited identity... in the name of a particular kind of rights".⁹⁹ Deconstruction, rather, "lets itself be called by a more exacting articulation of rights" that, in a different way, prescribes more

⁹⁸ Derrida and Nancy "Eating Well" 100.

⁹⁹ Derrida and Nancy "Eating Well" 108-109.

responsibility.¹⁰⁰ The duty in deconstruction that Derrida speaks of presents itself in the form of responsibility to *think again*; to think radically new discourses and determinations of "subjectivity" that destabilise the problematic of the Subject from a context that it no longer controls at its centre. This might very well require that we "forget" the unforgettable word ("Subject") by no longer speaking of it, but rather writing it, "writ[ing] 'on' it as on the 'subjectile,' for example".¹⁰¹ This need arises because the discourse on the Subject inevitably remains expressive of its constitutive presuppositions and is destined to link subjectivity with the human, even if it predicates the disruptive force of *différance*, trace, inadequation etc. A further problematic inherent to the determination of the "who" as Subject relates to the call of the Other which, in order to remain singular and other, must remain un-appropriated and un-subjected. We are faced with this challenge to thought precisely because the responsibility to protect the otherness of the Other is, as Derrida¹⁰² repeatedly reminds us, not simply a theoretical directive.

The problematic of the Subject is pronounced in its translation into law and remains marked by all the constraints that I have recalled. In order to put forward the interests of animals in the legal paradigm, scholars have to communicate and structure their reasoning and claims in keeping with the categories provided by the legal system. Within the subject-centered model of law, the result is that animal rights theorists are ultimately forced to establish rights for animals as *Subjects* by assimilating a human-like subjectivity, thereby (re)producing a different form of anthropocentric subjectivism that simply re-establishes the borders of ethical and legal consideration at an(other) equally problematic annexation whilst naively reinforcing the anthropocentric structure they seek to destabilise and eradicate. This approach of promoting a future of animal liberation by employing the very same hegemonic constructs that have historically functioned to subjugate animals is tragically paradoxical. A deconstructive engagement with the historical functioning of animality enumerates the exclusionary limitations of and concomitant need for radically new discourses, language, politics, ethics and law. The experience of deconstruction exposes the limits of our existing legal frameworks and clears the space for a rethinking of the concept of right that can proceed without indebtedness to the interpretation of man that is being called into question. Like Derrida I do not believe in a simple "miracle of legislation" and, identifying

¹⁰⁰ Derrida and Nancy "Eating Well" 109.

¹⁰¹ Derrida and Nancy "Eating Well" 105.

¹⁰² Derrida and Nancy "Eating Well" 111.

metaphysical anthropocentrism as the critical target, I am ultimately calling for an engagement with law at a conceptual level. It is in the "beyond" to the reconsideration of the history of law and right(s) that we can allow ourselves to see and be seen by all animals looking us in the face.

Bibliography

Literature

Aristotle "Treatise on Government"

Aristotle "A Treatise on Government: Book I" in Ellis W (trans) *Aristotle's Politics: A Treatise on Government* (Routledge Manchester 1895) 9-35

Bernasconi and Critchley "Introduction"

Bernasconi R and Critchley S "Introduction" in Bernasconi R and Critchley S (eds) *Re-reading Levinas* (Indiana University Press Bloomington 1991) xi-xviii

Calarco 2004 *Cont Philos Rev*

Calarco M "Deconstruction is not Vegetarianism: Humanism, Subjectivity, and Animal Ethics" 2004 *Cont Philos Rev* 175-201

Calarco "Heidegger's Zoontology"

Calarco M "Heidegger's Zoontology" in Calarco M and Atterton P (eds) *Animal Philosophy: Essential Readings in Continental Thought* (Continuum London 2004) 18-30

Calarco *Zoographies*

Calarco M *Zoographies: The Question of the Animal from Heidegger to Derrida* (Columbia University Press New York 2008)

Cornell *Philosophy of the Limit*

Cornell D *The Philosophy of the Limit* (Routledge New York 1992)

Critchley *Ethics, Politics, Subjectivity*

Critchley S *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought* (Verso London 1999)

Critchley "Question of the Question"

Critchley S "The Question of the Question: An Ethico-political Response to a Note in Derrida's *De l'esprit*" in Wood D (ed) *Of Derrida, Heidegger, and Spirit* (Northwestern University Press Evanston 1993) 93-102

Derrida "Force of Law"

Derrida J "Force of Law: The 'Mystical Foundation of Authority'" (trans Quaintance M) in Anidjar G (ed) *Acts of Religion* (Routledge New York 2002) 230-298

Derrida *Of Spirit*

Derrida J *Of Spirit: Heidegger and the Question* (trans Bennington G and Bowlby R) (University of Chicago Press Chicago 1989)

Derrida *The Animal That Therefore I Am*

Derrida J *The Animal That Therefore I Am* (trans Wills D, ed Mallet M) (Fordham University Press New York 2008)

Derrida "Violence and Metaphysics"

Derrida J "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas" in *Writing and Difference* (trans Bass A) (University of Chicago Press Chicago 1978) 79-153

Derrida and Nancy "'Eating Well'"

Derrida J and Nancy J "'Eating Well,' or the Calculation of the Subject: An Interview with Jacques Derrida" (trans Connor P and Ronell A) in Cadava E, Connor P and Nancy J (eds) *Who Comes after the Subject?* (Routledge New York 1991) 96-119

Descartes "Discourse"

Descartes R "Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in the Sciences: Part Five" in Veitch J (trans) *Discourse on the Method* (Cosimo Classics New York 2008) 36-46

De Villiers 2012 *SAJHR*

De Villiers J "Towards an Ethical Relation to the Nonhuman Other: Deconstruction, Veganism and the Law" 2012 *SAJHR* 18-30

De Villiers 2012 *SAPL*

De Villiers J "Examining the Similarity Principle and Language of (Animal) Rights as a Foundation for Animal Liberation" 2012 *SAPL* 40-53

De Villiers 2015 *SAPL*

De Villiers J "Animal Rights Theory, Animal Welfarism and the 'New Welfarist' Amalgamation: A Critical Perspective" 2015 *SAPL* 406-433

Douzinis *End of Human Rights*

Douzinas C *The End of Human Rights: Critical Legal Thought at the Turn of*

the Century (Hart Oxford 2000)

Francione *Animals as Persons*

Francione G *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press New York 2008)

Heidegger *Being and Time*

Heidegger M *Being and Time* (trans Macquarrie J and Robinson E) (Harper Perennial New York 1962)

Heidegger "Letter on 'Humanism'"

Heidegger M "Letter on 'Humanism'" (trans Capuzzi F) in McNeill W (ed) *Pathmarks* (Cambridge University Press Cambridge 1998) 239-276

Heidegger "Plato's Doctrine of Truth"

Heidegger M "Plato's Doctrine of Truth" (trans Sheehan T) in McNeill W (ed) *Pathmarks* (Cambridge University Press Cambridge 1998) 155-182

Heidegger "Age of the World Picture"

Heidegger M "The Age of the World Picture" in Young J and Haynes K (trans and eds) *Off the Beaten Track* (Cambridge University Press Cambridge 2002) 57-85

Heidegger *Fundamental Concepts of Metaphysics*

Heidegger M *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (trans McNeill W and Walker N) (Indiana University Press Bloomington 1995)

Heidegger "Origin of the Work of Art"

Heidegger M "The Origin of the Work of Art" in Hofstadter A (trans) *Poetry, Language, Thought* (Harper & Row New York 1971) 15-87

Heidegger *Parmenides*

Heidegger M *Parmenides* (trans Schuwer A and Rojcewicz R) (Indiana University Press Bloomington 1992)

Heidegger *On the Way to Language*

Heidegger M *On the Way to Language* (trans Hertz P) (Harper & Row New York 1971)

Heidegger *What is Called Thinking?*

Heidegger M *What is Called Thinking?* (trans Gray J) (Harper & Row New York 1968)

Levinas *Collected Philosophical Papers*

Levinas E *Collected Philosophical Papers* (trans Lingis A) (Martinus Nijhoff Publishers Dordrecht 1987)

Levinas *Otherwise than Being*

Levinas E *Otherwise than Being, or, Beyond Essence* (trans Lingis A) (Duquesne University Press Pittsburgh 1998)

Levinas "Paradox of Morality"

Levinas E "The Paradox of Morality: An Interview with Emmanuel Levinas" (trans Benjamin A and Wright T) in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge New York 1988) 168-180

Levinas *Totality and Infinity*

Levinas E *Totality and Infinity: An Essay on Exteriority* (trans Lingis A) (Kluwer Academic Publishers Dordrecht 1991)

Lewis 2017 *Cosmos and History*

Lewis M "The Relation between Transcendental Philosophy and Empirical Science in Heidegger's *Fundamental Concepts of Metaphysics*" 2017 *Cosmos and History: The Journal of Natural and Social Philosophy* 47-72

Peperzak "Presentation"

Peperzak A "Presentation" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press Bloomington 1991) 51-66

Plato "Statesman"

Plato "Statesman" (trans Rowe C) in Cooper J and Hutchinson D (eds) *Plato: Complete Works* (Hackett Indianapolis 1997) 294-358

Regan *Defending Animal Rights*

Regan T *Defending Animal Rights* (University of Illinois Press Urbana 2001)

Regan *Case for Animal Rights*

Regan T *The Case for Animal Rights* 2nd ed (University of California Press Berkeley 2004)

Wise *Drawing the Line*

Wise S *Drawing the Line: Science and the Case for Animal Rights* (Perseus Books Cambridge 2002)

List of Abbreviations

Cont Philos Rev
SAJHR
SAPL

Continental Philosophy Review
South African Journal on Human Rights
Southern African Public Law

VOL 136
(Part 2)
2019

THE SOUTH AFRICAN LAW JOURNAL

NOTES

LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL
DISCUSSION OF *NATIONAL SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS v MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT*

JAN-HARM DE VILLIERS

Senior Lecturer in Law, University of South Africa

INTRODUCTION

The academic field of animal law has grown exponentially over recent years, largely in response to the relentless efforts of the animal liberation movement. Yet, despite a growing academic interest and increasing legislative reform, it is hard to find evidence of meaningful change in the lives and deaths of animals. Theoretical and practical efforts have predominantly focused on legal reform as the key that will unlock the cage of oppression. In turn, these efforts bear witness to the fact that the law fails adequately to incorporate the animal's fundamental interests. The object or property status of animals is widely regarded as foundational to the problem of animal subjugation, and a considerable amount of ink has been spilled on the scientific and moral (il)logic of this categorisation in the face of morally relevant and subjectlike-traits manifested by so many animals (see Gary Francione *Animals, Property and the Law* (1995); Gary Francione *Rain without Thunder: The Ideology of the Animal Rights Movement* (1996); Tom Regan *The Case for Animal Rights* (1983); Tom Regan *Defending Animal Rights* (2001)). The law has however resisted embracing and protecting the animal as a legal subject.

The recent decision by the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* 2017 (1) SACR 284 (CC) reflects a radical shift in the traditional legal approach to the animal, and could potentially facilitate much needed change in our treatment of animals. In assessing the applicant's right to privately prosecute cases of animal cruelty, the court considered the plight of the animal and in the process of doing so, made significant pronouncements that destabilise the substratum of the animal's legal status. This position is however not consistently maintained and the ruling ultimately reflects the court's struggle to metabolise logically its construction and destruction of

‘the animal’. At issue, as I have previously illustrated, is anthropocentrism as a quasi-transcendental limit of legal discourse (see Jan-Harm de Villiers ‘Metaphysical anthropocentrism, limitrophy, and responsibility: An explication of the subject of animal rights’ (2018) 21 *PER/PELJ* 1). Being unable to erase or circumvent this inherent characteristic of the law, the ruling entangles discordant ideologies and embodies inconsistencies that render it puzzling and paradoxical.

In the first part of this note I position the National Society for the Prevention of Cruelty to Animals (‘the NSPCA’) historically and ideologically within the animal advocacy movement in order to contextualise the issues before the court and facilitate a discussion of the theoretical and ideological incongruences of the judgment. I then summarise the facts and litigation history in the second part, tracing how the trial developed from the high court to the Supreme Court of Appeal, and ultimately the Constitutional Court. Lastly, I critically analyse the Constitutional Court’s judgment. I first comment on the court’s approach to the dualistic private prosecution scheme set out in the Criminal Procedure Act 51 of 1977 (‘the CPA’), arguing that the court erred in not addressing the constitutionality of s 7(1)(a) of the CPA. I then discuss the court’s engagement with the question of the animal, which forms the focus of this note. I argue that whilst there is much to admire in the court’s ruling, and that it has the potential radically to transform the legal status of the animal, it confuses and vacillates between two incompatible perspectives and is ultimately unable to navigate successfully the challenges that the question of the animal poses.

BACKGROUND

The Society for the Prevention of Cruelty to Animals (‘the SPCA’) looms large in the history of a unified effort at addressing the plight of animals — a movement which originated in the eighteenth century. Prior to that time, animal protectionism was sporadic and we mainly find isolated examples of lone acts of kindness towards animals, like the 1567 decree of Pope Pius V that condemned bullfighting. Organised attempts to protect animals were however largely absent (Helena Silverstein *Unleashing Rights: Law, Meaning and the Animal Rights Movement* (1996) 29). The structured animal advocacy movement came to force in the 1800s and divided into two camps soon after its formation, one calling for an improvement of the conditions in which animals live and die, and the other advocating the total abolition of human (ab)use of animals. These two branches are respectively known as the animal welfare or humane movement, and the animal rights movement (which originated as the anti-vivisection movement).

Following a sixty-year period of anti-animal-cruelty literature, the 1800s saw the formation of a united attempt aimed at addressing the plight of animals in England. These works condemned blood sports like cock throwing and cockfighting, and advanced the notion that humans have a moral duty of care and compassion towards animals (ibid at 30). Even though

these works were written from the fringes and widely regarded as ‘eccentric’, they slowly penetrated the general public and laid important groundwork for change: ‘the writers were, so to speak, the artillery bombarding a position from a reasonably safe distance; the brunt of the fighting had to be done by the Members of Parliament’ (Charles D Niven *History of the Humane Movement* (1967) 55).

The fight for humane legislation commenced in 1800 when a Bill aimed at the suppression of bullbaiting was introduced into Parliament by Sir W Pulteney. Although the majority of Parliament opposed the Bill, it nevertheless stimulated considerable public debate on the issue of animal welfare (ibid at 58). In 1809 a more comprehensive Bill aimed at preventing ‘wanton and malicious cruelty to animals’ passed in the House of Lords before it was rejected in the House of Commons (Gerald Carson *Men, Beasts, and Gods: A History of Cruelty and Kindness to Animals* (1972) 49). England’s first animal protection legislation criminalising cruelty to animals would only see the light of day several years later in 1822 when Richard Martin saw through the adoption of the Martin’s Act, which specifically forbade cruelty to cattle (Roderick Nash *The Rights of Nature: A History of Environmental Ethics* (1989) 25). While Martin initially aimed for a broader scope, the final act only protected larger domesticated animals and excluded owner-inflicted cruelty to animals (ibid). This period also saw a rise in structured efforts outside of the legislature and in 1824 Martin, together with other English humanitarians, organised the SPCA with the main objective of utilising the newly enacted legislation to improve the welfare of animals (Carson op cit at 53). The SPCA is widely considered to be the first animal protection organisation and recognised as the founding father of the animal welfare movement (Silverstein op cit at 31). Despite struggling early on, the SPCA started gathering momentum in 1840 when Queen Victoria directed that the society become the Royal SPCA. This facilitated the formation of new branches and similar organisations across Europe (Carson op cit at 54).

The 1860s saw the birth of a new branch of animal advocacy that extended its scope of concern beyond the welfare movement’s now narrow focus on domesticated animals. The anti-vivisection movement, led by Frances Power Cobbe, focused on protecting animals used in scientific experimentation (Silverstein op cit at 31). Soon after its formation, the anti-vivisection movement split into two camps, one demanding the complete eradication of scientific experimentation on animals, and the other striving to minimise the suffering inflicted on animals used in experiments. This dissonance also effected a more significant split in the larger animal advocacy movement, solidifying a division between the anti-vivisectionists and the animal welfare camp. Notwithstanding these schisms, the anti-vivisectionists achieved significant success, passing a bill aimed at protecting laboratory animals in 1876 and forming several new anti-vivisection groups across Europe (ibid).

Animal welfare advocacy quickly spread to the United States where Henry Bergh, inspired by events in England, introduced the philosophy of animal welfare during the 1860s. Bergh’s labours culminated in the first anticruelty statute being adopted by the New York state legislature in 1866, stipulating:

‘Every person who shall, by his act or neglect, maliciously kill, maim, wound, injure, torture or cruelly beat any horse, mule, cow, cattle, sheep or other animal belonging to himself or another, shall upon conviction be adjudged guilty of a misdemeanor.’ (Cited in Niven *op cit* at 108.)

Bergh also founded the American Society for the Prevention of Cruelty to Animals, which was the first humane society in the Western hemisphere (*ibid*). Shortly thereafter in 1872, the Cape of Good Hope SPCA was established as the first animal welfare organisation and founder of the SPCA movement in South Africa. Today we find close to one hundred autonomous SPCAs across South Africa, governed by the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (‘the SPCA Act’).

The SPCA Act requires that all members register with the NSPCA, a juristic person established in terms of s 2(1) of the Act. Section 3 of the Act sets out the objects of the NSPCA, which include the prevention of ill-treatment of animals (s 3(c)), taking cognisance of laws affecting animals and making representations to appropriate authorities against this background (s 3(e)), and doing anything reasonably necessary for the achievement of its objects (s 3(f)). Section 6 of this Act bestows powers on the NSPCA in order to achieve its objectives, including the appointment of skilled persons as inspectors and employees (s 6(2)(c)), the confiscation of an animal reasonably believed to be ill-treated (s 6(2)(d)(vi)) and the power to defend and institute legal proceedings in connection with its functions (s 6(2)(e)). These functions and correlative powers are far-reaching, especially when interpreted against the larger animal welfare legislative framework.

The SPCA Act should be read and interpreted alongside the Animals Protection Act 71 of 1962 (‘the AP Act’), the latter being the primary piece of animal protection legislation aimed at consolidating and amending laws relating to the prevention of cruelty to animals. Section 6(1) of the SPCA Act specifically classifies the NSPCA as a society for the prevention of cruelty to animals for the purposes of s 8 of the AP Act. The AP Act sets out a broad list of animal cruelty offences (s 2(1)(a)–(r)) and once again endows any society for the prevention of cruelty to animals with a broad range of powers (s 8(1)(a)–(d)).

Despite these wide-ranging functions, or perhaps precisely because of the lack of delineation, the NSPCA has historically struggled to implement the AP Act, and their efforts to facilitate the prosecution of animal cruelty have been frustrated by the National Prosecuting Authority (‘the NPA’). Uncertainty about the NSPCA’s nature, mandate and powers contributed to its impotence. Certain state agencies have labored (or rather lazed) under the assumption that the NSPCA is authorised to enforce the AP Act on the government’s behalf, whilst others have interpreted the SPCA Act as merely regulating the NSPCA as a juristic person under private control rather than creating a licensed statutory body as such (Michelè Pickover *Animal Rights in South Africa* (2005) 71; see also *Hansard*, 25 November 1993 at 14066).

This state of affairs becomes more disconcerting if one considers the high number of animal cruelty incidences and the absence of a government

agency with the intention or capacity to implement the AP Act effectively. The matter of animal welfare supposedly rests with the Department of Agriculture, Forestry and Fisheries ('the DAFF'), yet there is no branch assuming responsibility for this issue (Pickover *op cit* at 71). The DAFF however finds itself in a precarious position, being simultaneously tasked with the exploitation of animals and the implementation of animal protection legislation. It has for a long time been voicing unease about 'being both player and a referee', and has expressed the intention to pass the legislation back to the Department of Justice, which was previously tasked with the administration of animal welfare legislation (*ibid* at 8). The question of capacity forms another central issue. The Minister of Agriculture already expressed concern about the state of animal welfare when the SPCA Act was enacted in 1993, stating (*Hansard*, 25 November 1993 at 14065):

'The responsibilities of animal welfare organizations are becoming greater as urbanisation in South Africa accelerates, and animals in many disadvantaged communities are in dire need of basic animal care. The State is and will probably remain unable to provide these services. This poses an enormous challenge to the SPCAs to extend their services to these disadvantaged communities ...'

