

# CRITICAL ANIMAL STUDIES AND ANIMAL LAW

By  
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*Law is anthropocentric. With the limited exception of its treatment of the corporation, law is a system of rules that privileges the concept of the human and ascribes reality through a human perspective. Appreciating this, it is truly impressive that animal issues in the law have become so prominent throughout the legal education system. With this increased exposure to posthumanist critiques of the legal system and its status for and treatment of animals, an increasing number of those involved in legal education are rethinking the law's species-based hierarchy that places humans at the apex. This flourishing interest in animal law is paralleled by growth in the field of Critical Animal Studies (CAS). However, these two disciplines have developed independently of each other. Acknowledging this, animal law scholarship is currently poised to incorporate the insights of CAS. Integrating such insight into the analysis of animal issues in the law will rectify the speciesist and otherwise exclusionary formulations of the socially constructed differences between various species, which have so far been unquestioned assumptions. CAS offers an understanding of these socially constructed differences and advances a common mission between issues identified as animal injustices and those identified as human injustices. CAS stresses the interconnection between human and animal issues, not simply parallels. This important synthesis can subvert the confinement of animal issues in the legal sphere and is key to extending these essential issues into a more diverse community.*

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## I. INTRODUCTION

The pace with which animal law has grown as an area of practice in the pages of American law reviews and the curricula of American law schools is impressive. It is a phenomenon that is doubtlessly attributable to several factors, many of which were discussed recently in a symposium for the *Journal of Legal Education* devoted to examining the rise of animal law in American law schools.<sup>1</sup> Indeed, the presence of animal law represents a radical intervention into legal education and scholarship. Law, as we know, is anthropocentric. It is a set of principles that privileges the concept of the person, and very few entities other than human beings qualify as such.<sup>2</sup> Moreover, like many other disciplines and institutions in an anthropocentric society, law venerates respect for human life, the sanctity of human life, and the inherent value of humans as foundational values.<sup>3</sup> Legal texts typically operationalize these values through the concept of human dignity. Affirmations of human dignity as a concept appear in the opening words of domestic and international documents addressing human rights as well as in constitutional jurisprudence.<sup>4</sup> Often, though, human dignity is not mentioned or referred to explicitly. Instead, it

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<sup>1</sup> Symposium on animal law, 60 *J. Leg. Educ.* 193–295 (2010); see Taimie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 *J. Leg. Educ.* 237, 243–44 (2010) (detailing how television personality Bob Barker’s gifts to various law schools have helped to foster and grow a variety of animal law programs); Megan A. Senatori & Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 *J. Leg. Educ.* 209 (2010) (noting dramatic growth in the study of animal law); Bruce A. Wagman, *Growing Up with Animal Law: From Courtrooms to Casebooks*, 60 *J. Leg. Educ.* 193 (2010) (detailing the author’s personal involvement with the growth of animal law in law schools). While animal law has also made more than a fleeting appearance in other common law jurisdictions such as Canada, England, and Australia, the United States far outstrips most other countries in terms of the number of law schools that have offered the course at one time or another as a percentage of the overall number of law schools in the country. The only exception to this is New Zealand, but with only four law schools, New Zealand’s sample is an outlier.

<sup>2</sup> Of course, corporations and ships are notable—and perhaps, telling—exceptions.

<sup>3</sup> See e.g. Universal Decl. of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) (a resolution recognizing that inherent dignity and the equal inalienable rights of all members of the human family is the “foundation of freedom, justice, and peace in the world”).

<sup>4</sup> Denise Reaumé, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 *Queen’s L.J.* 61, 62 (2003).

“might be thought to underlie every norm of a just legal system; human dignity in a very abstract sense provides the ultimate justification for every legal rule.”<sup>5</sup>

The importance of human dignity and the sanctity of human life as part of the normative foundations on which law rests and moves forward are clear from the frequency with which authorities assume it, rather than defending or even explaining it. Often, when human dignity is mentioned, it is simply posited as an evident truth.<sup>6</sup> A primary source of this reverential legal attitude toward human life is the premium given to the capacity to reason. As Ngairé Naffine writes, “the capacity for sophisticated reason was regarded as the source of human value: the seat of our personhood.”<sup>7</sup> Reason is a trait that has long been associated exclusively with humans, used to define what it means to be human, as well as to distinguish human animals from nonhuman ones.<sup>8</sup> Animals, of course, are assumedly irrational.<sup>9</sup> Humans who accept that some reasoning function exists in some animals may still justify the denial of legal personhood to all animals. This denial is often based on the purported reduced ability of animals to reason in comparison with the “average normal adult human.”<sup>10</sup> For animal law to have asserted itself so prominently within this highly anthropocentric domain is an impressive achievement and, arguably, a subversive development.

Examined from another perspective, however, animal law loses its subversive features and appears to be quite conventional. This conventionality is due to its strong liberal orientation. Liberalism, a foundational pillar for law in general, has been widely critiqued by critical scholars for its exclusions along lines of difference, such as gender and

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<sup>5</sup> *Id.*

<sup>6</sup> See *id.* at 62–63 (discussing the complexities of giving meaning to the abstract concept of “dignity,” but failing to defend the concept); Ngairé Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* 99–102 (Hart 2009) (noting that there are frequent references to innate human dignity within the law); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 *Notre Dame L. Rev.* 183, 232–34 (2011) (discussing several judicial interpretations of human dignity but failing to explain why it is important to the concept of law).

<sup>7</sup> Naffine, *supra* n. 6, at 99.

<sup>8</sup> See e.g. John Burroughs, *Human Traits in Animals*, in *Leaf and Tendril: The Writings of John Burroughs* 125–26 (Riverside Press 1908) (analyzing what it means to be human by distinguishing perceived exclusive character traits, and noting that “man is a bundle of instincts . . . supplemented by the gift of reason” and that “[t]he animal is a bundle of instincts . . . without the extra gift of reason”).

<sup>9</sup> See e.g. Steven Best, *The Rise of Critical Animal Studies: Putting Theory into Action and Animal Liberation into Higher Education*, 7 *J. for Critical Animal Stud.* 9, 17 (2009) (available at <http://www.criticalanimalstudies.org/journal-for-critical-animal-studies/archives>; select Volume VII, Issue I (accessed Apr. 7, 2012)) (lamenting the “speciesist straitjacket” that defines animals as “brute beasts lacking rationality”).