Notwithstanding this set of circumstances, the NSPCA has been faced with state opposition in attempts to fulfil its statutory mandate. Unsatisfied with the NPA's unwillingness to prosecute what the NSPCA alleges to be clear crimes of animal cruelty, the NSPCA has repeatedly attempted to institute private prosecutions in terms of the CPA. The CPA distinguishes two categories of private prosecution. Section 7 of the CPA permits private prosecution on the basis of a certificate *nolle prosequi*, providing as follows:

'(1) In any case in which a director of public prosecutions declines to prosecute for an alleged offence —

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; ...

may ... either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2)

(a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the [director of public prosecutions] that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

(b) The [director of public prosecutions] shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of

the process referred to in paragraph (a) within three months of the date of the certificate.

- (d) The provisions of paragraph (c) shall apply also with reference to a certificate granted before the commencement of this Act under the provisions of any law repealed by this Act, and the date of such certificate shall, for the purposes of this paragraph, be deemed to be the date of commencement of this Act.'

Section 8 of the CPA regulates private prosecution under statutory right, stating:

- '(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
- (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the [director of public prosecutions] concerned and after the [director of public prosecutions] has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.
- (3) A [director of public prosecutions] may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the [director of public prosecutions], and that the [director of public prosecutions] may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.'

After becoming aware of the sacrificial slaughtering of two camels by a religious group in November 2010, NSPCA inspectors attended the site and observed what they considered to be cruel and inhumane treatment that clearly contravened the AP Act. During the sacrifice, the two camels had to endure eight and three attempts respectively at slicing open their throats so that they could bleed out. After witnessing this, an inspector stepped in and shot both camels in order to relieve them of their suffering (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (CC) para 4). Following this incident, the NSPCA referred the matter to the NPA for prosecution and furnished the prosecutors with supporting evidence. After the NPA declined to prosecute the case, the NSPCA applied for a certificate *nolle prosequi* in terms of s 7(1)(a) of the CPA in order to institute a private prosecution. As in previous instances, the NPA refused to issue the certificate, arguing that only a 'private person' can institute a private prosecution in terms of s 7 of the CPA.

LITIGATION HISTORY

The high court's decision

The NSPCA brought a constitutional challenge to this interpretation of s 7(1)(a) of the CPA in *National Society for the Prevention of Cruelty to Animals v*

Minister of Justice and Constitutional Development [2014] ZAGPPHC 763. The NSPCA reasoned that there is no rational basis for the dissimilar treatment of juristic persons and natural persons, arguing that juristic persons are consequently deprived of equal protection and benefit of the law. Relying on s 9(1) and s 38(a) and (d) of the Constitution of the Republic of South Africa, 1996, the NSPCA argued that the differentiation does not serve a legitimate governmental purpose and is therefore irrational and unconstitutional (para 4).

The court confirmed the position as set out in *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A) at 726H and held that ss 7 and 8 of the CPA empower only natural persons and public bodies with the right of private prosecution, whilst companies and other legal persons are excluded from this right (para 15). In terms of s 8(4) of the Constitution, the court considered the nature of the right in question and the nature of the particular juristic person in order to determine whether the juristic person was entitled to the right. The right provided by s 7 of the CPA constitutes an exception to s 179(1) of the Constitution, which provides for a single NPA established in terms of an Act of Parliament. The purpose of s 7 of the CPA is to allow those who have some substantial or peculiar interest in the offence at hand to vindicate their private interests, and simultaneously to prevent natural and juristic persons without such interests from doing so (paras 14–16). Taking into account the objects, functions and powers of the applicant, the court confirmed its nature as a juristic person to be that of a public body performing a public function, rather than a private company (para 21).

After accepting that s 7(1)(a) of the CPA contains a differentiation which amounts to discrimination, the court proceeded to determine whether such discrimination is unfair or not, emphasising at the outset that not all rights in the Bill of Rights are for the benefit of juristic persons. Considering the factors identified in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), the court concluded (in para 28) that ‘the differentiation as well as the discrimination is not unfair, but is designed to serve a legitimate governmental purpose. It also appears that there is a rational relationship between this purpose and the differentiation.’ The court hence upheld the constitutionality of the provision.

The court also observed in passing that the purpose of s 8 of the CPA is to allow public bodies that have been conferred the right of private prosecution through statute ‘to institute a private prosecution in instances where offences have been committed which concern the public interest as determined by legislation’ (para 29). Whilst the NSPCA is indeed a public body, the court lamented that s 6(2)(e) of the SPCA Act does not confer such right of private prosecution on the NSPCA, commenting that ‘if such a right were to be conferred upon the applicant, it would enable the applicant to more effectively execute its functions’ (ibid).

The Supreme Court of Appeal’s decision

The NSPCA appealed the high court decision and continued its constitutional challenge to s 7(1)(a) of the CPA. In *National Society for the Prevention of*

Cruelty to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (SCA) the appellant contended that s 7(1)(a) of the CPA is non-compliant with ss 1(c) and 9(1) of the Constitution, and asserted that both natural and juristic persons ought to be capable of enforcing the right to institute a private prosecution (para 13). The relief claimed by the appellant was to have the word 'private' excised from s 7(1)(a) of the CPA (para 6).

The court first commented on the materiality of s 8 of the CPA, noting that the NSPCA was previously expressly authorised to institute private prosecution by s 12 of the Prevention of Cruelty to Animals Act 8 of 1914, which was repealed by the AP Act. Reading s 8 of the CPA together with the SPCA Act, the court emphasised that the NSPCA is not authorised to institute private prosecution under statutory right (paras 10–12).

The court then applied the test articulated in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 25 to determine whether the differentiation inherent in s 7(1)(a) of the CPA is rational in serving a governmental purpose and thus in line with the rule of law and the principle of equality before the law, as entrenched respectively in ss 1(c) and 9(1) of the Constitution (paras 14–16). Since the appellant conceded that the regulation of private prosecution constitutes a legitimate governmental purpose, the court focused on establishing whether a rational connection can be established between this purpose and the provisions of s 7(1)(a) of the CPA. The court articulated the legal position as follows in para 19:

'The rationality threshold is low. The connection must not be arbitrary but must be based on a reason that does not have to be the most efficient or the only reason. Put differently, the question is whether there is an acceptable reason for the limitation of private prosecutions contained in s 7(1)(a). This question must be answered within the context of the whole s 7 and s 8 of the CPA, s 179 of the Constitution and the provisions of the [National Prosecuting Authority Act 32 of 1998].'

The court concluded that a decision by the NPA to decline prosecution, which constitutes a prerequisite for a private prosecution, must be grounded in sound reasons and that the policy of limiting private prosecutions to exceptional cases thus 'c[ould] not be faulted' (para 25). The court strongly reiterated that 'private prosecutions in terms of s 7 of the CPA are only permitted on grounds of direct infringement of human dignity' and that this forms the rationale behind s 7(1)(a) of the CPA and the exclusion of juristic persons from instituting private prosecutions (para 28). As the exclusion of private prosecutions not stemming from the infringement of human dignity was, in the court's view, 'rationally related to the legitimate government purpose of limitation of private prosecutions', the court upheld the constitutionality of s 7(1)(a) of the CPA (para 28).

The Constitutional Court's decision

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* 2017 (1) SACR 284 (CC) the NSPCA appealed the decision of the Supreme Court of Appeal and, in addition to the

constitutional challenge to s 7(1)(a) of the CPA, advanced an alternative argument based on s 6(2)(e) of the SPCA Act read with s 8 of the CPA. Section 6(2)(e) of the SPCA Act provides:

- ‘(2) In order to perform its functions and to achieve the objects of the Council the board may — ...
 - (e) defend legal proceedings instituted against the Councils and institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.’

The applicant argued that s 8 of the CPA empowers statutory bodies to conduct private prosecutions under a statutory right, and since the NSPCA is indeed a ‘statutory body performing a statutory public interest function’, the power to ‘institute legal proceedings’ as set out in s 6(2)(e) of the SPCA Act encompasses the authority to institute criminal proceedings (para 21). The court emphasised that its approach of interpreting legislation within constitutional bounds ‘requires that a statute be read holistically as constitutionally compliant where possible’, and identified the issue before the court as necessitating that the NSPCA be correctly situated within the private prosecution framework provided by the CPA (para 26). The court approached this inquiry by first looking for the NSPCA’s potential prosecutorial powers in s 8 of the CPA, emphasising that its nature as a statutorily created public body made this the appropriate point of departure (paras 26–7).

Section 8 of the CPA requires that the right to institute private prosecution be ‘expressly conferred by law’. The court held that use of the term ‘expressly’ in legislation does not necessarily require explicit articulation through the use of specific words and that ‘it may indicate that the meaning of a provision must be clear and inconvertible, being conveyed with “reasonable clearness” or “as a necessary consequence”’ (para 33). The court followed a purposive and contextual interpretive approach to s 6(2)(e) of the SPCA Act by holistically considering ‘the specific statutory language; its textual, historical, and social context; and the constitutional values which underpin it’ (para 34). The court found the NSPCA’s statutorily conferred power to ‘institute legal proceedings connected with its functions’ under s 6(2)(e) of the SPCA Act to be ‘broad and permissive’, neither distinguishing between civil and criminal proceedings, nor excluding either (para 36). In order to determine the types of legal proceedings that the NSPCA is empowered to institute, its functions as determined by the SPCA Act and surrounding statutory scheme needed to be considered (para 37).

The AP Act establishes the animal welfare framework within which the NSPCA operates and explicitly empowers societies for the prevention of cruelty to animals (of which the NSPCA forms the primary example) to effect the culture of animal welfare envisaged by the AP Act (paras 38–9). The larger part of the provisions in the AP Act relates to animal cruelty offences, which logically suggests that the legal proceedings emanating from this piece

of legislation will mainly be criminal cases. As the NSPCA is specifically tasked with promoting the objectives of the AP Act, the power to 'institute legal proceedings connected with its functions' has to be interpreted to include the prosecution of offences (para 46). The court took into consideration that the right of private prosecution was previously explicitly conferred on the NSPCA by the 1914 SPCA Act, and that the AP Act, which repealed that earlier Act, is intentionally silent on the question of private prosecution. At the time of the AP Act's enactment in 1962, the Minister of Justice opposed the provision bestowing the right to privately prosecute without the safety valve of supervision by the prosecutorial authority. As the current CPA provides for such oversight in s 8(2) and 8(3), the basis for excluding the power of private prosecution in 1962 is no longer applicable (paras 49–50). This interpretation best harmonises the NSPCA's powers and objectives within the legislative framework and its historical development, and gives effect to the primary objective of the NSPCA: to prevent animal cruelty (para 53).

The court considered the significance of the NSPCA's critical role in the history of animal protection and the value of animal welfare in our current constitutional dispensation, explicitly connecting animal welfare with 'the right to have the environment protected' under s 24 of the Constitution (para 58). Tracing a lineage of animal cruelty cases that started in 1929, the court emphasised the progressively robust protection of animal welfare by South African courts (paras 54–9). Whilst solidifying the animal's legal status as property, the court in *R v Smit* 1929 TPD 397 held that an animal had to be killed in a 'humane' way which caused minimal suffering. The purpose of animal welfare legislation was considered in *R v Moato* 1947 (1) SA 490 (O) and held to protect the finer sensibilities and emotional wellbeing of humans rather than animal interests per se, an approach which was upheld in *S v Edmunds* 1968 (2) PH H398 (N). The minority judgment in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 38 departed from this view, arguing that animal protection legislation 'recognises that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain.' (For a wider discussion of the implications of this judgment, see Arthur van Collier 'The minority defending the interests of the vulnerable [An evaluation of the minority judgment in *NCSPCA v Openshaw* 2008 5 SA 339 (SCA)]' (2011) 22 *Stellenbosch LR* 306.) This sentiment was upheld in *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2009] ZAFSHC 68 and *South African Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA), whilst the court in *S v Lemthongtai* 2015 (1) SACR 353 (SCA) para 20 emphasised the duty 'to protect and conserve our biodiversity', and held that 'constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general'.

The court argued that the historical trajectory of animal welfare protection and the unique and critical role of the NSPCA in our polity demand a

contextual and purposive reading of the SPCA Act, which ‘must be taken to include the right to prosecute’ (para 61). The court subsequently set aside the orders of the high court and Supreme Court of Appeal, and declared that s 6(2)(e) of the SPCA Act read with s 8 of the CPA conferred the statutory right of private prosecution upon the NSPCA (para 65). Regarding the constitutionality of s 7(1)(a) of the CPA, the court followed the approach in *Director of Public Prosecutions, Transvaal v Minister of Constitutional Development & others* 2009 (4) SA 222 (CC) para 222, which determined that the core responsibility of a court is the adjudication of ‘live disputes’ and that it is ‘possibly an intrusion into the role of the legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation’. The court argued that the constitutionality of s 7(1)(a) of the CPA was no longer a ‘live dispute that implicates the NSPCA’s rights’, as the power to privately prosecute had already been conferred in the judgment (para 63). Consequently, the constitutionality of s 7(1)(a) of the CPA was not considered.

ANALYSIS

The dualistic private prosecution scheme in the CPA

As the decision in the Constitutional Court does unfortunately not give clarity on the constitutionality of s 7(1)(a) of the CPA, we will likely see further litigation aimed at empowering juristic persons to institute private prosecution. It has already been argued, in response to the high court ruling in 2014, that there is a need for legal reform in this regard and it has been recommended that the law be amended expressly to confer the right of private prosecution on companies, as is the case in countries such as the United Kingdom, Australia, Zimbabwe and Kenya (see Jamil Ddamulira Mujuzi ‘Private prosecutions and discrimination against juristic persons in South Africa: A comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*’ (2015) 15 *AHRLJ* 580).

The court’s approach of considering private prosecution under s 8 of the CPA as a neutral alternative to private prosecution under s 7 of the CPA however warrants closer inspection. Some scholars have argued that prosecution under statutory right in s 8 of the CPA, whilst identified as a ‘private prosecution’ in the CPA, is not a true private prosecution (J J Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 86). A body or person intending to institute private prosecution under s 8(1) first has to consult with the director of public prosecutions concerned who, secondly, has to withdraw ‘his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution’ (s 8(2) of the CPA). The director of public prosecutions may furthermore, under s 8(2), ‘withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the director of

public prosecutions, and that the director of public prosecutions may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution' (s 8(3) of the CPA). It is thus clear that private prosecution under s 8 of the CPA remains completely under the control of the director of public prosecutions, and that the NSPCA's prosecutorial powers could potentially be substantially curtailed under this section.

Reflecting on the reason why the NSPCA was denied the power of private prosecution when the SPCA Act was enacted in 1962, the court, somewhat ironically, explicitly found that the CPA of 1955 did not provide for a dualistic prosecution scheme under both a statutory right and a certificate *nolle prosequi* (paras 49–51). The 'safeguard of [director of public prosecutions] supervision' about which the Minister of Justice was concerned at the time, has been incorporated into s 8 of the current CPA, and by granting the NSPCA the power of private prosecution under this section the historical concern was rendered immaterial. The court however failed to appreciate the effect of such 'oversight by the prosecutorial authority' on the NSPCA and why prosecution under s 7 might be preferable to s 8. Put simply, the difference between ss 7 and 8 of the CPA does not merely concern the body upon which the right of private prosecution is conferred. The NSPCA is disenfranchised under s 8, and the court's failure to take this into account and regard the constitutional challenge to s 7(1)(a) as a 'live dispute' constitutes an oversight, in my opinion.

The question of the animal

The court's concern with the animal as a subject of legal knowledge and its willingness to address the question of the animal in relation to law is remarkably progressive and, considered from this perspective, renders this decision a landmark ruling in the South African jurisprudence. The question of the animal is notably absent from the high court and Supreme Court of Appeal's rulings, whilst the Constitutional Court's decision clearly situates and responds to the animal in relation to the animal's marginal legal status. (For a differentiation between human-centric and animal-centric approaches to animal protection, see Bonita Meyersfeld 'Non-human animals and the law: The fable of power' (2012) 27 *SA Public Law* 54.) In the process of doing so, the court also inevitably exposes law's (in)ability to metabolise logically its construction of animal life and the problematic surrounding the representation of animals in a (legal) system that is fundamentally anthropocentric.

After tracing the development of case law on animal cruelty, the court summarised the progression as follows (para 57):

'Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.'

This is a momentous pronouncement and I believe its implications should be carefully considered so that we can meaningfully reflect on law's relation to animal subjugation, both as architect of what might be called an

anthropocentric culture, and as possible facilitator of animal liberation (see Karin van Marle ‘Law’s time, particularity and slowness’ (2003) 19 *SAJHR* 239 on the value of slowness and critical reflection in contemplating the different dimensions that configure a particular situation and engaging law accordingly). In sketching the background to this case, I illustrated that the SPCA has always advocated a welfarist approach and has focused on legislative reform aimed at ensuring that the animals we utilise are treated humanely. The theoretical underpinnings of this approach can be found in utilitarian philosophy, which has embraced the animal on account of sentience; that is, the animal’s aptitude for experiencing pain and pleasure, and concomitant preference in avoiding the former and pursuing the latter. Animal welfarists thus acknowledge that the animal’s interest in avoiding suffering merits protection, but it is essentially a qualified interest in not suffering ‘unnecessarily’. No particular practice causing suffering or even death can be ruled out in advance within the utilitarian framework. Rather than eradicating suffering, the utilitarian welfare approach seeks to balance the (animal) suffering against the (human) pleasure derived from the utilisation (of the animal). It ultimately centers on a utilitarian balancing: ‘the right choices will be those that produce the largest aggregate balance of pleasure over pain or ... the largest net balance of satisfaction over dissatisfaction’ (Martha Nussbaum ‘The capabilities approach and animal entitlements’ in Tom Beauchamp & R. G. Frey (eds) *The Oxford Handbook of Animal Ethics* (2011) 236). If we examine the current AP Act, we see that the word ‘unnecessarily’ or ‘unnecessary’ appears at least eight times in s 2 alone. Section 2(1)(b) only prohibits a person from ‘confin[ing], chain[ing], tether[ing] or secur[ing] any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering’. Similarly, s 2(1)(c) only forbids ‘unnecessarily starv[ing] or under-feed[ing] or deny[ing] water or food to any animal’. This conversely means that it may be necessary and permissible to starve the animal under certain circumstances. As ‘unnecessary’ is not defined in the Act, standard practices constitute the norm and ‘necessity’, and only acts of gratuitous violence are ultimately recognised as contravening the Act.

The court supported a utilitarian philosophy in parts of the judgment, *inter alia* when it emphasised that ‘the prevention of *unnecessary* cruelty to animals — including those *which we may use for service or food* — is a goal of our society’ (para 45, emphasis supplied). Here the court reinforces the object or utility status of animals, and it needs to be noted that the necessity of human use of animals as such is never questioned. As is characteristic of the welfarist model, ‘only questions about the necessity of particular acts in relation to the presumed entitlement of humans to use animals’ are addressed (Taimie Bryant ‘Sacrificing the sacrifice of animals: Legal personhood for animals, the status of animals as property, and the presumed primacy of humans’ (2008) 39 *Rutgers LJ* 249). Notably, the utilitarian aggregation of consequences does not recognise every individual life as an end in itself, but allows for lives to be utilised as means for the ends of others (Nussbaum *op cit* at 237).

This approach can be starkly juxtaposed with the animal rights approach, which demands that we view animals as inviolable subjects with intrinsic worth and categorically abolish all human use of animals. Animal rightists reject utilitarian balancing and argue that the rightness of an action towards the animal is reliant upon recognition of, and respect for, the animal's moral rights. This approach is grounded in natural law and natural rights theory, and views animals as inviolable subjects with inherent worth separate from their usefulness to humans. Animal rightists reject any utilisation of the animal and argue that a craving for meat consumption, leather products and hunting cannot justify violation of the animal's bodily integrity. Whilst the interest in not suffering undoubtedly warrants protection, animal rights theorists argue there are other (and indeed more fundamental) interests at stake that need to be recognised and protected as well. The interest in not suffering is indeed secondary to the interest in not being treated instrumentally in a system of institutionalised exploitation when the suffering emanates from that very utilisation.

By regarding animals as possessing moral rights, these theorists bestow a distinctive moral status on animals. This moral status fundamentally counters a view of animals as utility objects or the property of humans, a view that welfarists readily accept. By recognising the animal as an 'individual' with 'intrinsic value', the court thus also suggests, albeit paradoxically, that the foundation for animal protection has shifted from an external utilitarian calculus towards an understanding of animals as individuals whose experiential lives fare well or ill for them independent of their usefulness to others. The notion of animals as 'subjects-of-a-life' developed by pioneering animal-rights philosopher Tom Regan resonates here, and the most obvious transference concerns a destabilisation of the (human) subject/(animal) object dichotomy entrenched in our law (see Regan *The Case for Animal Rights* op cit at 243). Regan's egalitarian ethics advances a shared subjectivity as the ethically relevant property possessed by both human beings and animals that establishes animals as individual co-subjects with rights that cannot be overridden or violated in the pursuit of maximum utility. This subjectivity (or being subject-of-a-life) is a more intricate property than the simple sentience grounding utilitarian claims, highlighting different dimensions of animal life and foregrounding the advanced abilities and complex existence of animals that extend beyond the preference for avoiding pain. As Regan *Defending Animal Rights* op cit at 42–3 states:

'Like us, [animals] possess a variety of sensory, cognitive, conative, and volitional capacities. They see and hear, believe and desire, remember and anticipate, and plan and intend. Moreover, as is true in our case, what happens to them matters to them. Physical pleasure and pain—these they share with us. But they also share fear and contentment, anger and loneliness, frustration and satisfaction, and cunning and imprudence; these and a host of other psychological states and dispositions collectively help define the mental lives and relative well-being of those humans and animals who (in my terminology) are "subjects of a life".'

Similarly, other theorists have also critiqued welfare theory against ‘the complex cognitive and social lives of animals’, arguing that many valuable experiences like self-recognition and mourning are not forms of pain or pleasure as understood within the utilitarian framework and that utilitarianism consequently ‘gives us a weak, dangerously incomplete way of assessing our ethical choices’ (Nussbaum *op cit* at 236). Animal rights theorists like Regan thus aim to remove animals from the category of objects or receptacles, and to award them non-instrumental, inherent value as subjects (see Regan *The Case for Animal Rights* *op cit* at 232–65). This status as subject is accompanied by protection that reaches well beyond the interest in not suffering (unnecessarily). The dissonance between these two perspectives can forcefully be illustrated through an engagement with the set of facts that ultimately gave rise to the NSPCA’s application. Under a utilitarian welfare perspective, the religious slaughtering of the two camels cannot be prohibited as an *a priori* rule or principle. At issue, rather, is the question of maximum aggregative utility with regard to the practice of religious slaughtering. In contradistinction to the utilitarian welfare approach, the animal rights framework regards the two camels as individual subjects with certain rights that can in principle not be violated in pursuit of the greatest good for the greatest number. The camels are granted these rights precisely because they are considered beings with intrinsic value, rather than mere resources that should be figured in our calculative deliberations. The practical implications of the rights view are abolitionist rather than reformist. If (as the court proclaimed) ‘the rationale behind protecting animal welfare has shifted ... to placing intrinsic value on animals as individuals’, the pertinent question is by what right can we continue to engage with animals as objects to be used as we see fit? The two ideologies that respectively regard animals as utility objects and individuals with intrinsic worth are fundamentally at odds, rendering the court’s judgment internally fissured and philosophically unsound.

The court’s vacillation between what I have previously argued to be two ideologically incompatible perspectives (see Jan-Harm de Villiers ‘Animal rights theory, animal welfarism and the “new welfarist” amalgamation: A critical perspective’ (2015) 30 *SA Public Law* 406) is a symptom of the law’s struggle to incorporate and embrace that which is other to the system. The law originates in fundamentally anthropocentric discourse that has *ab initio* legitimised animal exploitation and is antithetical to the animal’s interests. Law’s struggle logically and ethically to take account of its construction and destruction of the animal relates to its limitation of only being able to digest legally acceptable terms and concepts. Whilst the court acknowledges the nuanced problematic surrounding the legal categorisation and treatment of animals as objects, a meaningful response to this realisation inevitably requires the considerable effort of bending legal constructs so that they can accommodate animal life. The court’s integrative approach of absorbing animal suffering into the environmental right in the Constitution reflects one such effort (see paras 57–8). Whilst an extensive discussion of the short-

comings of this approach falls beyond the scope of this note, it needs to be emphasised that this approach ultimately entails a rather creative (re)interpretation of a *human* right rather than recognition of the animal as individual with intrinsic value, thus presenting another theoretical and ideological incongruence in the court's approach. I furthermore find the approach of resorting to the construct of human rights to protect the interests of animals to be a tragic contradiction. Human rights are grounded in the very structure of subjectivity that has been constructed on an underlying foundation of man's non-identity with animals and affirms precisely the interpretation of man that has been used to refuse animals moral standing for centuries (see Jacques Derrida & Jean-Luc Nancy '“Eating well,” or the calculation of the subject: An interview with Jacques Derrida' in Eduardo Cadava, Peter Connor & Jean-Luc Nancy (eds) *Who Comes after the Subject?* (1991) 96–119; Matthew Calarco *Zoographies: The Question of the Animal from Heidegger to Derrida* (2008) 1–14, 103–49).

As could be expected, the animal (subject) presented the court with various dilemmas and I believe the ruling illustrates my previous argument that any meaningful transformation towards animal liberation would require fundamental changes in forms of subjectivity and relationality at a conceptual level, rather than a resort to existing discourses and constructs that remain expressive of their anthropocentric constitutive presuppositions (see De Villiers 2018 *PER/PELJ* op cit). Such an approach fails adequately to frame and address the pertinent issues at stake in the contestation of animal subjugation. The subjugated status of the animal is the result of complex schemata of power and domination that span numerous historical, institutional, and cultural discourses and practices. My central concern is that approaches that fail to take on the laborious, time-consuming task of confronting anthropocentrism, or the 'set of relations and systems of power that are in the service of those who are considered by the dominant culture to be fully and properly human' (Matthew Calarco *Thinking Through Animals: Identity, Difference, Indistinction* (2015) 25) will foreclose the possibility of destabilising and moving beyond the classical humanism that lies at the heart of animal subjugation. There is undeniable congruence between law and anthropocentric culture and to the extent that the legal order continues to celebrate and sustain the very oppression in question, my sense is that we need a rigorous problematisation of law and right(s) rather than a pragmatic utilisation of the law in the hope that more law might be better law. My intention with this note was to make a small contribution in service of this ambitious purpose.

CONCLUSION

Although the ruling arguably raises more questions than it provides answers, it is especially pertinent and timely given the review of the animal protection legislation that is presently underway. The current AP Act thoroughly reflects, in both philosophy and language, a view of animals as objects that

exist for human utilisation and mechanises the animal, inter alia through repeated references to the ‘destruction’ of the animal (see ss 3(1)(a), 4(3)(b) and 5(1) of the AP Act). With this, the animal is deprived of the dignity of being able to ‘die’ and relegated to the status of an object that can only be destroyed. The apposite questions, then, are to what degree will the court’s pronouncement on the shift in the law’s view of animals be transposed into the new legislation, and how will animal liberation advocates utilise this judgment going forward?

Whilst I remain cautious and sceptical of a resort to (existing) legal constructs in service of animal liberation, I locate the primary significance of this judgment at the level of potentially facilitating a shift towards the extension of legal rights to animals, rather than mere increased (private) prosecution of animal cruelty cases. This opinion inevitably raises several important questions regarding law’s limits, whether or not law can be reflexive and ethically consistent. The task of *thinking* becomes increasingly essential and with that, the ethical imperative to place the animal at the centre of enquiry and to challenge the institution of law itself as a mechanism of social change.

Prolegomenon on the Role of the Polyphonic Novel for (Animal) Law: J.M. Coetzee's *The Lives of Animals*, the Voice of Refusal, and the Subversive Performativity of the Novel

Jan-Harm de Villiers

Abstract, This article reflects on the capacity of literature to problematize the authority of traditional philosophical and legal discourses and circumvent some of the theoretical and ethical constraints that they pose in relation to the question of the animal. It draws on Mikhail Bakhtin's critical work on the novel in order to put forward a reading of J.M. Coetzee's *The Lives of Animals* as polyphonic novel and analyze the protagonist's voice of refusal while illustrating how Bakhtin transformed fundamental aesthetic principles into the foundation of a coherent ethical theory. Literature and its potential to destabilize meaning and challenge the authority of a singular interpretation are central to the argument being developed. The article explores how a politics of refusal is fundamentally engaged in the task of exposing a limit, in turn preserving the possibility of an alternative thought of human-animal relationality and ultimately another law.

Keywords, animal ethics, Mikhail Bakhtin, polyphony, J.M. Coetzee, Socratic dialogue, sympathetic imagination, refusal, carnival, Jacques Derrida

I should think that today we are at least far from the ridiculous immodesty that would be involved in decreeing from our corner that perspectives are permitted only from this corner. Rather has the world become “infinite” for us all over again, inasmuch as we cannot reject the possibility that *it may include infinite interpretations*. Once more we are seized by a great shudder.¹

The animal looks at us, and we are naked before it. Thinking perhaps begins there.²

INTRODUCTION

My aim in this article is to offer tentative reflections on ways in which literature might begin to open up new potentialities and risks for thought in relation to the question of the animal (in law). I offer a reading of J.M. Coetzee's *The Lives of Animals* as polyphonic novel by analyzing what I interpret to be the protagonist's voice of refusal. My project speaks to the pervasiveness of metaphysical anthropocentrism as quasi-transcendental limit of philosophical and legal discourses, and this reading continues to engage with one of my concomitant concerns, namely the silencing of the animal Other's call. I have previously argued that the utilization of fundamentally anthropocentric constructs in service of animal liberation has the paradoxical effect of retaining and reinforcing the conceptuality of these discourses and I urged for their radical displacement at the conceptual level.³ This article explores how we might begin to problematize the authority of traditional philosophical and legal discourses and circumvent some of the theoretical and ethical constraints that they pose. My reflections here are not meant to bring closure, but rather to begin engaging issues that broach larger philosophico-juridical concerns and could potentially facilitate a shift towards a much needed alternative thought of human–animal relationality.

I examine what literature brings to law through the lens of literary theorist Mikhail Bakhtin's writings on the dialogical properties of the novel. A Bakhtinian approach to the relationship of law and literature de-emphasizes the role and importance of literary content or subject matter in favor of increased attention to the style and structure of the novel, which is fundamental to understanding the nature of literature and its implications for other discourses. The structure of the novel abets various layers of meaning and perspectives and is inherently dedicated to formal and linguistic indeterminacy.⁴ Central to Bakhtin's critical work on the novel is the idea of literature and aesthetic meaning as a social or collective act. For Bakhtin, the novel is not a circumscribed text, but a dynamic and communal process in which meaning is pluralistically conversed and collectively constructed by multiple voices that subsist in a constant relation of dialogicality. This aesthetic experience confronts us with a complexity and ambiguity that manifests the particularity of beings and experiences, and undermines interpretative closure by a single voice of authority. While the law encompasses various sources and a multiplicity of perspectives, principles, and voices across different fields, they ultimately coalesce into a monologic voice of authority. The polyphonic novel, in contrast, is dialogic precisely because its structure can meaningfully accommodate continuous dynamic and open engagement with distinctive counter-voices in and outside the novel. My interest here centers on the voice(lessness) of the animal.

Bakhtin used his insights into the destabilizing effects of dialogism in the novelistic tradition, specifically the way in which it manifests the particularity of relations, as the basis for conceptualizing a coherent ethical theory. The self, for Bakhtin, is a spatially and temporally structured event. Perception is shaped by a distinct position in existence and, correspondingly, the meaning of any observation is shaped by locality. Bakhtin links the dialogic history of the novel with a development in self-consciousness, foregrounding multiplicity and variety (as opposed to singularity and unity) as criteria for a higher degree of consciousness that is not marked by increased awareness of the self as a unique self, but rather “manifests the self’s discovery of the other.”⁵ We are in constant dialogue with the world around us and we enact a narrative function in relation to the Other. For Bakhtin, the ethics of the novel are located in the instability and incompleteness of our identification with the Other which, as we shall see, is an ethical imperative.

The relativity of relations and concomitant destabilization of meaning and resistance to interpretative closure that Bakhtin locates in the narrative method inherently challenges the authority of a singular interpretation and has the potential to alter our interpretative approach and stance on legal rules. From this vantage point, attentiveness to narrative in law requires recognition that the legal rule, by and of itself, cannot foretell its application in a particular circumstance. For Bakhtin, the inherent structural instability and incompleteness of the novel serve as comprehensive critique of authority as such, with “the novel’s mixity of high and low ... of common and stylized language cast[ing] a new and shifting light upon all claims to a transcendent and objective authority, whether legal, political, or spiritual.”⁶ This characteristic of the novel and its coterminous potential to beckon alternative approaches to the question of the animal (in law) forms my central interest in this article.

I draw on Karin van Marle’s call for a politics of refusal and Jacques Derrida’s deconstructionist interventions into animality in order to explicate what is at stake in this project. As such, I am supporting a multidisciplinary critical approach to the task of thinking through the anthropocentric substructures of the discourses that we have inherited. The struggle for compassion that we are facing requires, as Derrida has so aptly phrased, that “we *think* the war we find ourselves waging.”⁷ Derrida is once again positioning the question of the animal as a transgressal and transgressive experience of limit-rophy, one that is situated at and exposes the limits of philosophy and law and that demands another relational thinking of animality. Refusal, as I read it here, is fundamentally engaged in this task of exposing a limit, in turn preserving the possibility of another thought of relation and ultimately another law.

THE LIVES OF ANIMALS AS POLYPHONIC NOVEL, THE ANIMAL'S LITERARY VOICE, AND THE SUBVERSIVE CAPACITY OF LITERATURE

J.M. Coetzee presented the Tanner lectures at Princeton University in 1997 and, rather than delivering a conventional lecture, read a novella that would later be published as *The Lives of Animals*.⁸ Here Coetzee again made use of the character Elizabeth Costello, whom he first introduced a year earlier while delivering the Ben Belitt lecture at Bennington College, speaking on the question “What is realism?”⁹ This lecture would later be incorporated as Chapter/lesson 1 of the novel *Elizabeth Costello*,¹⁰ with the two chapters comprising *The Lives of Animals* being incorporated as Chapters/lessons 3 and 4. In this article I shall focus on *The Lives of Animals*, as the structure and style of this novella (read as a whole) present distinctive characteristics that disclose unique literary capacities and possibilities.

Costello is an Australian-born novelist best known for her pathbreaking feminist fiction novel *The House on Eccles Street* and is visiting Appleton College, where her son John lectures physics and astronomy, to present the annual Gates lecture. Instead of speaking about herself and her literature, she elects to address the theme of animal ethics in both her lectures, respectively titled “The philosophers and the animals” and “The poets and the animals.” Coetzee employs a complex literary design that has been described as “a lecture-narrative in which the writer distances himself from his material by attributing the views conveyed on the presentational surface of the narrative to a character,”¹¹ a “cross between a campus novel and a Platonic dialogue,”¹² and a “metafiction version of the academic novel, related to the philosophical dialogue.”¹³ These descriptions foreground the novella’s dialogic structure that accommodates a multiplicity of voices, none of which is domineering or conclusive, and invites a Bakhtinian reading as polyphonic novel.

Bakhtin situates the literary text within a larger socio-historical context and illustrates how the voice of a character cannot be foreclosed inside the language of the novel. Bakhtin rejects the myth of a single or unitary language by illustrating the distance between language and reality, emphasizing that the literary word not only has a direct, objectivized meaning, but is inevitably “oriented ... toward another’s word as well.”¹⁴ We are called to look for and listen to the Other’s voice outside the narrow domain of our own language. Bakhtin thus conceives of the literary word and utterance as inclusive of the Other’s response, centering attention on consciousness that is freed “from the tyranny of its own language and its own myth of language.”¹⁵ This understanding of the literary word contributes to the dynamism and unfinalizability (of both the self and our relationships) that Bakhtin is at pains to illustrate.

Within the dialogic interaction of the novel, each voice holds distinct weighted validity and resists conflation into a single worldview. The novel presents us

with a multiplicity of voices that are in a continuous relation of dialogicality through narration, rewriting, appropriation, retrospection, representation of utterance, quotation, and so forth. The novel's double-voicedness and capacity for polyglossia are also located in the distinctive interaction between the various discursive levels of the genre: the voices of the authors, narrators, characters, and literary tradition are interlaced with contemporary societal voices and language, discourses of memory, and sociocultural perspectives.¹⁶ History (or society) is inserted into a text and the text into history.¹⁷ This means that the literary language of the novel "lies on the borderline between oneself and the other" and is not neutral or impersonal, but rather "overpopulated with the intentions of others."¹⁸ Bakhtin thus accentuates that the voices of the novel manifest internal instability and ambivalence that is transfigured by contexts of speech, perspective, and utterance.

Bakhtin's insights into the linguistic indeterminacy and instability of perspective intrinsic to literature have important implications for the way in which we approach the novel. First, it cannot be understood through linguistics alone. A trans-linguistic science grounded in the inherent dialogism of language¹⁹ is required in order to grasp intertextual relationships, which has been labeled the "social value" or "moral message" of literature.²⁰ From this vantage point the discourse of a character cannot be resolved or fixed by way of characterization or plot development, nor can it serve as mouthpiece for personal ideologies of the author; "the consciousness of a character is given as *someone else's* consciousness, another consciousness, yet at the same time it is not turned into an object, is not closed, does not become a simple object of the author's consciousness."²¹

We can furthermore discern a certain tension that is evident between the rule-bound nature of law and the polyphonic novel's approach to relations as relative and incalculable in its irreducibility to formulae and principles. Dialogism stands in opposition to the "legal logic" that understands juxtaposition to be causal.²² Rather, dialogism moves us towards another logic of distance, analogy, and non-exclusive opposition that replaces the concepts of substance and causality by assimilating them into relationality.²³ The dialogism that we find in the novelistic genre thereby performs resistance to law's demand for interpretative and normative closure, always preserving the possibility of new and unanticipated meanings that warrant *de novo* consideration and calls a judgment into question. The form and experience of the novel thus encourage us to rethink our approach to the animal and the subjugated space that she occupies within the legally concretized social hierarchies manifested as a result of the (anthropocentric) assumptions of legal discourse. This tension and break from the predictability of law may lead to changes in the way we think about animals and also the law.

My previous reflections on a jurisprudence of slowness resonate here.²⁴ To the extent that the novel resists the penchant to generalize the particular and to

make the concrete abstract, we can say that the novel's time is one of slowness. In contrast to law's time, marked by a need to establish and resolve through the construction and application of rules, the novel holds open differently inflected truths and allows for a nuanced understanding of relational particularity by resisting the haste of interpretative closure. The novel engages a world of becoming, facilitating a reading-writing of the Other's development in an unfinished aperture to the world. Oppositions are non-exclusive and dichotomies (man/animal, subject/object, self/other) subsist in dynamic interplay rather than fixed juxtaposition.

Very importantly, this allows for an engagement with the animal's voice in a way that both exposes and circumvents a fundamental anthropocentric limitation of the law. Here animal Being resists the finalizing reduction and translation required to fit into legally digestible language and constructs (such as proof, standing, and legal subjectivity) in order to be "heard." These constructs inevitably remain expressive of their constitutive presuppositions and reinforce the unquestioned metaphysical anthropocentrism of traditional humanism that lie at the core of animal subjugation.²⁵ I am, in particular, concerned with the ethical and theoretical difficulties posed by the construct of (animal) rights. The tacit anthropocentric constraints of legal subjectivity compel a determination of animality in accordance with the same human-centered criteria that have historically been used to deny animals moral and legal concern. I regard the reluctance to consider alternative channels for developing a more sophisticated ethical disposition towards animals as both a symptom of the hegemony of the legal order and a failure of imagination on the part of animal ethicists. I locate the primary ethical potential of the novel for animal ethics at this level of gesturing an alternative mode of thinking our relation to others, and also our approach to the law.