<sup>10</sup> Robert Garner, *Animal Ethics* 54 (Polity Press 2005) (noting that “even the most intellectually able animals do not have the characteristics of personhood [including reason] to the same degree as the average normal adult human”); see generally *id.* at 47–54 (discussing the arguments for and reservations against animal personhood).

race.<sup>11</sup> Despite this extensive critique, animal law scholarship has thus far embraced this contested intellectual tradition (and I would speculate the same for animal law curricula). Part of the reason for the mooring of animal law scholarship within a liberal paradigm is likely a desire or compulsion to abide by law's normative framework. Law is steeped in liberalism—so much so that many authors classify our current legal system as one of liberal legalism.<sup>12</sup> It may strike many scholars as too difficult to challenge law's liberal assumptions *as well as* its anthropocentric orientation—it is challenging enough to contest the exploitation of animals that so profoundly shapes our social, cultural, economic, and legal order. If this resigned yet understandable perspective of animal law scholars does indeed animate many in their work, it would be helpful to have this acknowledged. As it stands, this perspective remains largely unarticulated within the literature; it is rare to read criticisms of the liberal tradition within animal law scholarship.<sup>13</sup> This leaves the impression that most animal law scholars are comfortable with law's liberalism and target their critique only at its anthropocentrism.

However, liberalism as a theoretical home for animal law scholarship is inadequate on its own to meaningfully achieve the ends that many animal law scholars desire. This is the case even for the abolitionist position within animal law.<sup>14</sup> Abolitionism, despite its extensive understanding of, and opposition to, the pervasive exploitation that animals experience, could also benefit from the understandings of the human–animal divide that critical theory advances. Animal law

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<sup>11</sup> See Radha Jhappan, *Introduction: Feminist Adventures in Law*, in *Women's Legal Strategies in Canada* 3, 13–14 (Radha Jhappan ed., Polity Press 2005) (describing feminist challenges to the “liberal . . . approach to law”); Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* 17–20 (The Glasshouse Press 2005) (discussing “limitations on liberalism—in particular its inability to transcend assumptions about the Other on which legal reasoning and the liberal project are based”). For scholars who are critical of liberalism's imagined rational independent agent and its ultimate potential for equality but value its tenet of equal worth of all individuals, see e.g. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* 86–87 (Oxford U. Press 2011) (noting that while “[i]t once mattered to me to sharply distinguish my relational approach from liberalism . . . I share with most of Anglo-American liberalism a belief in the infinite and equal worth of every individual”).

<sup>12</sup> See e.g. Robin West, *Jurisprudence and Gender*, in *Feminist Legal Theory: Readings in Law and Gender* 201, 201–02 (Katharine T. Bartlett & Rosanne Kennedy eds., Westview Press 1991) (describing “all of our modern legal theory—by which I mean ‘liberal legalism’ . . .”).

<sup>13</sup> A partial exception may be Robert Garner's earlier work. However, this concern with liberalism is not a part of his extensive discussion of the animal rights debate in his later work. Gary L. Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* 103–70 (Colum. U. Press 2010).

<sup>14</sup> The richness of the rights–welfare debate is beyond the scope of this paper. My own view aligns with the abolitionist perspective, yet the critique I advance here is not specific to one side of this debate. Instead, it applies to most types of animal law scholarship—welfarist, abolitionist, and beyond. For a recent review of the positions by their prominent proponents, see *generally id.* (describing contemporary animal law scholarship).

scholarship needs supplementation from a theoretical framework that has a better understanding of difference than liberalism, especially as animal law scholarship pertains to the dynamics of animal marginalization. Fortunately, this understanding is increasingly available, residing in the field of Critical Animal Studies (CAS). A growing interest outside the law in “the animal question” has produced this burgeoning literature.<sup>15</sup> CAS has grown as a field at the same time that interest in animal law has flourished in American law schools. For the most part, however, these two disciplines have developed independently of each other.

In this Article, I outline the primary contributions of CAS as an emerging field and explain why animal law scholarship would benefit from incorporating its insights. My argument is that integrating CAS’s insights into analysis of animal issues in law will lead to an elevated understanding of difference in animal law that will produce benefits conceptually and practically. Conceptually, CAS offers an understanding of socially constructed differences—species and otherwise—that would rectify the speciesist<sup>16</sup> and otherwise exclusionary formulation of difference present in legal liberalism. Practically, CAS highlights common causes—not just commonalities—between animal advocates and social justice advocates for humans. CAS is a theory that explains how “animal” issues extend more broadly into the community and align with concerns that social justice advocates have in general. This guiding belief in the interconnection of animal exploitation and human injustice holds potential to popularize animal issues to a larger and more diverse community than animal law, given how the latter’s concerns are currently limited to its theoretical scholarly base.

This Article is divided into three parts. Part II identifies the main tenets of CAS through a review of the literature in the field. That Part demonstrates the sophisticated understanding of difference that CAS scholars articulate and prioritize. Part III illuminates how CAS’s analysis of difference distinguishes it from conventional animal law scholarship. Part IV then elaborates on the conceptual and practical benefits CAS can offer to animal law as a field. The Article’s purpose is not to suggest a fundamental shift in animal law’s current trajectory, but to encourage scholars and advocates in this field to engage with CAS and to adopt its understanding of difference in animal law initiatives.

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<sup>15</sup> Kenneth Shapiro & Margo DeMello, *The State of Human-Animal Studies*, 18 *Soc’y. & Animals* 307, 307 (2010).

<sup>16</sup> “Speciesism is a term . . . understood to describe a doctrine that certain species are innately superior to others and is used to describe the exploitation by humans of ‘lower’ species.” Jodey Castricano, *Introduction: Animal Subjects in a Posthuman World*, in *Animal Subjects* 1, 27 (Jodey Castricano ed., Wilfrid Laurier U. Press 2008).

## II. CRITICAL ANIMAL STUDIES—ANOTHER BURGEONING FIELD

In this Part, I look at the relationship between posthumanism, human–animal studies, and CAS. Though related to the other two fields, CAS is a distinct field united by the aim of ending animal exploitation. I also review the literature of CAS to identify its three main tenets. CAS scholars focus on how power relationships permit oppression. The main themes in the literature are the power dynamics in the human–animal binary, the marginalization of the animal subject, and the Othering of the animal.