The interrelatedness of the novel's space and transmutations requires recognition that "everything is true in its own time, place, circumstance, and untrue outside of its own place, time, circumstance."²⁶ For Bakhtin the novel, and indeed language itself, is intrinsically dialogic, situational, and context dependent. Meaning does not result from individual utterance, but from the dynamic and interminable translation between particular speakers and contexts. Twentieth century literary criticism has contributed an understanding of the morality emanating from the aesthetic experience of the novel as situated in its very amorality, its embrace of the particularity of relations, and resistance to finalized judgment.²⁷

Bakhtin locates the birth of this novelistic structure that allows the expression of diverging views through a multiplicity of voices, which he calls the polyphonic novel, in Fyodor Dostoevsky's works. For Bakhtin, the voices of Dostoevsky's characters carry equal narratological weight and stand alongside his authorial voice in extraordinary independence:

Characters are polemicized with, learned from; attempts are made to develop their views into finished systems. The character is treated as ideologically authoritative and independent; he is perceived as the author of a fully weighted ideological conception of his own, and not as the object of Dostoevsky's finalizing artistic vision ... [T]he direct and fully weighted signifying power of the characters' words destroys the monologic plane of the novel and calls forth an unmediated response – as if the character were not an object of authorial discourse, but rather a fully valid, autonomous carrier of his own individual word.²⁸

The narrative structure accordingly needs to be approached through a logic of distance and relationship – which indicates a *becoming* – rather than fixed causally deduced determinations of being.²⁹ My sense is that such an approach holds great liberatory potential for those beings occupying the struggling end of a power relationship. The animal has been represented in written literature for thousands of years. As in law, however, animals in literature have predominantly been exiled to voiceless spaces as objects rather than subjects. Catherine Elick locates the beginning of a gradual shift towards literary subjectivity in the English-language children's literature of the modern period,³⁰ identifying “animal characters struggling to become true subjects, not objects, whose worth and welfare are not entirely dependent upon humans and whose power relations with people are more productively unstable than hierarchical.”³¹ These fictional worlds are said to mirror the social transition from animal welfare to animal rights advocacy that occurred in the twentieth century.³² Opting to focus exclusively on literature in which animal characters are anthropomorphized or endowed with the ability of speech, Elick employs Bakhtin's theory to consider specifically how animal characters gain authority by expressing and defining “themselves” through language.

Anthropomorphization undoubtedly empowers animal characters and enables them to express independent consciousness in a unique and valuable way; the caterpillar in *Alice in Wonderland* is able simultaneously to question Alice's identity and assert his own (mere three inches tall) presence authoritatively,³³ Stuart (from *Stuart Little*) effectively destabilizes the human/animal oppositional dichotomy,³⁴ and Charlotte (from *Charlotte's Web*) forcefully provokes thought on the belief system that allows us to love some animals and eat others.³⁵ The modal relationships within the dialogical structure of the polyphonic novel can, however, accommodate the animal voice on another (and I shall henceforth argue more primordial) level.

The interplay between the subject of enunciation and the subject of utterance can be organized in several ways, each arrangement holding distinct narrative

signification.³⁶ Anthropomorphized animal characters can indeed overwrite their vulnerabilities and instead be depicted as “capable of unbalancing human hierarchies and enjoying equitable relationships with people.”³⁷ Yet it is precisely in the animal’s finitude and embodied vulnerability that we can locate the primordial disruptive force that calls for compassion. Like Derrida, I am more concerned with the voice(lessness) of the flamingo used as a croquet mallet in *Alice in Wonderland* who, without uttering a word, “would twist itself round and look up in [Alice’s] face, with such a puzzled expression” just as she was about to give the rolled-up hedgehog (acting as croquet ball) a blow with its head.³⁸

“How can an animal look you in the face?” asks Derrida. This question does not point towards the animal’s (in)ability to speak, “but whether one can know what *respond* means.”³⁹ Whom and what does Alice come into contact with when she picks up the flamingo? The flamingo is both subject and object, co-habitant and participant in an other-worlding (human–animal) interaction. Donna Haraway compellingly illustrates how embodied engagement with animals is a practice of becoming worldly, a *becoming with*, that “bind[s] intra-acting critters, including people, together in the kinds of response and regard that change the subject – and the object.”⁴⁰ In a similar vein, Bakhtin also emphasizes the relational nature of being, ethically conceiving of the self as an unfixed and unfinalizable “yet-to-be,” with “the real center of gravity of my own self-determination” being situated in the future.⁴¹ We attend and intend an environment and dialogic space that reaches well beyond the written and spoken word of the human realm and our answerability follows:

In Bakhtin, the difference between humans and other forms of life is a form of authorship, since the means by which a specific ratio of self-to-other responsibility is achieved in any given action – a deed being understood as an answer – comes about as the result of efforts by the self to shape a meaning out of the encounter between them. What the self is answerable to is the social environment; what the self is answerable for is the authorship of its responses. The self creates itself in crafting an architectonic relation between the unique locus of life activity and the constantly changing natural and social environment which surrounds it. This is the meaning of Bakhtin’s dictum that the self is an act of grace, a gift of the other.⁴²

There is once again resonance with Haraway’s insistence that animals are co-“meaning-making figures” who “gather up those who respond to them into unpredictable kinds of ‘we.’”⁴³ The unfinalizability of identity inherent to the multi-voiced style and structure of the polyphonic novel has ethical significance. The

intersubjective space separating the authorial voice and the character of whom that voice speaks and endows with meaning “from beyond the horizon of his own consciousness” is an ethical imperative.⁴⁴ As everyday authors we give form and substance to the lives of others; not through assimilation of perspectives, but through an affirmation and preservation of what the Other negates in herself. Dialogical narrative is ethical, then, “not because we see what the hero sees but because we see what the hero, within the spatial and temporal limits of his own consciousness, cannot.”⁴⁵ In this sense we read and write the Other. Very importantly, the ethical essence and significance of the novel is located in the incompleteness and open-endedness of that identification, which stimulates a reaction. For Bakhtin, the ethical potential of literature lies at the level of provoking a response to an Other who is written in an incomplete, fragmented, and unstable openness that resists any finalized account. The novel thus presents a vehicle for enacting our ethical responsibility towards the Other. These insights into the complex relativity of relations also alter our stance on rules. From this perspective, literature does not impart abstract judgment and cannot be reduced to facts about the world it conveys, as the dynamic nature and absolute singularity of beings and circumstances manifested through narrative erodes and subverts the possibility of interpretative closure. Attentiveness to narrative in law moves us towards a rejection of rule-fetishism, as it requires acknowledgment that the rule inevitably cannot dictate its application at a particular time and under a particular circumstance.⁴⁶

The inherent critique of the narrative method is not unrelated to Derrida’s first aporia of justice, the *epokhē* of the rule. As Derrida reminds us, “each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.”⁴⁷ The novel rejects abstract judgment in support of a more nuanced grasp that is grounded in the particularity of an experience and sensitive to the numerous discourses that configure it.⁴⁸ This dynamism undercuts the attainability of interpretative closure and destabilizes authority from within.

For Bakhtin, the structural instability that is generated by the novel’s “complex stratification of language into genre, register, sociolect, dialect, and the mutual interanimation of these forms”⁴⁹ operates as a critique of authority as such. The historical trajectory of the novel not only leans towards a problematization of pontifical authority, but also places the novel’s own authority (and indeed its own limits of understanding) into question, imbuing an ironic self-critique of authority.⁵⁰ Because languages and discourses are not socially equal, the complex stratifications involve “dialogic interaction in which the prestige languages try to extend their control and subordinated languages try to avoid, negotiate, or subvert control,”⁵¹ generating structural instability and incompleteness. The inherent instability and indeterminacy hold great ethical value in the face of

unequal power relations, precisely because they reveal its volatile nature and susceptibility to interruption and inversion. Bakhtin's notions of the "carnavalesque," the liberating potential of laughter, and its relation to Socratic dialogue are important for understanding this ethical dimension.

The Socratic Model, Carnival, and Laughter

Bakhtin identifies the genre of the Socratic dialogue as simultaneously originating both scientific thinking and an artistic prose composition from which the novel evolved.⁵² He specifically focuses on the early, oral Socratic developmental stage and situates this stage within a carnivalistic lineage.⁵³ The Socrates that we find here engages several voices, none of which is conclusive. His primary concern is with living rather than knowing and he elicits dialogue with the objective of challenging people and ideas, rather than persuading others to adopt a proposition.⁵⁴ This reflects the dialogic nature of Socratic notions of truth and of thinking about truth, which is counterposed to a monologic, "ready-made truth."⁵⁵

Socratic dialogue engages an assemblage of voices through two basic stylistic devices, syncrisis and anacrisis. Syncrisis confronts several discourses through "the juxtaposition[ing] of various points of view on a specific object" while anacrisis is "a means for eliciting and provoking the words of one's interlocutor, forcing him to express his opinion and express it thoroughly."⁵⁶ A "carnival sense of the world" comes to the fore here and distinguishes Socratic dialogue from traditional rhetorical genres. While Socrates is testing the multiplicity of perspectives, "the dialogic testing of the idea is simultaneously also the testing of the person who presents it," including Socrates himself, "against a dialogizing background of other ideas."⁵⁷ Socrates is living a "*carnivalistic life*" of collaborative dialogue in which "everyone is an active participant, everyone communes in the carnival act"⁵⁸ and in no way presents closure or resolution to the dialogic interaction.

Carnivalistic suspension of restrictions and hierarchies is one of the primary characteristics transposed into literature. Medieval life was characterized by a two-world condition of existence and participation in official life and carnival life. In contrast to official culture, "infused with elements of fear, weakness, humility, submission, falsehood, hypocrisy, or on the other hand with violence, intimidation, threats, prohibitions,"⁵⁹ carnival culture resisted immortalization and completion and "celebrated temporary liberation from the prevailing truth and from the established order, it marked the suspension of all hierarchical rank, privileges, norms, and prohibitions."⁶⁰ Carnival was "the second life of the people, who for a time entered the utopian realm of community, freedom, equality, and abundance."⁶¹ Laughter played a crucial role in carnival culture and gave form to carnival rituals. Bakhtin characterizes carnival laughter as communal

laughter “of all the people” that is aimed at everyone, “including the carnival’s participants.”⁶² Carnival laughter is not, however, merely farcical, it is as tragic as it is comic. The subversive power of carnival laughter lies in its ambivalence, its potential simultaneously to exalt and deride; “it asserts and denies, it buries and revives.”⁶³ This dualistic ambivalence captures the essence of the carnivalesque, “*the pathos of shifts and changes, of death and renewal.*”⁶⁴ Structure and hierarchy are relative and temporary; the crowning of the carnival king is a dualistic ambivalent act that always already embodies the idea and turn towards his immanent decrowning.⁶⁵ Laughter can thus degrade (and inaugurate) power by destabilizing authority and effectuating power shifts. This destabilizing capacity inherent to the carnival tradition and effected by carnivalized literature lies central to the argument being developed here.

ELIZABETH COSTELLO AS SOCRATIC FIGURE AND VOICE OF REFUSAL

The Lives of Animals comprises two parts, each with several scenes. The first part, “The philosophers and the animals,” primarily consists of four scenes: Costello being received at the airport and hosted by John; Costello’s first lecture; the question and answer session; and the dinner at the Faculty Club. The second part, “The poets and the animals,” involves seven scenes: John and his wife Norma’s conversation following the first lecture and dinner; John handing over and then reading Abraham Stern’s letter to Costello; the question and answer session following Costello’s second lecture; John and Costello’s conversation en route to her last engagement; Costello’s debate with Thomas O’Hearne; John and Norma’s conversation following the debate; and John driving Costello to the airport the following morning.

The structure and style that Coetzee employs forcefully assert the capacity of fiction as a vehicle for ethical issues, which is itself a major theme in this novella. Despite large parts of the narrative being dedicated to Costello’s lectures, a mode that is typically monological, Coetzee has Costello engage a polyphony of independent voices throughout. The novella is narrated in the third person through John’s consciousness, maintaining a remarkably unobtrusive narratorial presence. John’s narration itself is dialogized in its observation and anticipation of responses and seamless transitions from narration to the independent voices of other characters. Costello not only interacts with these independent voices in the novella and her own past, present, and future, but also with literary, historical, and philosophical discourses that extend well beyond the text. Coetzee *inter alia* makes use of academic references, thereby invoking the voices of scholars such as Philippe Lacoue-Labarthe, Gary Francione, Franz Kafka, Thomas Nagel, Mary Midgley, and even Coetzee himself. The dialogical performance of the novella’s language is exteriorized, thereby resisting collapse into a monologic ideal

and solidifying a certain distance that separates the author and his characters who, like Dostoevsky's characters, are "*free* people, capable of standing *alongside* their creator, capable of not agreeing with him and even of rebelling against him."⁶⁶

Despite being the central conversing figure, Costello does not assume a controlling position (as "teacher") and remains merely one independent participant in the spoken dialogue, which is subsumed in the dialogized story. In what follows I shall argue, as others have done before me,⁶⁷ that Costello represents a Socratic figure; a midwife assisting in the birth of new ideas⁶⁸ in the image of a wise (wo)man "wearing the popular mask of a bewildered fool."⁶⁹ According to Bakhtin, "this combination produces the ambivalent image of wise ignorance" characteristic of "the ambivalent self-praise in the Socratic dialogue: I am wiser than everyone, because I know that I know nothing."⁷⁰ Costello undermines and critiques authority in the novella by drawing it into a space of familiarity where it can be investigated freely. The entry point to this investigation is contemporary reality, "the living people who occupy it together with their opinions."⁷¹ Costello elicits and provokes these opinions through what Karin van Marle terms a "politics of refusal" by utilizing the plot situation of the dialogue alongside anacrisis, provoking "the word by the word, for the same purpose," as is typical of Socratic dialogue.⁷²

The Politics of Refusal and Alternative Spaces of Thinking

I find theoretical grounding in Karin van Marle's reflections on a politics of refusal as a mode of abnegation that destabilizes traditional ways of theorizing and engaging politics and law. The central tenet to emphasize at the outset is that refusal, as conceptualized by van Marle, is not a spontaneous reaction or an outright extemporaneous rejection. On the contrary, the notion of critical thinking lies central to the notion of refusal and "the kind of politics, law and legal approach that might result from refusal is one inspired by- and imbued with thinking and reflection."⁷³ Refusal beckons alternatives precisely because it does not fix or close off; it is tentative and, I would argue, dialogic in its engagement with life, truth, and limits in that it resists singular reified approaches that proclaim possession of prefabricated, irrefutable truth by calling for unexpurgated and open-ended dialogical discourse. Refusal is not static but rather, in embracing uncertainty and humility, invites the kind of movement that facilitates polyphony. Indeed, van Marle's jurisprudence stems from her concern with the way in which the law silences female voices and the prospect of a subversive feminine space wherein women can tell their own tales in their own voices. Drawing on Adriana Cavarero's⁷⁴ retelling of the narrative of Penelope as creating a space

for refusal, van Marle translates a critical approach to the negotiation of power relations.

Penelope weaves in the weaving room during the day and she unweaves during the night, constructing her own rhythm by means of that act. She neither wishes to be part of Odysseus' world, nor does she submit to the role imposed on her as woman – that of producing clothes. By unweaving and abrogating, Penelope is refusing the relational structure dictated by patriarchy and disrupting an established power structure. The weaving room becomes a space of political action through the refusal of secondhand interpretations and definitions that finalize women's lives and deaths. In refusal Penelope belongs to herself and her consciousness becomes equally valid. We are ultimately left with an alternative space of thinking that challenges and resists the hegemony of objectification; a space in which engagement with women requires recognition of their autonomous consciousnesses and voices through dialogue as opposed to their objectifying transformation into mouthpieces or puppets that enact a patriarchal narrative.

Central to van Marle's argument, and as we shall later see also Costello's, is the notion of Western philosophy as a predominantly male activity. For the Greek male hero Odysseus, being is marked by death and adventure while Penelope, in contrast, values birth and rootedness.⁷⁵ Relying on Cavarero, van Marle recalls Western philosophy's preoccupation with the separation of body from soul, its insistence that "pure thought" could help the living untie the soul from the body (albeit temporarily and imperfectly) until death definitively effects this disentanglement. With this, the entity constituting the human is split in two: consisting of the body, belonging to the living world, and the soul, associated with thinking and belonging to the world of ideas.⁷⁶ From this perspective, the moment of birth is seen as an imprisonment or a "fall" to earth; "turn[ing] the place of origin from which each person actually enters the world into a simple (and devalued) place of appearance 'on earth' ... Life on earth originates precisely when, by falling into the body, the soul *ties itself* to it, and ends when the soul *releases itself* from it, with the death of the body."⁷⁷ A soul/body duality is engendered and through men's association with the former (and women's with the latter), their claim to gender neutrality and universality is grounded.⁷⁸ In reweaving, Penelope ultimately ties together that which philosophy seeks to separate, thereby reintroducing thought to a life punctuated by birth and death.⁷⁹ Not unrelated to this is Western philosophy's failure to appreciate who someone is, due to a fixation with what someone is, as explained by Cavarero in a later work.⁸⁰ Here she expounds an insightful argument on the relationship between selfhood and narration and illustrates how literary and philosophical narrative models can present new ways of reflecting on the construction of human identities. For Cavarero, a narrative politics that is not grounded in categorical or discursive norms can reveal the "who" and, just like Penelope's unweaving and

reweaving, create a space of resistance to patriarchal silencing of voices of difference and dissent.⁸¹ Once again a certain struggle for dialogic recognition and participation in the face of monologic dominance is foregrounded.

In refusal, as with the carnivalesque, laughter plays an important role as a mode of undermining and destabilizing hierarchical distance and creating a space for free and familiar engagement. Laughter simultaneously brings the world closer and detaches from fear, thereby facilitating an uninhibited investigation “without which it would be impossible to approach the world realistically.”⁸² Plato narrated the anecdote of the philosopher Thales, who fell into a water well while looking skywards in order to scrutinize the stars. A maidservant from Thrace laughed at him and remarked that his eagerness to examine the heavens gave rise to an ignorance of the world at his feet. For van Marle, this expression of detachment (from the patriarchy engendered in the Western philosophical tradition) effects a form of refusal that links with birth and renewal in the clearing of a space that beckons an alternative political future.⁸³ Bakhtin’s reading of the role of laughter in grotesque realism reverberates here:

Laughter degrades and materializes ... Degradation here means coming down to earth, the contact with earth as an element swallows up and gives birth at the same time. To degrade is to bury, to sow, and to kill simultaneously, in order to bring forth something more and better.⁸⁴

It is the capacity “to bring forth something more and better” that forms my central interest in this article. Refusal exposes a limit, in turn preserving the possibility of another thought of relation and ultimately another law. As Drucilla Cornell tells us repeatedly, the theme of limitation inherently shapes the hope for a better future, “as this is crucial to the good news that the future, as what is *other* to our present social reality, cannot be known in advance and already foreclosed by some grand theory.”⁸⁵ Limitation defends the prospect of an increasingly ethical mode of being precisely because it “keeps open the impossibility of knowing what is impossible,” thereby resisting interpretative closure to a future that, in the here and now, “cannot be shown to be either illusory or fully accessible.”⁸⁶ Similarly, the voice of refusal “is situated at ... an in-between space” and resists any finalizing interpretation; “in other words, there is always already another place but also another time to come.”⁸⁷

Elizabeth Costello embraces the hopeful unknown of what can be expected of each other by invoking refusal as a response to what she considers to be “a crime of stupefying proportions”⁸⁸ and reconfiguring the ideal of justice and equality. Cornell reminds us that this approach is contra the scientific notions of Karl Marx, who argued in favor of an analytic engagement with the primary

contradiction and the development of social movements grounded in an expression of our present(ed) reality rather than our idealistic aspirations for an ethical future.⁸⁹ This might be why Coetzee's character (perhaps ironically) named Elaine Marx, a member of the English Department at Appleton College, asks Costello the following question:

Are you not expecting too much of humankind when you ask us to live without species exploitation, without cruelty? Is it not more human to accept our own humanity – even if it means embracing the carnivorous Yahoo within ourselves – than to end up like Gulliver [from Swift's *Gulliver's Travels*], pining for a state he can never attain, and for good reason: it is not in his nature, which is a human nature?⁹⁰

Costello's Refusals, the Animal's Finitude, and Risking Law

Costello questions the authority and limits of Western philosophy's potential to inform a non-anthropocentric understanding of our place in the world and desperately calls forth (the possibility of) an alternative ethical image of the world. The discourse remains unfinalized and thoroughly double-voiced, with Costello engaging other characters through dialogue and the complex double-voicing that interconnects John's narratorial voice with the voices of the other characters. Like the Socrates from the early dialogues, Costello's focal concern is with living rather than knowing, and she enacts refusal to elicit voices and ideas (anacrisis) that are effectively juxtaposed to other voices (syncrisis) in the search for and testing of truth, often in disputatious dialogical interactions. The multiplicity of voices, complimentary and contradictory alike, express their ideologies freely in dialogue with Costello, herself the prime ideologist. Very importantly, it needs to be noted that Costello and her ideas are also tested throughout. She is a fallible figure who at times embodies contradictions,⁹¹ occasionally fails to engage in a convincing or even logical manner,⁹² and invites ridicule.⁹³ She does not always converse from a position of authority grounded in rational epistemologies, readily admitting "I don't know what I think ... I often wonder what thinking is, what understanding is."⁹⁴ This can be explained by a reading of Costello as Socratic midwife and wise fool who facilitates the search for a truth that is dialogical, correlational, relative, and unfixed. To this end, I would like to focus on three closely interwoven themes of refusal, as enacted by Costello: a refusal of the rationalist tradition's use of reason as philosophical mechanism of abstraction that ground claims to humanist superiority; a refusal of disembodied intellectualization; and a refusal to eat meat.

Costello is profoundly aware of her fellow humans' capacity to grasp intellectually that animals suffer and remain emotionally and ethically unresponsive to

this awareness. She returns us, again and again, to “the places of death all around us, the places of slaughter to which, in a huge communal effort, we close our hearts,” adding that “as far as [she] can see, our moral being is untouched.”⁹⁵ Costello locates the root of this passivity in the rationalist tradition’s privileging use of reason above all other human faculties as a capacity or criterion to justify subjugation. Costello attempts to destabilize the hierarchical mind/body, thought/feeling, and man/animal dualities entrenched by the masculinity of this tradition. She does not, however, attempt to effect a reprioritization or inversion; like Penelope, Costello is weaving together what Western philosophy has struggled to engage and untied, insisting on fullness or embodiedness rather than “a consciousness of yourself as a kind of ghostly reasoning machine thinking thoughts ... a pea rattling around in a shell.”⁹⁶ During her first lecture on “the philosophers and the animals,” she says:

I could ask what Saint Thomas takes to be the being of God, to which he will reply that the being of God is reason. Likewise Plato, likewise Descartes, in their different ways. The universe is built upon reason. God is a God of reason ... And the fact that animals, lacking reason, cannot understand the universe but have simply to follow its rules blindly, proves that, unlike man, they are part of it but not part of its being: that man is godlike, animals thinglike ... Even Kant does not pursue, with regard to animals, the implications of his intuition that reason may be not the being of the universe but on the contrary merely the being of the human brain ... Both reason and seven decades of life experience tell me that reason is neither the being of the universe nor the being of God. On the contrary, reason looks to me suspiciously like the being of human thought; worse than that, like the being of one tendency in human thought.⁹⁷

Following her conclusion that reason pertains to only a specific spectrum of human thinking, she asks “if this is so, if that is what I believe, then why should I bow to reason this afternoon and content myself with embroidering on the discourse of the old philosophers?”⁹⁸ For Costello, the rationalist tradition has consistently generalized and subjugated the animal in opposition to an anthropocentric standard of “thinking.” In response, she puts forward the faculty of “sympathetic imagination” as a vehicle for grappling with the particularity of an embodied engagement with another being, especially with an animal. Knowing the other *sympathetically* involves a corporeal response to the individual other being and thus a refusal of generalizing abstractions.⁹⁹ Costello turns to Thomas Nagel’s famous essay titled “What is it like to be a bat?”¹⁰⁰ in

explicating her case for the sympathetic imagination. She reads Nagel as espousing an anthropocentrically reductionist appreciation of the nature of consciousness in support of his supposition that a bat is “a fundamentally *alien* form of life.”¹⁰¹ Costello insists that “there is no limit to the extent to which we can think ourselves into the being of another. There are no bounds to the sympathetic imagination.”¹⁰²

It needs to be noted that the sympathetic imagination here does not involve a mental projection of feelings, but rather a move towards an imaginative union that is grounded in shared finitude. Costello explicitly connects her notion of sympathetic imagination with corporeality or embodiedness, emphasizing that it involves an experience “not of inhabiting another mind but of inhabiting another body.”¹⁰³ Haraway’s notion of “creating a we” and her call for “grappling *with*, rather than generalizing *from*”¹⁰⁴ is echoed in Costello’s insistence on a shift “toward a different kind of being-in-the-world” that involves reflection that “is not about the animal, but is instead the record of an engagement with him.”¹⁰⁵ Costello thus foregrounds a bodily experience of *abjection* as opposed to imaginative *projection*, the former involving an expulsion of the subject from linguistic and societal domains.¹⁰⁶

By expounding insights about the sympathetic imagination in opposition to a certain tendency in the rationalist tradition, the dual problematic of attacking reason while (inevitably) relying on reason and rejecting philosophical discourse¹⁰⁷ through the use of philosophical discourse comes to the fore. This problematic is emphasized and criticized by several voices in the novel, none more persistent and vehement than Costello’s daughter-in-law, Norma, who holds a PhD in philosophy. Norma argues “there is no position outside of reason where you can stand and lecture about reason and pass judgment on reason.”¹⁰⁸ Elaine Marx also raises this concern while addressing Costello:

In your lecture you argued that various criteria – Does this creature have reason? Does this creature have speech? – have been used in bad faith to justify distinctions that have no real basis, between *Homo* and other primates, for example, and thus to justify exploitation. Yet the very fact that you can be arguing against this reasoning, exposing its falsity, means that you put a certain faith in the power of reason, of true reason as opposed to false reason.¹⁰⁹

Costello’s refusal to “bow to reason” and “embroider on the discourse of the old philosophers” elicits the counter-voices of Norma and Elaine Marx, the latter’s words in turn echoing Jeremy Bentham’s famous call for a moral response to animal suffering. “The question is not, Can they *reason*? nor, Can they *talk*? but,

Can they *suffer*?” argued Bentham.¹¹⁰ It is precisely on the matter of animal suffering that Costello challenges the limits of traditional Western philosophical discourse on animals and invites a radical shift in our approach to animal ethics.

The dominant reception of Bentham’s argument in the field of animal ethics has entailed a consequentialist engagement with the animal’s ability to suffer (and emanating interest in not being subjected to suffering) as a ground for moral standing. Costello, rather, would have us consider the suffering of animals in light of their embodied exposure, emphasizing “to be alive is to be a living soul. An animal – and we are all animals – is an embodied soul.”¹¹¹ Costello’s views on animal suffering are related to Jacques Derrida’s reading of Bentham in his autobiographical lecture titled *The Animal That Therefore I Am*.¹¹² Like Costello, Derrida is never left indifferent to the ongoing suffering of animals, which to him broaches a complex disruptive dimension to human–animal relations.

Rather than reading Bentham’s question in terms of capacities and faculties, Derrida raises the more basic question of animals’ finitude and exposure. Derrida’s thought is guided by what Matthew Calarco terms a “proto-ethical imperative.”¹¹³ For Derrida, capacities do not configure the definitive foundation to the ethical relation with the animal Other. Rather, the question itself (Can they *suffer*?) subsumes the trace of a more fundamental interruptive encounter with the suffering of the animal Other that calls my being into question and provokes thought; the *question* is already a *response* to a preceding event.¹¹⁴ The idea of this proto-ethical encounter or event is fundamental to Derrida’s approach to animal ethics and, as we shall see, also Costello’s. Derrida is arguing that recognition of the animal Other’s ability or capacity for suffering holds less disruptive force than a confrontation with the animal Other’s *inability* or *incapacity* to escape suffering, her “fleshy vulnerability and exposure to wounding.”¹¹⁵ Derrida’s relocation of the disruptive power inherent to an encounter with the animal (in her embodied vulnerability) has radical significance for the configuration of a positive animal ethics that responds to this “nonpower at the heart of power”:

How should one take [this inability and vulnerability] into account? What right should be accorded it? To what extent does it concern us? Being able to suffer is no longer a power; it is a possibility without power, a possibility of the impossible. Mortality resides there, as the most radical means of thinking the finitude that we share with animals, the mortality that belongs to the very finitude of life, to the experience of compassion, to the possibility of sharing the possibility of this nonpower, the possibility of this impossibility, the anguish of this vulnerability, and the vulnerability of this anguish.¹¹⁶

Derrida's argument is that the interruptive force in animal suffering (and our response-ability) is undeniable and inescapable. The "face" of the animal Other disrupts us prior to any contemplation on the nature or extent of animal suffering, "before the *undeniability* of this response (yes, they suffer, like us who suffer for them and with them), before this response that precedes all other questions, both ground and cornerstone of this problematic shift."¹¹⁷ The question itself attests to the disruptive capacity of animal suffering and the finitude that humans share with animals. During her first lecture Costello also emphasizes our shared finitude and vulnerability as a force that demands reflection by evoking a Holocaust analogy that compares the suffering of animals in modern-day society to the genocidal killing of Jews in the Nazi death camps:

Let me say it openly: we are surrounded by an enterprise of degradation, cruelty, and killing which rivals anything that the Third Reich was capable of, indeed dwarfs it, in that ours is an enterprise without end, self-regenerating, bringing rabbis, rats, poultry, livestock ceaselessly into the world for the purpose of killing them.¹¹⁸

Costello refuses consequentialist debates that seek to deflect the disruptive force of our shared embodiedness and exposure:

And to split hairs, to claim that there is no comparison, that Treblinka was so to speak a metaphysical enterprise dedicated to nothing but death and annihilation while the meat industry is ultimately devoted to life (once its victims are dead, after all, it does not burn them to ash or bury them but on the contrary cuts them up and refrigerates and packs them so that they can be consumed in the comfort of our homes) is as little consolation to those victims as it would have been – pardon the tastelessness of the following – to ask the dead of Treblinka to excuse their killers because their body fat was needed to make soap and their hair to stuff mattresses with.¹¹⁹

The Holocaust analogy once again elicits several strong counter-voices in the novel. Following Costello's evocation of the Holocaust during her first lecture, Abraham Stern, a well-respected elderly Jewish poet and academic at Appleton College, withdraws in protest from the dinner held in Costello's honor. He leaves a handwritten letter addressed to Costello, explaining the reason for his refusal to "break bread" with her:

At the kernel of your lecture, it seemed to me, was the question of breaking bread. If we refuse to break bread with the executioners of Auschwitz, can we continue to break bread with the

slaughterers of animals? You took over for your own purposes the familiar comparison between the murdered Jews of Europe and slaughtered cattle. The Jews died like cattle, therefore cattle die like Jews, you say. That is a trick with words which I will not accept. You misunderstand the nature of likenesses; I would even say you misunderstand willfully, to the point of blasphemy. Man is made in the likeness of God but God does not have the likeness of man. If Jews were treated like cattle, it does not follow that cattle are treated like Jews. The inversion insults the memory of the dead. It also trades on the horrors of the camps in a cheap way.¹²⁰

Coetzee's dramatic structure here effectively facilitates polyphony, attaining synchysis and anacrisis and realizing several Bakhtinian themes related to carnival. While autonomous voices are heard during Costello's lecture through John's narrational consciousness and the question and answer session, the dinner following Costello's lecture is dialogical in form and enables the birth of truth through a Socratic dialectic. Here, as is characteristic of carnivalistic acts, authority and hierarchy are temporary and susceptible to inversion and give right to "ease and familiarity, to a certain frankness, to eccentricity, ambivalence; that is, the combination in one discourse of praise and abuse, of the serious and the comic."¹²¹ John alludes to authority and hierarchy when he says that he and Norma had initially not been invited to the dinner and were only added to the list after it came to light that Costello had a son at Appleton College. He adds that "they will certainly be the most junior, the lowliest."¹²² The suspension and inversion of this hierarchy is evident in the imperious presence of Norma's counter-voice at the table and the pervasiveness of her combative opposition to Costello's vegetarianism.

The carnivalesque is also realized at the level of ingestion. Bakhtin emphasizes that eating and drinking are central to carnival; "the body transgresses here its own limits: it swallows, devours, rends the world apart, is enriched and grows at the world's expense."¹²³ Man's experience here is one of conquest, "man's encounter with the world in the act of eating is joyful, triumphant; he triumphs over the world, devours it without being devoured himself."¹²⁴ Interestingly, the etymology of the word "carnival" is "to remove meat" and meat was excluded from the menu on account of Costello's vegetarianism.¹²⁵ John reiterates the significance of this when he states that he looks forward, with grim interest, "to seeing how the college will cope with the challenge of the menu."¹²⁶ John also anticipates confrontational dialogical interactions on this issue, dreading that someone will ask Costello what led her to become vegetarian "and that she will then get on her high horse and produce what he and Norma call The Plutarch Response."¹²⁷ His use of the high horse metaphor once again alludes to hierarchy and the impermanent relativity thereof. While Costello is never confronted with

the dreaded question, the anticipated answer is “imperfectly reproduced” in John’s narratorial consciousness and thereby included in the dialogical interaction:

You ask me why I refuse to eat flesh. I, for my part, am astonished that you can put in your mouth the corpse of a dead animal, astonished that you do not find it nasty to chew hacked flesh and swallow the juices of death-wounds.¹²⁸

Costello’s alternative account of being as reflected in her refusal to eat meat holds great symbolic significance. There is clear questioning and suspension of the hierarchical precedence that facilitates and legitimates man’s consumption of animals and, typical of the carnivalesque scene, we find “temporary liberation from the prevailing truth and from the established order”¹²⁹ on a very deep level. A sense of hostility towards a certain immortalized and completed interpretation of man (as conquering eater of flesh) can be felt, imbuing a sense of becoming, modulation, and renewal. Costello’s response when prompted by a member of the university administration to elaborate on the motivation behind her vegetarianism is equally significant. She insists that her vegetarianism “comes from a desire to save [her] soul,” rather than moral conviction.¹³⁰ Here the Socratic idea of salvation through critical self-reflection is brought to mind¹³¹ and the leitmotif of our shared embodiedness and mortality is recalled. More importantly, it is Costello’s exclusive position that provokes and facilitates the dialogue, as is typical of Socratic dialogism.¹³² By not giving voice to the standard arguments of the animal rights movement, Costello represents a marginal figure and her discourse is figured as the pleadings of a woman on the threshold. As Julia Kristeva explains, this fulfills an important function in Socratic dialogism, as “the exclusive situation liberates the word from any univocal objectivity, from any representative function, opening it up to the symbolic sphere.”¹³³ Costello is not expounding any “ready-made truth,” principle, or rule, but rather engaging in constructive carnivalesque dialogical discourse to question and test people and their ideas. Costello’s dialogue inherently resists finalizing authority precisely because it also engages in dialogue with itself, “writing reads another writing, reads itself and constructs itself through a process of destructive genesis.”¹³⁴

In continuing to consider the relevance of the insights and subversive force that literature brings to law’s finalizing authority, I briefly turn, in conclusion, to van Marle’s notion of a “risking law.” I am interested in the capacity of literature, specifically the voice of refusal, to ultimately gesture another ethics and another law, and I ask, along with van Marle, what kind of law will this be?¹³⁵ In considering the kinds of approaches and type of law to which refusal might lead us, van Marle reflects on refusal’s precarious relation to risk and tentatively suggests the idea of a “risking law” in relation to which the notion of risk lies central in several

regards. On a very broad or general level, it could refer to the mere possibility of taking the risk of utilizing law to achieve a certain aim. More significantly, it denotes a legal approach “that goes beyond the certainty of predictable approaches and that is candid about the risks involved when engaging law.”¹³⁶

I read and regard a risking law as a decentered and humbled law; challenged in its ignorant complacency grounded in self-perpetuating force that claims objective authority, and realistically approached as a method with both advantageous and pernicious consequences. A risking law, finally, is not fixed or closed off, but dwells in a space “between past and future.”¹³⁷ It is never completed, but rather in a constant state of reform(ulation), engaging a world of ambiguity and instability. We see why the voice of refusal is neither defeatist nor passive, but beckons alternatives in holding open the possibility of writing an increasingly ethical world. Neither its relevance nor its success can be known in advance; it is, however, certain that the question of animal liberation is situated at the limits of law and philosophy and that the tools with which we can address this question are not located solely inside those traditions. It is within the type of critical space opened up by refusal that an alternative thought and approach might develop.

CONCLUSION

As the title of this article suggests, my intention here was not to provide any solutions or conclusions, but rather to introduce the law and literature interplay from a specific vantage point that, I hope, might motion an alternative approach to law and the question of the animal. The reconfiguration of a risking law inevitably introduces several unexamined questions regarding law’s limits and representation of being(s); its capacity for reflexivity and perception of ambiguity and rigidity. Apart from attempting to illustrate the implications of a Bakhtinian approach to the law and literature interaction, I hope to motivate scholars in the field of animal ethics to think more critically about the direction that the increasingly glorifying discourse of animal rights has taken and challenge the view of legal reform as the be-all and end-all of animal liberation. This article should thus essentially be read as both a reflection on refusal and an act of refusal in itself.

The ethics of the novel proceed from a relational structure where identity is in flux and neither the self nor the other is solely human, allowing us to employ literature as a vehicle to ethically “write” the animal and “read” her response that is silenced by the law. The dearth of scholarship that engages with this alternative avenue in order to effect change is itself a symptom of the way in which law exercises power and disqualifies other discourses. It is, ironically, precisely for this reason that animal ethicists should continue their engagement with law. Being cognizant of the congruence between law and anthropocentric

culture, I however urge that the engagement with law and especially a resort to law should be tentative, reflective, and cautious.

Bakhtin would have us consider literature's generic force in relation to law. I hope to have demonstrated that the structure and style of *The Lives of Animals* place various views and discourses in juxtaposition in order to unsettle and create insight into complacent authorities. Costello's refusal of philosophically and legally solidified premises sets the violence of these discourses and practices against their material effects, thereby illustrating Bakhtin's insights into the literary tradition's capacity to carry out a mode of justice. Coetzee's novella does not collapse prescription into description by advancing assertions that thematize and speak directly about a certain formulated justice. Rather, the novel stimulates reaction to(wards) a positive practice of justice. To reiterate, the discourse of justice in literary works is located in its manner rather than its matter.¹³⁸ Approached from this vantage point, literature provides new resources with which we can grasp the relation of law and literature and engage with the question of animality. Perhaps more importantly, it resists any form of closure to the possibility of bringing forth something more and better.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author.