### A. *Posthumanism, Human–Animal Studies, and CAS*

CAS is both a subset of posthumanist studies and human–animal studies. Posthumanism is a term that applies to a range of fields, and a concrete definition has proved elusive.<sup>17</sup> A working definition would understand it as the consolidation of those theoretical strands that question the traditional boundaries of the human subject, noting its mechanical, animal, monstrous, and/or alien dimensions.<sup>18</sup> Posthumanism questions the stability of the human subject that has been foundational to Western thought. With its focus on animals as a non-human group, CAS is one branch of posthumanist studies.

Adopting a narrower focus than posthumanism, human–animal studies (or animal studies as it is often called) focuses on animals in terms of nonhuman groups, and specifically on the relationships between humans and animals.<sup>19</sup> Posthumanism thus overlaps, but is not coterminous with, human–animal studies. As one long-standing commentator put it in a recent article in the *New York Times* covering the growth of animal studies on American campuses, human–animal studies is a field that covers “anything that has to do with the way humans and animals interact.”<sup>20</sup> Described as an “exploding” academic area in terms of the number of courses, college concentrations/programs, conferences, listservs, publications, academic presses offering series dedicated to animal titles, etcetera, that have arisen in the last decade, the descriptor applies to an array of academic disciplines.<sup>21</sup> Human–animal studies is a field that initially arose in philosophy, developed in the social sciences, and then spread further into the humanities and then even the natural sciences.<sup>22</sup>

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<sup>17</sup> Cary Wolfe, *What Is Posthumanism?* xii (U. Minn. Press 2010).

<sup>18</sup> *Id.* at xv–xvi.

<sup>19</sup> Margo DeMello, *Introduction*, in *Teaching the Animal: Human–Animal Studies across the Disciplines* xi (Margo DeMello ed., Lantern Bks. 2010).

<sup>20</sup> James Gorman, *Animal Studies Cross Campus to Lecture Hall*, *N.Y. Times* D1 (Jan. 3, 2012) (quoting Marc Bekoff, Professor Emeritus of Ecology and Evolutionary Biology at the University of Colorado).

<sup>21</sup> Shapiro & DeMello, *supra* n. 15, at 307–09.

<sup>22</sup> *Id.* at 310.

Within human–animal studies, CAS is a branch that raises “the question of the animal” in the hope of exposing and ending animal exploitation. According to the website of the Institute for Critical Animal Studies, an organization promoting this field in the U.S. and abroad, CAS is an “academic field of study dedicated to the abolition of animal and ecological exploitation, oppression, and domination . . . [and] is grounded in a broad global emancipatory inclusionary movement for total liberation and freedom.”<sup>23</sup>

Thus, while both the larger field of human–animal studies and the subsidiary of CAS share a focus on human–animal relationships, and while many human–animal studies works espouse themes and insights that overlap with those of CAS,<sup>24</sup> CAS is distinct for its consistent focus on the exploitative dimensions of these relationships as well as social change.<sup>25</sup> Simply put, the conviction that animal exploitation is wrong shapes CAS as a field, and a commitment to abolish animal suffering unites its contributors. Some critics of mainstream human–animal studies view it as a purely academic field that explores human–animal relationships without achieving or even concerning itself with tangible, concrete impacts.<sup>26</sup> Of course, some human–animal studies scholars are strongly committed to ending animal exploitation and see their writing as directed toward that goal (and thus could qualify as CAS scholars should they self-identify as such).<sup>27</sup> The anti-exploitative and activist commitments are not defining features of

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<sup>23</sup> The Inst. for Critical Animal Stud., *Home*, <http://www.criticalanimalstudies.org/> (accessed Apr. 7, 2012).

<sup>24</sup> See *infra* pt II(B).

<sup>25</sup> Many CAS scholars situate the question of animal justice within the interdisciplinary, yet still anthropocentric, field of cultural studies. CAS scholars have thus extended the usual scope of cultural studies, which focuses on the analysis of everyday life, by examining routine human–animal practices. See e.g. *Animal Subjects: An Ethical Reader in a Posthuman World* (Jodey Castricano ed., Wilfrid Laurier U. Press 2008); Donna J. Haraway, *When Species Meet* (U. Minn. Press 2008) [hereinafter Haraway, *Species*]; Donna J. Haraway, *The Haraway Reader* (Routledge 2004); Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory* (U. Chi. Press 2003) (showcasing collections of articles by CAS scholars focusing on the exploitative dimensions of human–animal relationships within the broad discourse of cultural studies).

<sup>26</sup> See e.g. Best, *supra* n. 9, at 12 (excoriating mainstream human–animal studies as “arid and shockingly detached and complacent,” and denouncing “the bankruptcy and irrelevance of [its] ivory tower thinking”).

<sup>27</sup> As longtime feminist science scholar and animal advocate Lynda Birke points out in the Preface to a very recent signature publication of the Animal and Society Institute:

My own approach to human–animal studies derives partly from my background as a biologist specialized in the study of animal behavior. It emerges, too, out of interest in our social relatings with other species, and how such relatings work within, and produce, what we understand as culture. But it is also founded in politics. While human–animal studies within the academy runs in parallel to broader cultural attitudes toward nonhuman animals, it has roots in animal advocacy politics as well. As such, it can both chart how we think about animals and help to create further change. But to do that effectively, it needs critical theory as well as activism. It needs the people prepared to do things (often radical things)

human–animal studies as they are with CAS.<sup>28</sup> In part, CAS is a response to this perceived failing.<sup>29</sup>

### B. Main Tenets of CAS

To date, I am unaware of any literature review that has been done specifically on CAS.<sup>30</sup> What follows is a condensed review that focuses on several of CAS's main themes and tenets. These receive lengthy discussion to reveal the contributions the field can share with animal law scholarship.

#### 1. Power Circulates through the Human–Animal Binary

Critical theoretical scholarship generally examines how a dominant group exercises power over a subordinate group.<sup>31</sup> Understandings of power as strictly top-down have themselves gone through a reworking through the widespread influence of Michel Foucault's writing on the subject; his work has popularized the concept of power as dispersed rather than top-down, as productive as well as oppressive, and as a force that circulates through everyday discourses and practices.<sup>32</sup> Foucault's scholarship also encouraged analyses that examine how such discourses and practices mediate our bodies through state regulation of bodily interventions, forms, and habits, thus giving rise to "biopower" and "biopolitics" in societies.<sup>33</sup>

CAS scholars have increasingly applied Foucault's insights to human–animal relations, particularly in the area of food production and consumption, to explore, for example, the ethics of confined animal feed operations (CAFOs) and of eating animals.<sup>34</sup> Scholars have ar-

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which challenge the status quo, and at the same time it needs theories which challenge and develop our ideas.