1. Friedrich Nietzsche, *The Gay Science*, trans. Walter Kaufmann (New York: Vintage, 1974), 336.
2. Jacques Derrida, *The Animal That Therefore I Am*, trans. David Wills, ed. Marie-Louise Mallet (New York: Fordham University Press, 2008), 29.
3. Jan-Harm de Villiers, "Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights," *Potchefstroom Electronic Law Journal* 21 (2018): 1-29.
4. Desmond Manderson, "Mikhail Bakhtin and the Field of Law and Literature," *Law, Culture and the Humanities* 12, no. 2 (2016): 221-42, 224.
5. Michael Holquist illustrates how Bakhtin's approach to the history of consciousness fundamentally differs from thinkers like Hegel and Lukács, the latter postulating singularity and unity as criteria for a developed consciousness that ultimately constitutes individuality "so radical that it condemns the novelistic hero to loneliness and alienation." See Michael Holquist, *Dialogism: Bakhtin and his World*. 2nd ed. (London: Routledge, 2002), 73-77, 75.
6. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 234.
7. Derrida, *The Animal That Therefore I Am*, 28 (own emphasis).
8. See J.M. Coetzee, "The Lives of Animals," in *The Lives of Animals*, ed. Amy Gutmann (Princeton: Princeton University Press, 1999), 15-69.
9. J.C. Kannemeyer, *A Life in Writing*, trans. Michiel Heyns (Johannesburg: Jonathan Ball Publishers, 2012), 511.
10. J.M. Coetzee, *Elizabeth Costello* (New York: Penguin Books, 2003).
11. Michael Marais, "Impossible Possibilities: Ethics and Choice in J.M. Coetzee's *The Lives of Animals* and *Disgrace*," *The English Academy Review* 18, no. 1 (2001): 1-20, 16-17.
12. David Lodge, "Disturbing the Peace," *The New York Review of Books*, <https://www.nybooks.com>.

- com/articles/2003/11/20/disturbing-the-peace/ (accessed October 2, 2018). It needs to be noted that this description pertains to the novel *Elizabeth Costello*. Lodge, however, emphasizes "in lessons three and four, 'The Lives of Animals,' the novel comes closest to the Platonic dialogue in form."
13. Marjorie Garber, "Reflections," in *The Lives of Animals*, ed. Amy Gutmann (Princeton: Princeton University Press, 1999), 73-84, 79.
 14. Mikhail Bakhtin, *The Dialogic Imagination: Four Essays*, trans. Caryl Emerson and Michael Holquist, ed. Michael Holquist (Austin: University of Texas Press, 1981), 61.
 15. Ibid.
 16. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 226.
 17. Kristeva, *Desire in Language*, 68.
 18. Bakhtin, *The Dialogic Imagination*, 293-94.
 19. Julia Kristeva outlines the dialogical relationships that are encountered on the various levels of language: "First, within the combinative dyad, langue/parole; and secondly, within the systems either of language (as collective, monological contracts as well as systems of correlative value actualized in dialogue with the other) or of parole (as essentially 'combinative,' not pure creation, but individual formation based on the exchange of signs)." Kristeva, *Desire in Language*, 68.
 20. Ibid., 69.
 21. Mikhail Bakhtin, *Problems of Dostoevsky's Poetics*, trans. and ed. Caryl Emerson (Minneapolis: University of Minnesota Press, 1984), 7.
 22. Desmond Manderson, "Modernism and the Critique of Law and Literature," *The Australian Feminist Law Journal* 35 (2011): 107-25, 122.
 23. Kristeva, *Desire in Language*, 71-72.
 24. Jan-Harm de Villiers, "Animal Rights Theory, Animal Welfarism and the 'New Welfarist' Amalgamation: A Critical Perspective," *Southern African Public Law* 30 (2015): 406-33.
 25. For an exposition of the critical stakes involved in the displacement of the metaphysico-anthropocentric foundation of traditional humanism, see Matthew Calarco, "Deconstruction is not Vegetarianism: Humanism, Subjectivity, and Animal Ethics," *Continental Philosophy Review* 37 (2004): 175-201.
 26. D.H. Lawrence quoted in Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 231.
 27. Ibid.
 28. Bakhtin, *Problems of Dostoevsky's Poetics*, 5.
 29. Kristeva, *Desire in Language*, 71-72.
 30. Broadly defined as 1900-1975.
 31. Catherine Elick, *Talking Animals in Children's Fiction: A Critical Study* (Jefferson: McFarland & Company, 2015), 1.
 32. Ibid.
 33. See Lewis Carroll, *Alice's Adventures in Wonderland* (Princeton: Princeton University Press, 2015); Elick, *Talking Animals*, 23-43.
 34. See E.B. White, *Stuart Little* (New York: Harper & Row, 1945); Elick, *Talking Animals*, 154-69.
 35. See E.B. White, *Charlotte's Web* (New York: Dell, 1952); Elick, *Talking Animals*, 170-88.
 36. See Julia Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art*, trans. Thomas Gora, Alice Jardine, and Leon Roudiez, ed. Leon Roudiez (New York: Columbia University Press, 1980), 86-87.
 37. Elick, *Talking Animals*, 6.
 38. Carroll, *Alice's Adventures*, 67.
 39. Derrida, *The Animal That Therefore I Am*, 7-8.
 40. Donna J. Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2008), 287.
 41. Mikhail Bakhtin, *Art and Answerability: Early Philosophical Essays by M.M. Bakhtin*, trans. Vadim Liapunov, ed. Michael Holquist and Vadim Liapunov (Austin: University of Texas Press, 1990), 127.
 42. Katerina Clark and Michael Holquist, *Mikhail Bakhtin* (Massachusetts: Harvard University Press, 1984), 67-68.
 43. Haraway, *When Species Meet*, 5.
 44. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 228.
 45. Ibid.
 46. Ibid., 233-34.
 47. Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Acts of Religion*, trans. Mary Quaintance, ed. Gil Anidjar (New York: Routledge, 2002), 230-98, 251.
 48. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 233.
 49. Allon White, *Carnival, Hysteria and Writing: Collected Essays and an Autobiography* (Oxford: Oxford University Press, 1994), 136.
 50. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 234.

51. White, *Carnival, Hysteria and Writing*, 137.
52. Bakhtin, *The Dialogic Imagination*, 24.
53. Bakhtin juxtaposes the final Platonic dialogues in which "the content often assumed a monologic character that contradicted the form-shaping idea of the genre" and the dialogues of Plato's first and second periods, noting that "the dialogue of these early periods has not yet been transformed into a simple means for expounding ready-made ideas (for pedagogical purposes) and Socrates has not yet been transformed into a 'teacher'." Bakhtin, *Problems of Dostoevsky's Poetics*, 110.
54. James P. Zappen, "Bakhtin's Socrates," *Rhetoric Review* 15, no. 1 (1996): 66-83, 71.
55. Bakhtin, *Problems of Dostoevsky's Poetics*, 110.
56. Ibid.
57. Ibid., 111-12.
58. Ibid., 122.
59. Mikhail Bakhtin, *Rabelais and His World* [1965], trans. Hélène Iswolsky (Bloomington: Indiana University Press, 1984), 94.
60. Ibid., 10.
61. Ibid., 9.
62. Ibid., 11.
63. Ibid., 11-12.
64. Bakhtin, *Problems of Dostoevsky's Poetics*, 124.
65. Ibid.
66. Ibid., 6.
67. My argument was stimulated by Richard Northover's thorough and convincing interpretation of Costello as Socratic figure in Richard Alan Northover, "J.M. Coetzee and Animal Rights: Elizabeth Costello's Challenge to Philosophy" (PhD thesis, University of Pretoria, 2009). Also see Richard Alan Northover, "Elizabeth Costello as a Socratic Figure," *English in Africa* 39, no. 1 (2012): 37-55.
68. Bakhtin, *Problems of Dostoevsky's Poetics*, 110.
69. Bakhtin, *The Dialogic Imagination*, 24.
70. Ibid.
71. Ibid., 25.
72. See Bakhtin, *Problems of Dostoevsky's Poetics*, 111.
73. Karin van Marle, "Introduction: Refusal, Risk, Liminality," in *Refusal, Transition and Post-Apartheid Law*, ed. Karin van Marle (Stellenbosch: SUN MeDIA, 2009), 1-14, 3.
74. See Adriana Cavarero, *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy*, trans. Serena Anderlini-D'Onofrio and Aine O'Healy (New York: Routledge, 1995).
75. Karin van Marle, "Laughter, Refusal, Friendship: Thoughts on a Jurisprudence of Generosity," in *Refusal, Transition and Post-Apartheid Law*, ed. Karin van Marle (Stellenbosch: SUN MeDIA, 2009), 15-28, 20.
76. Cavarero, *In Spite of Plato*, 23-24.
77. Ibid., 24-26.
78. Van Marle, "Laughter, Refusal, Friendship," 20.
79. Ibid.
80. See Adriana Cavarero, *Relating Narratives: Storytelling and Selfhood*, trans. Paul Kottman (London: Routledge, 2000).
81. Van Marle, "Laughter, Refusal, Friendship," 21.
82. Bakhtin, *The Dialogic Imagination*, 23.
83. Van Marle, "Laughter, Refusal, Friendship," 19.
84. Bakhtin, *Rabelais and His World*, 20-21.
85. Drucilla Cornell, *Moral Images of Freedom: A Future for Critical Theory* (Maryland: Rowman & Littlefield Publishers, 2008), 3. See also Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992).
86. Cornell, *Moral Images of Freedom*, 6.
87. Van Marle, "Introduction," 3.
88. Coetzee, "The Lives of Animals," 69.
89. Cornell, *Moral Images of Freedom*, 6-7.
90. Coetzee, "The Lives of Animals," 55-56.
91. One prominent example is Costello's use of leather products, despite her ethical vegetarianism. She clearly appreciates this contradiction and is reluctant to accept praise and respect: "I'm wearing leather shoes ... I'm carrying a leather purse. I wouldn't have overmuch respect if I were you." Ibid., 43.
92. Costello often fails to structure a coherent, convincing argument. At the conclusion of her first lecture, for example, John remarks that it was "a strange talk ... ill gauged, ill argued. Not her métier, argumentation." Ibid., 36.
93. Costello's use of Ted Hughes's poetry, despite Hughes being a sheep farmer, opens her to mockery. During her first lecture, an audience member facetiously remarks "either he is just raising sheep as poetic subjects ... or he is a real rancher raising sheep for the market." This comment prompts laughter from the audience, suggesting ridicule. Ibid., 51-52.
94. Ibid., 45.
95. Ibid., 35.
96. Ibid., 33.

97. Ibid., 22–23.
98. Ibid., 23.
99. Marais, "Impossible possibilities," 2.
100. Thomas Nagel, "What is it like to be a bat?" *The Philosophical Review* 83, no. 4 (1974): 435–50.
101. Ibid., 438. It needs to be noted that there are scholars who convincingly argue that Costello misreads Nagel, the latter constructing an argument "against materialist reductions of consciousness" that actually "makes [Costello's] point in advance." Michael Bell, "What is it like to be a Nonracist? Elizabeth Costello and J.M. Coetzee on the Lives of Animals and Men," in *J.M. Coetzee and the Idea of the Public Intellectual*, ed. Jane Poyner (Ohio: Ohio University Press, 2006), 172–92, 177.
102. Coetzee, "The Lives of Animals," 35.
103. Ibid., 51.
104. Haraway, *When Species Meet*, 3 (own emphasis).
105. Coetzee, "The Lives of Animals," 51.
106. Sam Durrant, "J.M. Coetzee, Elizabeth Costello, and the Limits of the Sympathetic Imagination," in *J.M. Coetzee and the Idea of the Public Intellectual*, ed. Jane Poyner (Ohio: Ohio University Press, 2006), 118–34, 130.
107. Coetzee, "The Lives of Animals," 22.
108. Ibid., 48.
109. Ibid., 55.
110. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola: Dover Publications, 2012), 311.
111. Coetzee, "The Lives of Animals," 33.
112. Derrida, *The Animal That Therefore I Am*.
113. See Matthew Calarco, *Zoographies: The Question of the Animal from Heidegger to Derrida* (New York: Columbia University Press, 2008), 103–49.
114. Ibid., 117–18.
115. Ibid., 118.
116. Derrida, *The Animal That Therefore I Am*, 28.
117. Ibid.
118. Coetzee, "The Lives of Animals," 21.
119. Ibid., 21–22.
120. Ibid., 49–50.
121. Bakhtin, *Problems of Dostoevsky's Poetics*, 120.
122. Coetzee, "The Lives of Animals," 37.
123. Bakhtin, *Rabelais and His World*, 281.
124. Ibid.
125. Northover, "J.M. Coetzee and Animal Rights," 140. Note that the menu did, however, include fish.
126. Coetzee, "The Lives of Animals," 37.
127. Ibid., 38.
128. Ibid.
129. Bakhtin, *Rabelais and His World*, 10.
130. Coetzee, "The Lives of Animals," 43.
131. Northover, "J.M. Coetzee and Animal Rights," 18.
132. Kristeva, *Desire in Language*, 81.
133. Ibid.
134. Ibid., 77.
135. Van Marle, "Introduction," 2.
136. Ibid.
137. Ibid., 3.
138. Manderson, "Mikhail Bakhtin and the Field of Law and Literature," 241.

Jan-Harm de Villiers is a senior lecturer of jurisprudence in the School of Law at the University of South Africa. His research falls within the broad field of animal ethics and involves critical theory, continental philosophy, and jurisprudence.

CONCLUSION

To manifest oneself as a face is to *impose oneself* above and beyond the manifested and purely phenomenal form, to present oneself in a mode irreducible to manifestation, the very straight-forwardness of the face to face, without the intermediary of any image, in one's nudity, that is, in one's destitution and hunger.¹

As with every bottomless gaze, as with the eyes of the other, the gaze called "animal" offers to my sight the abyssal limit of the human: the inhuman or the ahuman, the ends of man, that is to say, the bordercrossing from which vantage man dares to announce himself to himself, thereby calling himself by the name that he believes he gives himself. And in these moments of nakedness, as regards the animal, everything can happen to me, I am like a child ready for the apocalypse, *I am (following) the apocalypse itself*, that is to say, the ultimate and first event of the end, the unveiling and the verdict.²

What does it mean to be caught (naked) under the gaze of an animal? How can an animal look you in the face? What limits must I cross in order to stand in the truth of (my) being in front of an animal? In his remarkably rich and insightful autobiographical text *The Animal That Therefore I Am*,³ Jacques Derrida recalls the unease and shame that he experienced when, following a morning shower, he unexpectedly discovered that he was being looked at naked by his companion cat who entered the bathroom to ask for her

1 Emmanuel Levinas *Totality and Infinity: An Essay on Exteriority* (trans Lingis A) (Martinus Nijhoff Publishers: The Hague, 1979) 200.

2 Jacques Derrida *The Animal That Therefore I Am* (trans Wills D, ed Mallet M) (Fordham University Press: New York, 2008) 12.

3 Derrida *The Animal That Therefore I Am*.

breakfast. Derrida is not focused on his personal awareness of the cat, but rather on the experience of “finding [himself] naked, [his] sex exposed, stark naked before a cat that looks at [him] without moving”.⁴ This seemingly banal encounter has profound philosophical significance for Derrida, given Western philosophy’s refusal to acknowledge the address of the animal gaze and how this negation, which “could not be the figure of just one disavowal among others”, fundamentally “institutes what is proper to man, the relation to itself of a humanity that is above all anxious about, and jealous of, what is proper to it”.⁵ Not surprisingly, then, this encounter leads Derrida to reflect on his own certitudes and what he considers to be the leading question of his body of work: *Who am I (following)?*⁶ It becomes increasingly clear that Derrida is not raising the question with the intention of concretizing an answer. He is here more interested in determining the sense of this question, which opens onto his much broader concern with ontology and an exploration of the strong connection between our thinking concerning animals and our self-understanding.⁷

Derrida is somewhat perplexed by a lingering embarrassment. This “impropriety of a certain animal nude before the other animal ... [that] one might call ... a kind of *animalséance*: the single, incomparable and original experience of the impropriety that would come from appearing

4 Derrida *The Animal That Therefore I Am* 4.

5 Derrida *The Animal That Therefore I Am* 14.

6 Derrida *The Animal That Therefore I Am* 3-4. In formalizing philosophical responsibility as inescapably concerning the responsibility (and thus question) of *someone*, Derrida previously argued “I would say that for me the great question is always the question *who*. Call it biographical, autobiographical or existential, the form of the question *who* is what matters to me, be it in, say, its Kierkegaardian, Nietzschean, or Heideggerian form. *Who? Who asks the question who? Where? How? When? Who arrives?* It is always the most difficult question, the irreducibility of *who* to *what*, or the place where between *who* and *what* the limit trembles, in some way. It is clear that the *who* withdraws from or provokes the displacement of the categories in which biography, autobiography, and memoirs are thought. Abyssal question of the signature, but also signature of the question, the pledge pledged in the question”. Jacques Derrida and Maurizio Ferraris *A Taste for the Secret* (trans Donis G, ed Donis G and Webb D) (Polity Press: Cambridge, 2001) 41-2.

7 David Wood “Thinking with Cats” in Atterton P and Calarco M (eds) *Animal Philosophy: Essential Readings in Continental Thought* (Continuum: London, 2004) 129-44, 129.

in truth naked, in front of the insistent gaze of the animal, a benevolent or pitiless gaze, surprised or cognizant” not only invokes a reflex of shame, but also a certain shame for being ashamed.⁸ It is the complexity of this shame, which Derrida finely traces back to a time before the Biblical fall,⁹ and the alterity of the cat that evokes his reflections on (the nature of) animal difference(s). Being all too aware of the peril of neutralization and erasure, Derrida’s central concern is with multiplying the difference(s) in order to mark or avow the “unsubstitutable singularity” of his companion animal as “an existence that refuses to be conceptualized”.¹⁰ Derrida is at pains to underscore that this encounter involves a *real* (rather than metaphorical or figurative) cat who, even before its identification *as* a cat, “comes to [him] as *this* irreplaceable living being that ... can encounter [him], see [him], even see [him] naked”.¹¹ This is not a primal scene of Man meeting Animal. On the contrary, it is precisely the Man/Animal binary opposition that has served to neutralize and erase the multitudes of differences that ground the possibility of the intersecting gaze that allows me to recognize the absolute alterity of my neighbor. The encounter that Derrida speaks of here is one of mutual recognition, embodied proximity, responsiveness, and responsibility that subsist in a dimension of radical singularity and irreducibility. It is a “naked” encounter with an Other before or outside concepts and proper names that designate and denote them. It is a face-to-face encounter.

Moving beyond the reductive thinking, conceptual hegemony, and actual violence engendered by the general singular category “Animal” towards an ethics of (multitudes of) difference(s) is imperative to the possibility of a face-to-face encounter with the Other. In this dissertation I sought to delineate a problematic counter-movement at the core of dominant models of animal rights that paradoxically defines animals in relation to humans and forecloses the possibility

8 Derrida *The Animal That Therefore I Am* 4.

9 See especially Derrida *The Animal That Therefore I Am* 3-23.

10 Derrida *The Animal That Therefore I Am* 9.

11 Derrida *The Animal That Therefore I Am* 9.

of recognizing and embracing the animal as (unsubstitutable, singular) Other. To this end I identified the metaphysics of subjectivity, specifically the way in which it solidifies and binds these theories to the very humanism they seek to displace, as the focus and critical point of departure for this project. The metaphysics of subjectivity is inextricably part of the history of the oppositional Human/Animal binary that has functioned to subsume and effect an erasure of the multitudes of differences on both sides of the divide and facilitate our subjugating position of mastery over animals. Drawing on philosophical resources, I have sought to foreground the importance of thinking *difference* differently, outside of- and beyond oppositional binaries. Inasmuch as the subordinating structure embedded in the Human/Animal oppositional limit bequeathed by the metaphysico-dialectic tradition continues to operate in the dominant models of animal rights theory and forecloses the possibility of openness to difference, I have situated my critical project at the borders of the Human/Animal opposition and specifically illustrated its constitutive functioning in relation to the construct of subjectivity. This inquiry grounds my thesis that there is essential congruence between (the subject-centered model of) law and animal subjugation and my sustained problematization of law as channel for animal liberation.

As explained in chapter 2, deconstruction aims to protect the ethical relation from being collapsed into symmetry and the Other from being denied her otherness. The ethical impulse implicit in deconstruction is excavated by Drucilla Cornell in her (re)conceptualization of the philosophy of the limit, allowing us to better understand its insistence on maintaining a divide between the system of rules that *is* and the future that *ought*, and situating the structure of subjectivity in relation to the difference between law and justice. Following Derrida, I illustrated that the human is constituted as subject through a carnophallogocentric schema of sacrifice and, in turn, I sought to demonstrate the deconstructive potential of veganism as a mode of being that exposes and resists the sacrificial anthropocentric character of this configuration.