Lynda Birke, *Preface: In Hope of Change: Rethinking Human–Animal Relations?*, in *Theorizing Animals: Re-Thinking Humanimal Relations* xvi, xviii (Nik Taylor & Tania Signal eds., Brill 2011).

<sup>28</sup> *Id.*

<sup>29</sup> Best, *supra* n. 9, at 23.

<sup>30</sup> *But see* Shapiro & DeMello, *supra* n. 15, at 13–14 (for a review on human–animal studies literature that references CAS literature, but in a summarized way).

<sup>31</sup> Best, *supra* n. 9, at 17–18.

<sup>32</sup> Sara Mills, *Michel Foucault* 34–37 (Routledge 2003).

<sup>33</sup> *Id.* at 83–84.

<sup>34</sup> *See* Matthew Cole, *From 'Animal Machines' to 'Happy Meat'? Foucault's Ideas of Disciplinary and Pastoral Power Applied to 'Animal-Centered' Welfare Discourse*, 1 *Animals* 83, 83–85 (2011) (noting "a number of features of Foucault's account of disciplinary power that appear to 'fit' with the experience of nonhumans in industrialized 'farming' systems"); Chloe Taylor, *Foucault and the Ethics of Eating*, 9 *Foucault Stud.* 71, 71 (2010) (contesting Foucault's arguments about diet and sexuality, and exploring implications for the animal liberation movement); Stephen Thierman, *Apparatuses of Animality: Foucault Goes to a Slaughterhouse*, 9 *Foucault Stud.* 89, 89, 91 (2010) (noting that Foucault's notion of an "apparatus" is a "useful methodological tool for thinking about the constellation of spaces and discourses in which various bodies (both human and nonhuman) find themselves enmeshed").



gued that slaughterhouses function as “technologies of power” against both human and nonhuman animal subjects.<sup>35</sup> The multiple hierarchies in CAFOs preclude the operation of any sort of care and compassion and render both human and nonhuman animals vulnerable and nameless.<sup>36</sup> Extensions of Foucauldian insights on power to animals have also addressed topics such as wildlife management, educational practice, and media representations.<sup>37</sup> A unifying theme in these analyses is a belief not only in the localized and diverse instantiations of power by which animal oppression occurs, but also in the possibility of instability in these regimes and resistance to them.<sup>38</sup> Foucault’s imprint is discernible here, revealing that CAS scholars are eager to adopt a nuanced analysis of power, searching for it not only in legal and economic institutions, but also in how we speak, the spaces we inhabit, and the cultural practices that constitute our identities.

## 2. *Animal Subjectivity Is Marginalized*

Power relations also exert an epistemological impact. Cultural discourses and practices, through which power circulates, construct particular ways of seeing the world and those who inhabit it.<sup>39</sup> Through these processes, dominant representations materialize that classify some as central and others as peripheral to society. The question of the subject and subjectivity has thus constituted a primary focus in critical theory across all disciplines. Critical scholars Deleuze and Guattari’s concept of “becoming-animal”<sup>40</sup> has been very influential in this decentering of human subjectivity and in the attempts to relocate animals from the margins literally and theoretically.<sup>41</sup> CAS scholars have adopted the concept to evaluate how to approach human–animal relations, viewing it as an important tool to de-hierarchize human and

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<sup>35</sup> See e.g. Thierman, *supra* n. 34, at 95 (noting “the slaughterhouse as a technology of power that is complicit in the domination . . . of both human and nonhuman animal subjects”).

<sup>36</sup> *Id.* at 103–04; Cole, *supra* n. 34, at 96.

<sup>37</sup> Helena Pedersen, *Animals in Schools: Processes and Strategies in Human–Animal Education* 12–13 (Purdue U. Press 2010) (describing and citing scholarly applications of Foucauldian notions to human–animal power relations); Joanna Zylińska, *Of Swans and Ugly Ducklings: Bioethics Between Humans, Animals and Machines*, 15 *Configurations* 125, 125 (2007) (discussing cosmetic surgery and confidence training within the context of Foucault’s work on biopolitics).

<sup>38</sup> Pedersen, *supra* n. 37, at 13–14.

<sup>39</sup> See generally Mills, *supra* n. 32, at 33–40 (discussing Foucault’s theories about power relations between social structures and the individual).

<sup>40</sup> “Becoming” is the metamorphosis from one being into another. Rather than taking on a new form, the subject becomes distinguishable from another being or thing (woman, animal, mineral, vegetable, etcetera). To “become-animal” means creating an assemblage of human and animal affects. Alain Beaulieu, *The Status of Animality in Deleuze’s Thought*, 9 *J. for Critical Animal Stud.* 69, 73–78 (2011).

<sup>41</sup> *Id.* at 72–73; Gilles Deleuze & Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* 239 (Brian Massumi trans., U. Minn. Press 1987).

nonhuman animal relations and afford animals their subjectivity.<sup>42</sup> To be recognized as a subject with subjectivity is to be seen as a person and not an object.<sup>43</sup> A subject is entitled to respect, dignity, autonomy and all the other normal markers of personhood status in Western societies. When treatment that accords with these values does not materialize, injustices arise, most often along the lines of objectification and dehumanization.<sup>44</sup>

Literary analysis is a field within CAS rich with recent discussion about these representation issues. Indeed, borrowing from feminist standpoint theory from the 1980s, Josephine Donovan uses the term “animal-standpoint criticism” to signal an animal-centered perspective from which to examine the aesthetic exploitation and the absences of animals in literature.<sup>45</sup> True to standpoint theory, which generally argues that the subjectivity of historically marginalized groups can be properly recuperated only when analyses proceed from their perspectives, Donovan argues that literature can accurately depict animals only if they are conceived as subjects in their own right and do not simply function as literary devices designed to convey human situations.<sup>46</sup>

The subjectivity of animals has also received concerted attention in feminist science studies. Tracy Smith-Harris has addressed the similar ways in which both women and animals have been reduced to their biologies in scientific accounts that flatten the differences within the group.<sup>47</sup> While gross generalizations have become increasingly illegitimate as “good science” when made about women,<sup>48</sup> Smith-Harris notes how researchers still perpetuate this reductive construction about animals.<sup>49</sup> Even feminist science studies scholars, who are typically sus-

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<sup>42</sup> Beaulieu, *supra* n. 40, at 84–85. Other scholars are critical of even this stopping point for posthumanism. For example, Karen Houle argues that “thinking-the-animal” is already prevalent in Western philosophy but has not made any changes in the treatment of animals. She argues that “becoming-animal” should be replaced with “becoming-plant.” Herbality should be the unit of analysis because it requires thinking about assemblages or radical collectivities. Rather than trying to determine what human and nonhuman animals are, the concept of becoming-plant would analyze how plants compose us. Karen Houle, *Animal, Vegetable, Mineral: Ethics as Extension or Becoming? The Case of Becoming-Plant*, 9 *J. for Critical Animal Stud.* 89, 111–12 (2011).

<sup>43</sup> Piyel Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* 3–5 (Routledge Cavendish 2007).

<sup>44</sup> Maneesha Deckha, *The Subhuman as a Cultural Agent of Violence*, 8 *J. for Critical Animal Stud.* 28, 28–30 (2010).

<sup>45</sup> Josephine Donovan, *Aestheticizing Animal Cruelty*, 38 *Coll. Lit.* 202, 203–04 (No. 4, 2011).

<sup>46</sup> *Id.* at 203–204, 214.

<sup>47</sup> Tracy Smith-Harris, *Bringing Animals into Feminist Critiques of Science*, 23 *Can. Women Stud.* 85, 85 (No. 1, 2003).

<sup>48</sup> But not as quickly as feminists would like. See Cordelia Fine, *Delusions of Gender* (W.W. Norton & Co. 2010) (criticizing popular pseudo-scientific and even academic scientific studies which conclude that men and women are “wired differently” and that gendered traits are biologically determined).

<sup>49</sup> Smith-Harris, *supra* n. 47, at 86.

pect of scientific claims to objectivity and representations about the social meaning of biology, accept scientists' representation of animals at face value.<sup>50</sup> Smith-Harris urges feminists to not shy away from animals in their critiques.<sup>51</sup> Other feminist science scholars have tried to restore agency and subjectivity to the ubiquitous laboratory rat by critically exploring the discursive representations that present the rat as a repository and/or vehicle for scientific labor rather than as a living, breathing, agentic individual made the subject of non-consensual and painful research.<sup>52</sup> The authors seek to disrupt the associations between human with culture on the one hand, and animals with nature on the other, extending theories of performativity to laboratory rats to illuminate their participation in making scientific meaning.<sup>53</sup> As with literary studies, CAS scholars in feminist science studies are questioning the normalized disavowal of the subjectivity of animals and their passive and objectified representations by humans.

### 3. *Animals as Other*

Correlated with the denial of subjectivity for animals is their placement as a cultural "Other." The idea of the Other is a long-standing philosophical concept, popularized by postcolonial theorists, and in particular, by Edward Said's *Orientalism*.<sup>54</sup> Postcolonial theory examines Western representations of non-Western societies and cultures, taking care to note the imperial and ongoing hierarchical and instrumental agendas animating Western discourses about non-Western geopolitical spaces.<sup>55</sup> It is through the idea and body of the Other that the Western Self makes sense of its own identity, defining the Other in contrast to how it wishes to see itself.<sup>56</sup> Law constitutes a critical component of this self-definition, prompting one legal scholar to comment that the subjectivity of the law itself is defined through what the Western gaze judged to be the lawlessness of non-Western societies.<sup>57</sup> The British lauded common law's exaltation of the rule of law and reason as distinctive Western features and exported the common law as a civilizing agent to areas of the globe purported to lack these values. Both of these features demarcating the common law from non-Western "customary" practices also demarcated the Western "rational," "restrained," and "orderly" Self from the "irrational," "pleasure-seeking,"

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 88.

<sup>52</sup> Lynda Birke et al., *Animal Performances: An Exploration of Intersections Between Feminist Science Studies and Studies of Human/Animal Relationships*, 5 *Feminist Theory* 167, 172–74 (2004).

<sup>53</sup> *Id.* at 176–78.

<sup>54</sup> Edward Said, *Orientalism* (Random House Inc., 1978).

<sup>55</sup> See Kapur, *supra* n. 11, at 3–6 (describing such representations as related to feminist postcolonial theorists).

<sup>56</sup> *Id.* at 5–6.

<sup>57</sup> Haldar, *supra* n. 43, at 15.

“indulgent/excessive” Other.<sup>58</sup> Ideas of racial and cultural difference, although presented as innate, were socially constructed. The Other, as a concept, was a vital element of colonial and legal logic that socially constructed groups as inferior and uncivilized, thereby justifying the imposition of the common law and other “carriers” of Western civilization.

CAS scholars have used the concept of the Other, and the premise of the social construction of difference on which it relies, to explore and explain how human identity is constituted against and through the animal Other. Society projects dominant characteristics onto animals (instinctual, unaware, dirty, gluttonous, promiscuous, violent, etcetera) to distinguish and underscore that which we wish to claim for ourselves (rational, self-conscious, orderly, logical, tempered, deliberative, altruistic, etcetera) as uniquely human.<sup>59</sup> In her discussion of animal Othering, Helena Pedersen takes care to note that in addition to this type of “conceptual Othering,” scholars have also identified the “geographical Othering” of animals that happens through human insistence on keeping their lives separate and away from the spaces that humans occupy (think of zoos and wildlife management policies in urban spaces).<sup>60</sup> Undoing this entrenched self-Other relationship between humans and animals requires not only wide-scale social change but also an ongoing vigilance by those who wish to improve the conditions of the lives of animals to monitor and evaluate their representations. The existence of animals as humanity’s Other prompts CAS scholars to caution how humans theorize about them even when an end to their exploitation is a theorist’s goal.<sup>61</sup> Even with benevolent ends in mind, humans still shape how animals are represented in discourse and thus hold the epistemological power.<sup>62</sup> Moreover, beyond a certain level, an incommensurability arises, making it impossible for humans to fully “know” animals.<sup>63</sup> Indeed, to long to “know” animals for many reasons—to be closer to them, to understand them better, to learn more about ourselves—mirrors colonial desires to “know” the non-Western Other for the colonizer’s own purposes.<sup>64</sup> Lisa Kemmerer

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<sup>58</sup> *Id.* at 5–8, 14.

<sup>59</sup> Lisa Kemmerer, *Theorizing ‘Others’*, in *Theorizing Animals: Re-Thinking Humanimal Relations* 59, 69 (Nik Taylor & Tania Signal eds., Brill 2011).