In chapter 3 I introduced another thesis on the juridical register of animality by illustrating how a strategic support for welfare-based law reforms that condone the sacrificial property status of animals fundamentally counters the ideological foundations of the rights-based position, and I urged that the two paradigms be conceptually and strategically separated in order to preserve the possibility of recalibrating the animal's sacrificial status. Whilst the existence of an ideological purlieu separating welfare theory and rights theory is by no means a novel insight, I hope to have illustrated its profound significance for a positive political project and that a sustained engagement with the conceptual inconsistencies between the two models is vital to safeguarding a projected future of animal liberation from being deflected, and ultimately foreclosed, in the continuation of the present. A critical approach of slowness, which effects a de-privileging of the present, is apposite precisely because it allows us to acknowledge and reflect on the complexity of the question of the animal in law as being situated in the past, present and future, and to consider that a utilization of law may unintentionally solidify discourses, practices and modes of social regulation that are fundamentally anthropocentric and thereby produce more harm than good.

I employed a semiotic approach to offer a problematization of rights in chapter 4. My critical angle of engagement involved the philosophical conditions of existence of modern rights that inherently render them limitless and allows for the extension of rights to animals. By specifically focusing on the similarity principle, which is deeply rooted in a logic of binary opposition, I sought to illustrate how the animal rights model defines animals by virtue of their relative proximity to humans and thereby forecloses the possibility of embracing their singularity and otherness. The fundamental problematic here concerns the oppositional thinking that effaces differences and reverts to the homogenous. By thinking animal Being in light of shared substantive properties, animals are not recognized as phenomenologically symmetrical to humans. The animal is conceptualized as the Other to man and thus, ultimately, not genuinely other at all.

Chapter 5 aimed to position the anthropocentric ontology of similarity underlying rights theory in relation to a more foundational problematic that continues to situate the human as ground of intelligibility and relational center of all that exists. I turned my attention to uncovering the metaphysics of subjectivity as having effected a progressive subjectivization of human-Being (in opposition to animal-Being). This focus on man's becoming-subject allowed me to isolate anthropocentrism as a guiding thread of the metaphysical tradition and foreground its implications for discourses and institutions that employ the construct of subjectivity in service of animal liberation. The operational force of what I termed the anthropomorphic hegemony of subjectivity renders any evocation of the subject a (paradoxical) deepening or solidification of the very interpretation of man that lies at the core of animal subjugation. As such, I argued that a meaningful turn towards animal liberation requires a rigorous and sustained deconstruction of the underlying metaphysical support of rights in order to preserve the possibility of rethinking human-animal relationality from a non-anthropocentric, post-metaphysical space.

In chapter 6 I critically engaged with a landmark ruling by the highest court in South Africa in order to illustrate the profound hold that metaphysical anthropocentrism has over Western culture and the emanating difficulties accompanying efforts aimed at the recalibration of the animal's legal status as an object, even when animals are recognized as sentient beings with intrinsic worth. The ruling presented me with an opportunity to comprehend and articulate law's deep resistance to the concerns of animals against my thesis on the object status of the animal as a constitutive function of (the subject-centered model of) law, thus deepening my problematization of a pragmatic utilization of law as instrument of immediate resolution. The court's vacillation between two contrasting ideologies that respectively regard animals as utility objects and individuals with intrinsic worth relates to the anthropocentric limits inherent in legal discourse and institutions, or the animal as other to a subject-

centered system of law. At issue, as previously illustrated, is the way in which discourse on the subject continues to associate subjectivity with the human, even when it acknowledges that animals possess subjective consciousness, are capable of experiencing pain, and form an integral part of a rich social fabric. The question of the animal as subject of law thus re-introduces precisely what is put in question, and whilst this consequence might strategically be worth risking in certain circumstances, I regard it as crucial that we are forthright in acknowledging these types of risks when engaging law. As such, my discussion here prefigured my reflections on the notion of a risking law in the following chapter.

In my final chapter I reflected on the capacity of literature to problematize the authority of traditional philosophical and legal discourses and circumvent some of the theoretical and ethical constraints that I have foregrounded in the preceding chapters. Drawing on Mikhail Bakhtin's critical insights into the comprehensive critique of authority performed by the style and form of the polyphonic novel, I analyzed the stylistic and structural characteristics of J.M. Coetzee's novella *The Lives of Animals* in order to present a reading of this text as a very important counterpoise to not only the anthropocentrism embedded in law, but indeed law as a regulating authority of the social order. Insofar as the experience of the polyphonic novel, as aesthetic activity, can furthermore facilitate a "writing" of the animal and a "reading" of her response that is silenced by the law, my sense is that literature holds great liberatory potential for the animal. Whilst I interpret the dearth of scholarship exploring this alternative as a symptom of law's ever growing hegemony, it is precisely for this reason that I feel strongly that literature has a vital role to play in animal studies. Literature not only destabilizes the dominant binary mode of exclusively engaging (with) law to either resist legal changes that pose detriment to animals or utilizing law to promote the interests of animals, but also effects a de-centering of law that can radically alter our understanding of- and approach to law itself. It is in this sense that I consider the subversive

potential of literature as potentially gesturing what Karin van Marle terms a risking law that is humbled through the exposure of its conservation of both conceptual and actual violence, and realistically engaged as a strategy that not only inherently poses risk, but could potentially generate disastrous effects.

I hope to have persuasively illustrated that the question of the animal is an exceedingly nuanced one that necessitates a response more rigorous than the extension of any right(s) can effectuate. At the center of this complex problematic lies the construct of man as subject that has facilitated unbridled power for some and unimaginable violence for others.¹² I have been arguing that, in order for thought to progress otherwise in regard to animals, these very concepts of man, subject, and thus also animal, have to be subjected to sustained deconstruction. The fundamental issue at stake concerns the (im)possibility of a non-violative and non-relational alterity that is not assimilated into an economy of the same. Resistance to the collapse of difference into the register of the calculable and exchangeable is vital to preserving the possibility of “the singular coming of the Other”, or what Derrida also calls an event.¹³ This challenge to responsibly think the alterity of the living relates to a thought exposed and responsive to the very un-conditionality and non-calculability that exceeds the order of the subject. My intention, then, was to think the conditions of possibility towards the *event* of what we so confusedly call the animal.

12 I recall here Theodor Adorno’s critique of the concept of Western subjectivity as complicit in the tragic events of twentieth-century history, arguing “it is not wrong to raise the less cultural question whether after Auschwitz you can go on living – especially whether one who escaped by accident, one who by rights should have been killed, may go on living. His mere survival calls for the coldness, the basic principle of bourgeois subjectivity, without which there could have been no Auschwitz; this is the drastic guilt of him who was spared”. Theodor Adorno *Negative Dialectics* (trans Ashton E) (Continuum: New York, 1973) 362-63.

13 See *inter alia* Jacques Derrida *Rogues: Two Essays on Reason* (trans Brault P and Naas M) (Stanford University Press: Stanford, 2005) xiv.

SUMMARY

The Anthropomorphic Hegemony of Subjectivity: Critical Reflections on Law and the Question of the Animal

This project contemplates an ethics of difference and singularity that can effectuate a displacement of anthropocentrism and radical transformation in the way we understand and approach relationality across species borders. My reflections take place against the background of the problematic accompanying the (re)presentation of animals in the subject-centered models of moral philosophy and law, and I call into question the salient ways in which theorists have engaged these avenues in order to effect change in our treatment of animals. Animal liberation scholars and activists have mainly sought to address the plight of animals from the theoretical frameworks of legal rights, interest-based equality, and identity discourse that foreground the ways in which animals are essentially similar to human beings in terms of ethically relevant qualities or characteristics. My project critically reflects on Emmanuel Levinas's formulation of the ethical in order to advance an alternative understanding of human-animal relations as grounded in the radical singularity or difference of individual beings.

Following Jacques Derrida and Drucilla Cornell, I deconstruct the dominant animal rights models by uncovering anthropocentrism as a guiding thread of the Western metaphysical tradition and illustrating how the construct of subjectivity born from that tradition forecloses or limits certain ethical possibilities. I situate the functioning of the human/animal oppositional limit in relation to man's becoming-subject and argue that attempts at assimilating animals to the model of (legal) subjectivity paradoxically solidify precisely

the interpretation of man that is being called in question. In line with much of the scholarship written in the post-humanist tradition, I thus also take the metaphysics of subjectivity as the critical point of departure of my project. I aim to illustrate specifically *the anthropomorphic hegemony of subjectivity* – by which term I wish to designate the tacit anthropocentric contours of the construct of subjectivity that guide a determination of animal Being and ethical worth against a standard of humanness – and its implications for discourses and institutions that evoke this construct.

My focus ultimately concerns an examination of law's relation to animal subjugation, both as facilitator of animal sacrifice and potential enabler of animal liberation, against the operative force of the anthropocentrism embedded in law's fabric. I determine that law fundamentally grounds and maintains the subordinate status of animals and illustrate essential congruence between law and what might be called an anthropocentric culture. I accordingly propose that the critical focus of animal ethicists should be on law and legal discourse as signifier of anthropocentric power in preference to legal reform as such, and I call for an ongoing engagement with the underlying metaphysical support of animal rights at a conceptual level rather than a pragmatic utilization of the law as instrument of immediate resolution. This study concludes by offering reflections on ways in which literature might begin to open up new potentialities and risks for thought in relation to the question of the animal (in law). I explore the capacity of literature to problematize the authority of traditional philosophical and legal discourses and circumvent some of the theoretical and ethical constraints that they pose. By disrupting or de-centering the construct(s) of law, my primary aim is to open a critical space wherein an alternative thought of relation might develop.

SAMENVATTING

(Summary in Dutch)

De Anthropomorfische Hegemonie van Subjectiviteit: Kritische Reflecties op Recht en de Kwestie van het Dier

Dit project denkt een ethiek van verschil en singulariteit die een verplaatsing van anthropocentrisme kan bewerkstelligen, en radicale verandering in de manier waarop we relationaliteit over de grenzen van de soorten heen begrijpen en benaderen. Mijn beschouwingen vinden plaats tegen de achtergrond van de problematiek van het (re)presenteren van dieren in de modellen van morele filosofie en recht die gecentreerd zijn rond het subject, en ik stel de gangbare manieren ter discussie waarop theoretici deze modellen hebben gebruikt om verandering tot stand te brengen in de manier waarop we dieren behandelen. Wetenschappers en activisten die zich bezighouden met de bevrijding van dieren hebben vooral geprobeerd om de slechte toestand van dieren te benaderen vanuit de theoretische kaders van juridische rechten, een op belangen gebaseerde gelijkheid en een discours van identiteit, kaders die de manieren waarop dieren in essentie lijken op mensen waar het gaat om ethisch relevante kwaliteiten of kenmerken op de voorgrond zetten. Door een kritische reflectie op Emmanuel Levinas' formulering van het ethische breng ik een alternatief begrip van mens-dierrelaties naar voren dat is gebaseerd op de radicale singulariteit of het verschil van individuele wezens.

In navolging van Jacques Derrida en Drucilla Cornell deconstrueer ik de dominante modellen van dierenrechten, door bloot te leggen hoe anthropocentrisme een rode draad is in de westerse metafysische traditie, en door te laten zien hoe de constructie van subjectiviteit die is geboren uit die traditie bepaalde ethische mogelijkheden afsluit of beperkt. Ik situeer het functioneren van de mens/diertegenstelling in relatie tot het subject-woorden

van de mens, en ik betoog dat pogingen om dieren te assimileren tot het model van (juridische) subjectiviteit het mensbeeld dat ter discussie gesteld wordt paradoxaal genoeg juist consolideren. In lijn met veel wetenschappelijke werken in de posthumanistische traditie neem ook ik de metafysica van de subjectiviteit dus als kritisch vertrekpunt van mijn project. Ik probeer specifiek om de anthropomorfische hegemonie van subjectiviteit te illustreren - met deze term bedoel ik de stilzwijgende anthropocentrische contouren van de constructie van subjectiviteit die bij het bepalen van het Zijn en de ethische waarde van dieren menselijkheid als maatstaf nemen - en de implicaties voor discoursen en instituties die deze constructie tevoorschijn roepen.

Mijn uiteindelijke focus is een onderzoek naar de relatie van het recht tot de onderwerping van dieren, niet alleen als iets dat het offeren van dieren faciliteert, maar ook als iets dat de bevrijding van dieren mogelijk zou kunnen maken, tegen de werkzame kracht van het anthropocentrisme dat is ingebed in de vezels van het recht. Ik stel vast dat het recht de ondergeschikte status van dieren fundeert en in stand houdt, en ik illustreer een essentiële overeenstemming tussen het recht en wat een anthropocentrische cultuur zou kunnen worden genoemd. Daarom stel ik voor dat de kritische focus van dierenethici zou moeten liggen op het recht en op het juridische discours als symptoom van anthropocentrische macht, in plaats van op het hervormen van het recht. Ook pleit ik voor voortdurende aandacht voor de onderliggende metafysische steun voor dierenrechten op conceptueel niveau, in plaats van een pragmatisch gebruik van het recht als instrument voor onmiddellijke oplossingen. Deze studie besluit met enkele gedachten over manieren waarop literatuur nieuwe mogelijkheden en risico's voor het denken zou kunnen openen in relatie tot de vraag van het dier (in het recht). Ik onderzoek het vermogen van literatuur om de autoriteit van traditionele filosofische en juridische discoursen te problematiseren, en om sommige van de theoretische en ethische beperkingen die deze discoursen stellen te omzeilen. Mijn primaire doel is om, door de constructie(s) van het recht te ontwrichten of van hun centrale plek te halen, een kritische ruimte te openen waarin een alternatief denken van relatie zich zou kunnen ontwikkelen.

BIBLIOGRAPHY

Books and chapters

- Adorno, Theodor *Negative Dialectics* (trans Ashton E) (Continuum: New York 1973)
- Agamben, Giorgio *Homo Sacer: Sovereign Power and Bare Life* (trans Heller-Roazen D) (Stanford University Press: California 1998)
- Agamben, Giorgio *Infancy and History: Essays on the Destruction of Experience* (trans Heron L) (Verso: London 1993)
- Agamben, Giorgio *The Open: Man and Animal* (trans Attell K) (Stanford University Press: California 2004)
- Ainley, Alison "Amorous Discourses: 'The Phenomenology of Eros' and Love Stories" in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York 1988) 70-82
- Aristotle *A Treatise on Government* (trans Ellis W) (Routledge: Manchester 1895)
- Bakhtin, Mikhail *Art and Answerability: Early Philosophical Essays by M.M. Bakhtin* (trans Liapunov V, ed Holquist M and Liapunov V) (University of Texas Press: Austin 1990)
- Bakhtin, Mikhail *Problems of Dostoevsky's Poetics* (trans and ed Emerson C) (University of Minnesota Press: Minneapolis 1984)
- Bakhtin, Mikhail *Rabelais and His World* (trans Iswolsky H) (Indiana University Press: Bloomington 1984)
- Bakhtin, Mikhail *The Dialogic Imagination: Four Essays* (trans Emerson C and Holquist M, ed Holquist M) (University of Texas Press: Austin 1981)
- Beauchamp, Tom "Rights Theory and Animal Rights" in Beauchamp T and Frey R (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press: Oxford 2011) 198-227
- Bell, Michael "What is it like to be a Nonracist? Elizabeth Costello and J.M. Coetzee on the Lives of Animals and Men" in Poyner J (ed) *J.M. Coetzee and the Idea of the Public Intellectual* (Ohio University Press: Ohio 2006) 172-92
- Bentham, Jeremy *An Introduction to the Principles of Morals and Legislation* (Dover Publications: Mineola 2012)

- Bernasconi, Robert "Skepticism in the Face of Philosophy" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington 1991) 149-61
- Bernasconi, Robert and Critchley, Simon "Introduction" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington 1991) xi-xviii
- Braverman, Irus *Zooland: The Institution of Captivity* (Stanford University Press: California 2013)
- Burggraave, Roger "Awakened into Vigilance – In Conversation with a Recalcitrant Thinker" in Burggraave R (ed) *The Awakening to the Other: A Provocative Dialogue with Emmanuel Levinas* (Peeters: Leuven 2008) 1-11
- Burggraave, Roger "'No One Can Save Oneself without Others': An Ethic of Liberation in the Footsteps of Emmanuel Levinas" in Burggraave R (ed) *The Awakening to the Other: A Provocative Dialogue with Emmanuel Levinas* (Peeters: Leuven 2008) 13-65
- Calarco, Matthew "Heidegger's Zoontology" in Calarco M and Atterton P (eds) *Animal Philosophy: Essential Readings in Continental Thought* (Continuum: London 2004) 18-30
- Calarco, Matthew *Thinking Through Animals: Identity, Difference, Indistinction* (California: Stanford University Press 2015)
- Calarco, Matthew *Zoographies: The Question of the Animal from Heidegger to Derrida* (Columbia University Press: New York 2008)
- Carroll, Lewis *Alice's Adventures in Wonderland* (Princeton University Press: Princeton 2015)
- Carroll, Lewis *Alice's Adventures in Wonderland & Through the Looking-Glass* (Wordsworth: Hertfordshire 1993)
- Carson, Gerald *Men, Beasts, and Gods: A History of Cruelty and Kindness to Animals* (Charles Scribner's Sons: New York 1972)
- Cavalieri, Paola and Singer, Peter (eds) *The Great Ape Project: Equality Beyond Humanity* (St. Martin's Press: New York 1993)
- Cavarero, Adriana *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (trans Anderlini-D'Onofrio S and O'Healy A) (Routledge: New York 1995)
- Cavarero, Adriana *Relating Narratives: Storytelling and Selfhood* (trans Kottman P) (Routledge: London 2000)
- Chanter, Tina "Feminism and the Other" in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York 1988) 32-56
- Clark, Katerina and Holquist, Michael *Mikhail Bakhtin* (Harvard University Press: Massachusetts 1984)

- Coetzee, J.M. *Elizabeth Costello* (Penguin Books: New York 2003)
- Coetzee, J.M. "The Lives of Animals" in Gutmann A (ed) *The Lives of Animals* (Princeton University Press: Princeton 1999) 15-69
- Cornell, Drucilla *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* 2nd ed (Rowman & Littlefield Publishers: Lanham 1999)
- Cornell, Drucilla *Moral Images of Freedom: A Future for Critical Theory* (Rowman & Littlefield Publishers: Maryland 2008)
- Cornell, Drucilla *The Philosophy of the Limit* (Routledge: New York 1992)
- Critchley, Simon *Ethics, Politics, Subjectivity: Essays on Derrida, Levinas and Contemporary French Thought* (Verso: London 1999)
- Critchley, Simon "The Question of the Question: An Ethico-Political Response to a Note in Derrida's *De l'esprit*" in Wood D (ed) *Of Derrida, Heidegger, and Spirit* (Northwestern University Press: Evanston 1993) 93-102
- D'Emilio, John *Sexual Politics, Sexual Communities* (University of Chicago Press: Chicago 1998)
- Davis, Colin *Levinas: An Introduction* (Polity Press: Cambridge 1996)
- De Beauvoir, Simone *The Second Sex* (trans Borde C and Malovany-Chevallier S) (Vintage Books: London 2011)
- Deleuze, Gilles *Francis Bacon: The Logic of Sensation* (trans Smith D) (University of Minnesota Press: Minneapolis 2003)
- Deleuze, Gilles and Guattari, Félix *A Thousand Plateaus: Capitalism and Schizophrenia* (trans Massumi B) (Bloomsbury Academic: London 2013)
- Derrida, Jacques *Aporias: Dying – Awaiting (One Another at) the 'Limits of Truth'* (trans Dutoit T) (Stanford University Press: Stanford 1993)
- Derrida, Jacques "Force of Law: The 'Mystical Foundation of Authority'" (trans Quaintance M) in Anidjar G (ed) *Acts of Religion* (Routledge: New York 2002) 230-98
- Derrida, Jacques "Geschlecht II: Heidegger's Hand" (trans Leavey J) in Sallis J (ed) *Deconstruction and Philosophy: The Texts of Jacques Derrida* (University of Chicago Press: Chicago 1987) 161-96
- Derrida, Jacques *Of Grammatology* (trans Spivak G) (Johns Hopkins University Press: Baltimore 2016)
- Derrida, Jacques *Of Spirit: Heidegger and the Question* (trans Bennington G and Bowlby R) (University of Chicago Press: Chicago 1989)
- Derrida, Jacques *Positions* (trans Bass A) (University of Chicago Press: Chicago 1981)