<sup>60</sup> Pedersen, *supra* n. 37, at 9 (citing Chris Philo & Chris Wilbert, *Animal Spaces, Beastly Places: New Geographies of Human-Animal Relations* 10 (Chris Philo & Chris Wilbert eds., Routledge 2000)).

<sup>61</sup> Kemmerer, *supra* n. 59, at 79–82.

<sup>62</sup> *Id.* at 62 (“When humans theorize about ‘others’ our theories are most likely to go astray, both because we fail to understand ‘others,’ and because there is something that theorists might gain by theorizing about ‘others.’”).

<sup>63</sup> Nik Taylor, *Introduction: Thinking About Animals*, in *Theorizing Animals: Re-Thinking Humanimal Relations*, *supra* n. 59, at 1, 6.

<sup>64</sup> Robert Carr, *Crossing the First World/Third World Divides: Testimonial, Transnational Feminisms and the Postmodern Condition*, in *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* 153–55 (Inderpal Grewal & Caren Kaplan eds., U. Minn. Press 1994).

urges humans who theorize about animals to guard against such “vested interests.”<sup>65</sup>

At the same time that CAS scholars note the parallels between animal Othering and the Othering of marginalized humans,<sup>66</sup> they also suggest that animal Otherness serves as an archetype for all forms of Otherness, available as a category into which marginalized human groups may be readily assimilated.<sup>67</sup> Given the cultural and legal force of anthropomorphism, animalization operates as an ongoing threat of dehumanization into a fully abject ethical and legal Other.<sup>68</sup> As we know, animals as a group are socially constructed as lacking morally relevant characteristics (reason, language, self-awareness, complex emotions, and so on).<sup>69</sup> This lack purportedly justifies their dismal treatment and Othered status.<sup>70</sup> Yet, those same characteristics may extend to domesticate and police human groups that are troublesome to the hegemonic order.<sup>71</sup> The Other is a powerful exclusionary tool because of its conceptual ability to apply across oppressions.<sup>72</sup>

*a. Interconnectedness of Oppressions and Social Constructions of Difference*

Related to this archetypal conceptualization of animal Otherness, CAS emphasizes interactive dynamics between the processes and practices that constitute animal exploitation and those that give rise to human exploitation.<sup>73</sup> Central to these dynamics is the shared modernist Western history that positions animals and marginalized human groups as subordinate to those considered fully human.<sup>74</sup> Epistemologically, this was achieved through Cartesian dualisms that considered the mind, reason, and culture to be in sharp contrast and superior to, respectively, the body, emotion, and nature.<sup>75</sup> Thus, a critical insight of CAS is that hegemonic narratives about animals, which

<sup>65</sup> Kemmerer, *supra* n. 59, at 74.

<sup>66</sup> *Id.*; Pedersen, *supra* n. 37, at 9.

<sup>67</sup> Pedersen, *supra* n. 37, at 9.

<sup>68</sup> Cary Wolfe, *In the Shadow of Wittgenstein's Lion: Language, Ethics, and the Question of the Animal*, in *Zoontologies: The Question of the Animal* 1, 5–10 (Cary Wolfe ed., U. Minn. Press 2003).

<sup>69</sup> Raymond Corbey, *The Metaphysics of Apes: Negotiating the Animal–Human Boundary* 179 (Cambridge U. Press 2005).

<sup>70</sup> Kemmerer, *supra* n. 59, at 69.

<sup>71</sup> Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side*, 28 *Sydney L. Rev.* 665, 675 (2006).

<sup>72</sup> *See id.* at 675–79 (providing examples of different oppressions analyzed with the “Other” tool).

<sup>73</sup> Best, *supra* n. 9, at 16 (stating that the “connections between human oppression of other animals and of themselves are deep and profound”).

<sup>74</sup> *See id.* at 15 (noting the “discourse of the ‘human’ has been constituted in dualistic, speciesist, racist, patriarchal, and imperialist terms”); Taylor, *supra* n. 63, at 4 (noting that “our modern (western) intellectual heritage is one which has sought to establish that humans are somehow different to animals”).

<sup>75</sup> Taylor, *supra* n. 63, at 4.

purportedly justify their exploitation, have counterparts in the subordinating stories that were historically told about marginalized groups and which continue to have influence today. Both animal and intra-human differences are socially constructed through these narratives based on the norms and values of modernist dichotomies.<sup>76</sup>

Moreover, the justificatory narratives overlap and support each other. Thus, CAS is not a stand-alone theory that conceptualizes human–animal relations as separate from intra-human relations. To the contrary, CAS views gender, race, ethnicity, class, and other axes of socially constructed difference as indelibly connected to the constitution, meaning, and impacts of species difference.<sup>77</sup> Some analyses examine the mutual historical constitution of species with other differences.<sup>78</sup> Others illuminate how the human–animal dichotomy continues to function as a “fundamental driving mechanism” of race, sex, and colonial oppression.<sup>79</sup>

A primary and globally resonant example of this is what transpired at Abu Ghraib Prison, documented by images of Iraqi prisoners made to assume animal-like, sexualized positions by American soldiers.<sup>80</sup> The specific representation of the sexualized acts was meant to animalize the racialized bodies of the Iraqi men.<sup>81</sup> As Colleen Boggs notes, animalization works to stigmatize and degrade only because of the logic of human exceptionalism that renders animality a “position of nonsubjectivity and of socially sanctioned abjection.”<sup>82</sup> The

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<sup>76</sup> See *id.* (stating that there is a need to move beyond the studies that reveal the rich and detailed lives of animals and that an obvious starting point is to acknowledge that humans are animals); see generally Said, *supra* n. 54 (discussing how Western identity is constructed through narratives about other cultures).

<sup>77</sup> See Carol J. Adams, *Why Feminist-Vegan Now?*, 20 *Feminism & Psychol.* 302, 303, 306 (2010) (proposing a link between masculinity and meat-eating and how that link is perpetuated by using women interchangeably with animals in advertisements); Erika Cudworth, *‘The Recipe for Love’? Continuities and Changes in the Sexual Politics of Meat*, 8 *J. for Critical Animal Stud.* 78 (2010) (discussing the relationship between meat, gender, and sexuality and its place in U.S. culture); Donovan, *supra* n. 45, at 203, 212 (noting that the cultural practice of animal subordination is driven by the “ideology of speciesism”); James Kim, *Petting Asian America*, 36 *MELUS* 135, 137 (2011) (discussing the “gendered division of emotional labor that characterizes global patriarchy”); Jovian Parry, *Gender and Slaughter in Popular Gastronomy*, 20 *Feminism & Psychol.* 381, 382 (2010) (analyzing how gender plays a role in animal slaughter).

<sup>78</sup> See Paula Harrington, *No Mongrels Need Apply*, 2010 *Minn. Rev.* 219 (Nos. 73–74, 2009–2010) (discussing the relationship between a dog’s status in America and the changes in American culture in terms of class, celebrity, and race).

<sup>79</sup> Rebecca Tuvel, “*Veil of Shame*”: *Derrida, Sarah Bartmann and Animality*, 9 *J. for Critical Animal Stud.* 209, 210 (2011).

<sup>80</sup> See Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, *The New Yorker* (May 17, 2004) (available at [http://www.newyorker.com/archive/2004/05/17/040517fa\\_fact2?currentPage=all](http://www.newyorker.com/archive/2004/05/17/040517fa_fact2?currentPage=all) (accessed Apr. 7, 2012)) (describing the images of prisoners at Abu Ghraib and criticizing the Department of Defense’s reaction).

<sup>81</sup> See *id.* at ¶ 3 (describing photos of prisoners posed with animals).

<sup>82</sup> Colleen Glenney Boggs, *American Bestiality: Sex, Animals, and the Construction of Subjectivity*, 76 *Cultural Critique* 98, 99 (2010).

interlocking oppressions of racism, sexism, and homophobia in this instance are driven by mechanisms of shame and violence related to animality.<sup>83</sup> Rather than trying to use anthropocentric concepts such as human rights to tackle issues of violence and injustice against humans, scholars have called for attention to be placed on minimizing the human–animal boundary.<sup>84</sup> Such an emphasis should enrich not just understandings of “animal” issues, but also of issues identified as central to feminism, postcolonialism, queer studies, etcetera.<sup>85</sup>

An exciting, yet nascent, area within this subfield of the literature is the application of queer studies to animal issues. Carmen Dell’Aversano extends to the human–animal dichotomy the dominant focal points of queer theory, addressing prohibited love, domesticated desires, regulated sex, and gender performance.<sup>86</sup> Similar to the regulation of romantic/sexual desires for another human being socially viewed as not of the “opposite” sex or gender, Dell’Aversano examines the cultural limits imposed on the type of love humans should have for animals.<sup>87</sup> For example, she investigates the strong social disapprobation people who (platonically) love animals experience when this level of affection goes too high or is directed at the wrong species, thus exceeding the “normal” feelings we are permitted to have for (certain species) of animals.<sup>88</sup> Just as heteronormativity compels “opposite-sex,” monogamous partnering as the romantic norm and condemns those who love and have sex outside of this as abnormal, Dell’Aversano coins the term “humanormativity” to encapsulate those social forces that dictate that we hold humans in higher regard than animals and that we form our primary and serious emotional attachments with other humans.<sup>89</sup> Those humans that transgress these norms violate anthropocentric codes of normalcy.<sup>90</sup> In effect, they are not following the proper social script for human identity.

With this insight, Dell’Aversano extends the concept of performance, popularized by the work of queer theorist Judith Butler,<sup>91</sup> to ani-

<sup>83</sup> *Id.*

<sup>84</sup> Deckha, *supra* n. 44, at 43–47.

<sup>85</sup> See Neel Ahuja, *Postcolonial Critique in a Multispecies World*, 124 PMLA 556, 556 (2009) (noting a change in species critique as “postcolonial studies, ethnic studies, and species studies acknowledges links between species, race, and transnational power structures”).

<sup>86</sup> See generally Carmen Dell’Aversano, *The Love Whose Name Cannot Be Spoken: Queering the Human–Animal Bond*, 8 J. for Critical Animal Stud. 73 (2010) (available at <http://www.criticalanimalstudies.org/wp-content/uploads/2009/09/JCAS-Vol-VIII-Issue-I-and-II-2010-Full-Issue1.pdf> (accessed Apr. 7, 2012)).

<sup>87</sup> *Id.* at 78.

<sup>88</sup> *Id.* at 78–79.

<sup>89</sup> See *id.* at 76 (explaining that the term humanormativity means that “all members of one species (*homo sapiens*) have more in common with one another than any of them have with any member of any other species,” which implies that we should hold humans in higher regard than animals).

<sup>90</sup> *Id.* at 78.

<sup>91</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, Chapman, & Hall 1990).

mals.<sup>92</sup> The concept of gender as a performance suggests that we perform gender identity through everyday practices of dress, comportment, body language, grooming, etcetera.<sup>93</sup> Dell'Aversano builds on this idea by noting that we also perform our species identities as humans through affective scripts that influence how we interact with animals.<sup>94</sup> Farm children, for example, learn to accept the slaughter and consumption of animals they once knew and loved, because of the norms they absorb about what it means to be human.<sup>95</sup>

Dell'Aversano reminds us that one of the purposes of queer theory is to liberate love.<sup>96</sup> If (platonic) love is truly liberated, Dell'Aversano argues, then "it would have nothing to do with species distinctions."<sup>97</sup> What should follow for queer theorists, and everyone committed to their projects, is the insight that human and animal interests can no longer be understood as mutually exclusive and separate concepts.<sup>98</sup> In making such connections across species, scholars are mindful of the potential of emphases on similarity to occlude vital differences in the formation and trajectories of different forms of hierarchies. There is a danger that, in the hope of convincing critical scholars of the importance of the "animal question" to issues of race and disability, for example, animal studies scholars will suppress the nuances and histories of racism and disability prejudices.<sup>99</sup>

CAS scholars are also aware of the discomfort that their critiques may prompt from critical theorists who have always assumed an anthropocentric orientation, the *inclusivity* of a human rights framework, and the need for a wider reading of who counts as human—not a disruption of the category.<sup>100</sup> In a recent special issue of *Feminism & Psychology* devoted to animal studies, Richard Twine notes the discomfort and even disgust some feminist scholars feel toward the argu-

<sup>92</sup> Dell'Aversano, *supra* n. 86, at 79–80.

<sup>93</sup> Butler, *supra* n. 91, at 24–25.

<sup>94</sup> Dell'Aversano, *supra* n. 86, at 82.