- Derrida, Jacques *Rogues: Two Essays on Reason* (trans Brault P and Naas M) (Stanford University Press: Stanford 2005)
- Derrida, Jacques *Signéponge / Signsponge* (trans Rand R) (Columbia University Press: New York 1984)
- Derrida, Jacques *The Animal That Therefore I Am* (trans Wills D, ed Mallet M) (Fordham University Press: New York 2008)
- Derrida, Jacques *The Truth in Painting* (trans Bennington G and McLeod I) (University of Chicago Press: Chicago 1987)
- Derrida, Jacques "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas" in *Writing and Difference* (trans Bass A) (University of Chicago Press: Chicago 1978) 79-153
- Derrida, Jacques and Ferraris, Maurizio *A Taste for the Secret* (trans Donis G, ed Donis G and Webb D) (Polity Press: Cambridge 2001)
- Derrida, Jacques and Nancy, Jean-Luc "'Eating Well,' or the Calculation of the Subject: An Interview with Jacques Derrida" (trans Connor P and Ronell A) in Cadava E, Connor P and Nancy J (eds) *Who Comes after the Subject?* (Routledge: New York 1991) 96-119
- Derrida, Jacques and Roudinesco, Elisabeth *For What Tomorrow... A Dialogue* (trans Fort J) (Stanford University Press: Stanford 2004)
- Descartes, René *Discourse on the Method* (trans Veitch J) (Cosimo Classics: New York 2008)
- Diamond, Cora "Eating Meat and Eating People" in Sunstein C and Nussbaum M (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press: New York 2004) 93-107
- Douzinas, Costas *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish: Abingdon 2007)
- Douzinas, Costas *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing: Oxford 2000)
- Douzinas, Costas and Gearey, Adam *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing: Oxford 2005)
- Durrant, Sam "J.M. Coetzee, Elizabeth Costello, and the Limits of the Sympathetic Imagination" in Poyner J (ed) *J.M. Coetzee and the Idea of the Public Intellectual* (Ohio University Press: Ohio 2006) 118-34
- Elick, Catherine *Talking Animals in Children's Fiction: A Critical Study* (McFarland & Company: Jefferson 2015)
- Francione, Gary *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia University Press: New York 2008)

- Francione, Gary *Animals, Property and the Law* (Temple University Press: Philadelphia 1995)
- Francione, Gary *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press: Philadelphia 1996)
- Frey, R.G. "Utilitarianism and Animals" in Beauchamp T and Frey R (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press: Oxford 2011) 172-97
- Gaddis, William *A Frolic of His Own* (Poseidon Press: New York 1994)
- Garber, Marjorie "Reflections" in Gutmann A (ed) *The Lives of Animals* (Princeton University Press: Princeton 1999) 73-84
- Haraway, Donna *When Species Meet* (University of Minnesota Press: Minneapolis 2008)
- Heidegger, Martin *Being and Time* (trans Macquarrie J and Robinson E) (Harper Perennial: New York 1962)
- Heidegger, Martin "Letter on 'Humanism'" (trans Capuzzi F) in McNeill W (ed) *Pathmarks* (Cambridge University Press: Cambridge 1998) 239-76
- Heidegger, Martin *On the Way to Language* (trans Hertz P) (Harper & Row: New York 1971)
- Heidegger, Martin *Parmenides* (trans Schuwer A and Rojcewicz R) (Indiana University Press: Bloomington 1992)
- Heidegger, Martin "Plato's Doctrine of Truth" (trans Sheehan T) in McNeill W (ed) *Pathmarks* (Cambridge University Press: Cambridge 1998) 155-82
- Heidegger, Martin *Poetry, Language, Thought* (trans Hofstadter A) (Harper & Row: New York 1971)
- Heidegger, Martin "The Age of the World Picture" in Young J and Haynes K (trans and eds) *Off the Beaten Track* (Cambridge University Press: Cambridge 2002) 57-85
- Heidegger, Martin *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (trans McNeill W and Walker N) (Indiana University Press: Bloomington 1995)
- Heidegger, Martin *What is Called Thinking?* (trans Gray J) (Harper & Row: New York 1968)
- Holquist, Michael *Dialogism: Bakhtin and His World* 2nd ed (Routledge: London 2002)
- Irigaray, Luce "Questions to Emmanuel Levinas: On the Divinity of Love" (trans Whitford M) in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington 1991) 109-18
- Joubert, J.J. (ed) *Criminal Procedure Handbook* 12th ed (Juta: Claremont 2017)

- Kannemeyer, J.C. *J.M. Coetzee: A Life in Writing* (trans Heyns M) (Jonathan Ball Publishers: Johannesburg 2012)
- Kristeva, Julia *Desire in Language: A Semiotic Approach to Literature and Art* (trans Gora T, Jardine A and Roudiez L, ed Roudiez L) (Columbia University Press: New York 1980)
- Levinas, Emmanuel *Collected Philosophical Papers* (trans Lingis A) (Martinus Nijhoff Publishers: Dordrecht 1987)
- Levinas, Emmanuel *Entre Nous: Thinking-of-the-Other* (trans Smith M and Harshav B) (Columbia University Press: New York 1998)
- Levinas, Emmanuel *Ethics and Infinity: Conversations with Phillipe Nemo* (trans Cohen R) (Duquesne University Press: Pittsburgh 1985)
- Levinas, Emmanuel *Of God Who Comes to Mind* (trans Bergo B) (Stanford University Press: Stanford 1998)
- Levinas, Emmanuel *Otherwise than Being, or, Beyond Essence* (trans Lingis A) (Duquesne University Press: Pittsburgh 1998)
- Levinas, Emmanuel "The Paradox of Morality: An Interview with Emmanuel Levinas" (trans Benjamin A and Wright T) in Bernasconi R and Wood D (eds) *The Provocation of Levinas: Rethinking the Other* (Routledge: New York 1988) 168-80
- Levinas, Emmanuel *Totalität und Unendlichkeit: Versuch über die Exteriorität* (trans Krewani W) (Verlag Karl Alber: München 1987)
- Levinas, Emmanuel *Totality and Infinity: An Essay on Exteriority* (trans Lingis A) (Martinus Nijhoff Publishers: The Hague 1979)
- Llewelyn, John "Am I Obsessed by Bobby? (Humanism of the Other Animal)" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington 1991) 234-45
- MacKinnon, Catharine "Of Mice and Men: A Feminist Fragment on Animal Rights" in Sunstein C and Nussbaum M (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press: New York 2004) 263-76
- Mill, John Stuart *The Subjection of Women* (D. Appleton and Company: New York 1869)
- Nash, Roderick *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press: Wisconsin 1989)
- Nietzsche, Friedrich *The Gay Science* (trans Kaufmann W) (Vintage: New York 1974)
- Niven, Charles *History of the Humane Movement* (Johnson Publications: London 1967)
- Norris, Christopher *Deconstruction: Theory and Practice* 3rd ed (Routledge: London 2002)

- Northover, Richard J.M. *Coetzee and Animal Rights: Elizabeth Costello's Challenge to Philosophy* (Ph.D. Thesis: University of Pretoria 2009)
- Nussbaum, Martha "The Capabilities Approach and Animal Entitlements" in Beauchamp T and Frey R (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press: Oxford 2011) 228-51
- Orwell, George *Animal Farm* (Signet Classics: London 2004)
- Otomo, Yoriko and Mussawir, Ed (eds) *Law and the Question of the Animal: A Critical Jurisprudence* (Routledge: Oxon 2013)
- Pacheco, Alex "The Silver Spring Monkeys" in Singer P (ed) *In Defence of Animals* (Basil Blackwell: Oxford 1985) 135-47
- Peperzak, Adriaan "Presentation" in Bernasconi R and Critchley S (eds) *Re-Reading Levinas* (Indiana University Press: Bloomington 1991) 51-66
- Pickover, Michelè *Animal Rights in South Africa* (Double Storey Books: Cape Town 2005)
- Plato "Statesman" (trans Rowe C) in Cooper J and Hutchinson D (eds) *Plato: Complete Works* (Hackett: Indianapolis 1997) 294-358
- Regan, Tom *Defending Animal Rights* (University of Illinois Press: Urbana 2001)
- Regan, Tom *The Case for Animal Rights* 2nd ed (University of California Press: Berkeley 2004)
- Ryder, Richard "Speciesism in the Laboratory" in Singer P (ed) *In Defence of Animals* (Basil Blackwell: Oxford 1985) 77-88
- Safran Foer, Jonathan *Eating Animals* (Hamish Hamilton: London 2009)
- Silverstein, Helena *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (University of Michigan Press: Michigan 1996)
- Singer, Peter *Animal Liberation* 4th ed (Harper Collins Publishers: New York 2009)
- Smart, Carol *Feminism and the Power of Law* (Routledge: New York 1989)
- Sumner, L.W. *The Moral Foundation of Rights* (Clarendon Press: Oxford 1987)
- Van Marle, Karin "Introduction: Refusal, Risk, Liminality" in Van Marle K (ed) *Refusal, Transition and Post-Apartheid Law* (SUN MeDIA: Stellenbosch 2009) 1-14
- Van Marle, Karin "Laughter, Refusal, Friendship: Thoughts on a Jurisprudence of Generosity" in Van Marle K (ed) *Refusal, Transition and Post-Apartheid Law* (SUN MeDIA: Stellenbosch 2009) 15-28
- Walvin, James *Questioning Slavery* (Routledge: New York 1996)
- Wellman, Carl *Real Rights* (Oxford University Press: New York 1995)

- White, Allon *Carnival, Hysteria and Writing: Collected Essays and an Autobiography* (Oxford University Press: Oxford 1994)
- White, E.B. *Charlotte's Web* (Dell: New York 1952)
- White, E.B. *Stuart Little* (Harper & Row: New York 1945)
- Wise, Steven "Animal Rights, One Step at a Time" in Sunstein C and Nussbaum M (eds) *Animal Rights: Current Debates and New Directions* (Oxford University Press: New York 2004) 19-50
- Wise, Steven *Drawing the Line: Science and the Case for Animal Rights* (Perseus Books: Massachusetts 2002)
- Wise, Steven *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books: Massachusetts 2000)
- Wood, David "Comment ne pas manger – Deconstruction and Humanism" in Steeves H (ed) *Animal Others: On Ethics, Ontology and Animal Life* (State University of New York Press: Albany 1999) 15-35
- Wood, David "Thinking with Cats" in Atterton P and Calarco M (eds) *Animal Philosophy: Essential Readings in Continental Thought* (Continuum: London 2004) 129-44

Journal articles

- Atterton, Peter "Levinas and Our Moral Responsibility Toward Other Animals" (2011) 54 *Inquiry: An Interdisciplinary Journal of Philosophy* 633-49
- Balkin, Jack "Transcendental Deconstruction, Transcendent Justice" (1994) 92 *Michigan Law Review* 1131-86
- Bilchitz, David "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" (2009) 25 *South African Journal on Human Rights* 38-72
- Bolton, Matthew "The Ethics of Alterity: Adapting Queerness in *Brokeback Mountain*" (2011) 5 *Adaptation* 35-56
- Braverman, Irus "Animal Mobilelegalities: The Regulation of Animal Movement in the American City" (2013) 5 *Humanimalia* 104-35
- Bryant, Tamie "Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans" (2008) 39 *Rutgers Law Journal* 247-330
- Bryant, Taimie "Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to be Legally Protected from Humans?" (2007) 70 *Law and Contemporary Problems* 207-54
- Calarco, Matthew "Deconstruction is not Vegetarianism: Humanism, Subjectivity, and Animal Ethics" (2004) 37 *Continental Philosophy Review* 175-201

- Cavalieri, Paola "The Meaning of the Great Ape Project" (2015) 1 *Politics and Animals* 16-34
- Chartier, Gary "Natural Law and Animal Rights" (2010) 23 *Canadian Journal of Law and Jurisprudence* 33-46
- Cornell, Drucilla "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136 *University of Pennsylvania Law Review* 1135-229
- Crowe, Jonathan "Levinasian Ethics and Animal Rights" (2008) 26 *Windsor Yearbook of Access to Justice* 313-28
- De Villiers, Jan-Harm "Animal Rights Theory, Animal Welfarism and the 'New Welfarist' Amalgamation: A Critical Perspective" (2015) 30 *Southern African Public Law* 406-33
- De Villiers, Jan-Harm "Examining the Similarity Principle and Language of (Animal) Rights as a Foundation for Animal Liberation" (2012) 27 *Southern African Public Law* 40-53
- De Villiers, Jan-Harm "Law and the Question of the Animal: A Critical Discussion of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*" (2019) 136 *South African Law Journal* 207-23
- De Villiers, Jan-Harm "Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explication of the Subject of Animal Rights" (2018) 21 *Potchefstroom Electronic Law Journal* 1-29
- De Villiers, Jan-Harm "Prolegomenon on the Role of the Polyphonic Novel for (Animal) Law: J.M. Coetzee's *The Lives of Animals*, the Voice of Refusal, and the Subversive Performativity of the Novel" (2019) 0 *Law and Literature* 1-26
- De Villiers, Jan-Harm "Towards an Ethical Relation to the Nonhuman Other: Deconstruction, Veganism and the Law" (2012) 28 *South African Journal on Human Rights* 18-30
- DeCoux, Elizabeth "Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement" (2009) 16 *Animal Law* 9-64
- Francione, Gary "Animal Rights and Animal Welfare" (1996) 48 *Rutgers Law Review* 397-469
- Francione, Gary "Ecofeminism and Animal Rights: A Review of *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals*" (1996) 18 *Women's Rights Law Reporter* 95-106
- Fuller, Lon "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 17 *Harvard Law Review* 630-72
- Garvin, Larry "Constitutional Limits on the Regulation of Laboratory Animal Research" (1988) 98 *Yale Law Journal* 369-88

- Goodman, Ellen "Animal Ethics and the Law" (2006) 79 *Temple Law Review* 1291-314
- Haldar, Piyel "Law and Animalities" (2009) 3 *Law and Humanities* 71-85
- Haldar, Piyel "Zoologian Jurisprudence" (2011) 24 *International Journal for the Semiotics of Law* 291-306
- Hankin, Susan "Not a Living Room Sofa: Changing the Legal Status of Companion Animals" (2007) 4 *Rutgers Journal of Law & Public Policy* 314-410
- Hohfeld, Wesley "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16-59
- Hutchinson, Allan "A Postmodern's Hart: Taking Rules Sceptically" (1995) 58 *The Modern Law Review* 788-819
- Lewis, Michael "The Relation between Transcendental Philosophy and Empirical Science in Heidegger's *Fundamental Concepts of Metaphysics*" (2017) 13 *Cosmos and History: The Journal of Natural and Social Philosophy* 47-72
- Litowitz, Douglas "Derrida on Law and Justice: Borrowing (Illicitly?) from Plato and Kant" (1995) 8 *Canadian Journal of Law and Jurisprudence* 325-46
- Lopez Lerma, Monica "Law in High Heels: Performativity, Alterity, and Aesthetics" (2011) 20 *Southern California Interdisciplinary Law Journal* 289-324
- Manderson, Desmond "Mikhail Bakhtin and the Field of Law and Literature" (2016) 12 *Law, Culture and the Humanities* 221-42
- Manderson, Desmond "Modernism and the Critique of Law and Literature" (2011) 35 *The Australian Feminist Law Journal* 107-25
- Marais, Michael "Impossible Possibilities: Ethics and Choice in J.M. Coetzee's *The Lives of Animals* and *Disgrace*" (2001) 18 *The English Academy Review* 1-20
- Meyersfeld, Bonita "Non-Human Animals and the Law: The Fable of Power" (2012) 27 *Southern African Public Law* 54-69
- Mujuzi, Jamil "Private Prosecutions and Discrimination Against Juristic Persons in South Africa: A Comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another*" (2015) 15 *African Human Rights Law Journal* 580-95
- Nagel, Thomas "What is it like to be a Bat?" (1974) 83 *The Philosophical Review* 435-50
- Northover, Richard "Elizabeth Costello as a Socratic Figure" (2012) 39 *English in Africa* 37-55
- Oliver, Kelly "Sexual Difference, Animal Difference: Derrida and Difference 'Worthy of Its Name'" (2009) 24 *Hypatia* 54-76

- Pacewicz, Lawrence "Human Rights in the State of Nature: Indeterminacy in the Resolution of the Conflict between Security and Liberty" (2011) 17 *University College London Jurisprudence Review* 34-66
- Shepherd, Lois "Face to Face: A Call for Radical Responsibility in Place of Compassion" (2003) 77 *Saint John's Law Review* 445-514
- Singer, Joseph "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) 6 *Wisconsin Law Review* 975-1059
- Smith, Nick "Incommensurability and Alterity in Contemporary Jurisprudence" (1997) 45 *Buffalo Law Review* 503-53
- Valverde, Mariana "Derrida's Justice and Foucault's Freedom: Ethics, History, and Social Movements" (1999) 24 *Law and Social Inquiry* 655-76
- Van Coller, Arthur "The Minority Defending the Interests of the Vulnerable [An Evaluation of the Minority Judgment in *NCSPCA v Openshaw* 2008 5 SA 339 (SCA)]" (2011) 22 *Stellenbosch Law Review* 306-13
- Van Marle, Karin "Law's Time, Particularity and Slowness" (2003) 19 *South African Journal on Human Rights* 239-55
- Wise, Steven "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy" (1998) 22 *Vermont Law Review* 793-915
- Zappen, James "Bakhtin's Socrates" (1996) 15 *Rhetoric Review* 66-83
- Zick, Timothy "Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography" (2004) 45 *William and Mary Law Review* 2261-398

Statutes

Animals Protection Act 71 of 1962

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Prevention of Cruelty to Animals Act 8 of 1914

Societies for the Prevention of Cruelty to Animals Act 169 of 1993

Table of cases

Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (A)

Director of Public Prosecutions, Transvaal v Minister of Constitutional Development [2009] ZACC 8

Harksen v Lane N.O. and Others 1998 (1) SA 300 (CC)

National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA)

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another [2016] ZACC 46

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development [2014] ZAGPPHC 763

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development [2015] SASCA 206

Prinsloo v Van der Linde and Another [1997] ZACC 5

R v Moato 1947 (1) SA 490 (O)

R v Smit 1929 TPD 397

S v Edmunds 1968 (2) PH H398 (N)

S v Gerwe 1977 (3) SA 1078 (T)

S v Lemthongtai [2014] ZASCA 131

South African Predator Breeders Association v Minister of Environmental Affairs and Tourism [2009] ZAFSHC 68

South African Predator Breeders Association v Minister of Environmental Affairs and Tourism [2010] ZASCA 151

Internet Sources

Lodge, David "Disturbing the peace" *The New York Review of Books*
<https://www.nybooks.com/articles/2003/11/20/disturbing-the-peace/> (accessed October 2, 2018)

Parliamentary Debates, Republic of South Africa

Hansard, November 25, 1993

CURRICULUM VITAE

Jan-Harm de Villiers (Pretoria, 1985) matriculated with 7 distinctions from the Afrikaans high school for boys and holds BCom (Law) (*cum laude*), LLB (*cum laude*) and LLM (Jurisprudence) (*cum laude*) degrees from the University of Pretoria, where he also started his academic career as a lecturer in the Department of Legal History, Comparative Law and Legal Philosophy. De Villiers serves on the editorial board of the Global Journal of Animal Law (Åbo Akademi University, Finland) and has acted as peer reviewer for several accredited journals. His doctoral research was conducted at the Institute for the Interdisciplinary Study of the Law at Leiden University. De Villiers is currently a senior lecturer in the Department of Jurisprudence at the University of South Africa where he has lectured several courses, including Legal Philosophy and Legal Ethics.