<sup>95</sup> See *id.* at 83 (referencing the book and movie *The Yearling*, "the story of a Florida boy and his pet deer, who he is forced to shoot when the deer grows up and threatens to eat the family's crop"); Alison Loveridge, *Farm Children's Understanding of Animals in Changing Times: Autobiographies and Farming Culture*, 35 *Australian Zoologist* 28, 28 (2009) ("Farming community children are generally positioned as having the 'right' attitude to the killing of animals, they are assumed to have internalized the hierarchy of animals that allows people to functionally differentiate similar animals.").

<sup>96</sup> Dell'Aversano, *supra* n. 86, at 112.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 75.

<sup>99</sup> Ahuja, *supra* n. 85, at 557–58; Daniel Salomon, *From Marginal Cases to Linked Oppressions: Reframing the Conflict Between the Autistic Pride and Animal Rights Movements*, 8 *J. for Critical Animal Stud.* 47, 47–48 (2010); Sunaura Taylor, *Beasts of Burden: Disability Studies and Animal Rights*, 19 *Qui Parle* 191, 196 (2011).

<sup>100</sup> See e.g. Richard Twine, *Intersectional Disgust? Animals and (Eco)Feminism*, 20 *Feminism & Psychol.* 397, 398–99, 402 (2010) (available at <http://fap.sagepub.com/content/20/3/397.full.pdfml> (accessed Apr. 7, 2012)) (discussing reactions of disgust to suggestions of intersectionality between animal studies and feminist studies, as well as to the analogy between animal agriculture and the Holocaust).



ments that animals' oppression parallels women's oppression and that feminism should thereby recognize its kinship with posthumanism.<sup>101</sup> He argues that this affective response, while understandable, is nevertheless in need of critical reflection since it rests on an unacknowledged (and unsustainable) belief in a human–animal hierarchy.<sup>102</sup> Further, Twine stresses that feminist scholars must accept that posthumanist debates already occupy a significant part of feminist theory.<sup>103</sup> Other CAS scholars have made similar pleas for better understanding across the “human” social justice sphere.<sup>104</sup>

*b. Advocacy and Coalitional Commitment*

Given the stress on interconnections among oppressions, it is not surprising that CAS has a commitment to using academic theory for activism. CAS is a discipline that explicitly supports the application of theory to actual and tangible projects advocating for an end to animal exploitation.<sup>105</sup> Further, the activist commitment is based on an intersectional idea of coalition. The principal belief that oppressions are interconnected, coupled with the advocacy element, leads CAS to promote a coalition ethic that seeks to connect animal advocacy efforts with social justice efforts broadly.<sup>106</sup>

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<sup>101</sup> *Id.* at 397, 400–02.

<sup>102</sup> *Id.* at 397.

<sup>103</sup> *Id.*

<sup>104</sup> See e.g. *Animal Geographies: Place, Politics, and Identity in the Nature-Culture Borderlands* xvii (Jennifer Wolch & Jody Emel eds., Verso 1998) (promoting an understanding of the ways in which animals play a role in identity construction, and providing examples of the interconnectedness of animal oppression to the oppression of indigenous peoples and immigrants, and to ecofeminism); Josephine Donovan & Carol J. Adams, *Introduction*, in *The Feminist Care Tradition in Animal Ethics* 1, 7–11 (Josephine Donovan & Carol J. Adams eds., Colum. U. Press 2007) (discussing feminist positions on interrelated oppressions of animals and women and endorsing “a unified radical and cultural feminist approach to animal issues”); Claire Jean Kim, *Multiculturalism Goes Imperial: Immigrants, Animals, and the Suppression of Moral Dialogue*, 4 *Du Bois Rev.* 233, 233–35 (2007) (arguing that a multiculturalist interpretation of animal advocates’ criticism of immigrant animal practices mischaracterizes the position of animal advocates as ethnocentric and racist); Claudia Serrato, *Ecological Indigenous Foodways and the Healing of All Our Relations*, 8 *J. for Critical Animal Stud.* 52, 56 (2010) (available at <http://www.criticalanimalstudies.org/wp-content/uploads/2009/09/JCAS-Special-Issue-Women-of-Color-November-3-FINAL-2010.pdf> (accessed Apr. 7, 2012)) (describing the interconnectedness of oppression of animals and indigenous peoples).

<sup>105</sup> See Best, *supra* n. 9, at 23–26 (describing objectives of the Institute for Critical Animal Studies, which seeks to make abstract theories of animal studies more concrete in support of practical applicability and direct action).

<sup>106</sup> *Id.* at 24–26.

### III. HOW CRITICAL ANIMAL STUDIES DIFFERS FROM ANIMAL LAW

Of course, CAS scholars are not monolithic in their views.<sup>107</sup> Scholars exhibit diversity in perspectives, even though all adherents write against exploitation.<sup>108</sup> Still, it is fair to note that the themes described above define the field. CAS applies concepts and ideas from critical theory in general—power, subjectivity, Othering, social constructedness, interconnectedness of oppressions—to “the animal question.”<sup>109</sup> These are insights that compel a sophisticated understanding of difference and how much these social constructions matter to the lives of individuals, both animal and human, privileged and exploited. It is this type of extensive critical discussion about difference, however, that is largely absent in animal law scholarship. CAS promotes activism and thus would presumably include animal law advocacy as a form of activism and welcome animal law scholars into its interdisciplinary theoretical home. However, animal law may not be comfortable residing there because of its strong liberal orientations.

Most scholars writing in animal law approach the question from philosophical vantage points that do not question liberalism and may be generally housed under liberal deontological and utilitarian schools of thought.<sup>110</sup> In *Animal Rights: Current Debates and New Directions*,<sup>111</sup> the only law text recently identified as a “key essay collection” in a review of the growing Human–Animal Studies literature,<sup>112</sup> the authors assume a liberal foundation and do not consider the relevance of other difference-based movements and corresponding social con-

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<sup>107</sup> See e.g. Kimberly W. Benston, *Experimenting at the Threshold: Sacrifice, Anthropomorphism, and the Aims of (Critical) Animal Studies*, 124 PMLA 548, 548–49 (2009) (exploring how literary representations of animal experimentations challenge the species boundary and arguing that the discussion of animal experimentation in literature reveals resemblances between the researcher and the subject); Naama Harel, *The Animal Voice Behind the Animal Fable*, 7 J. for Critical Animal Stud. 9, 19 (2009) (pointing out, unlike many scholars, that the meaning of a text relies on the reader’s interpretation and arguing that readers will recognize alternate meanings if they can move past their own anthropomorphic perspectives).

<sup>108</sup> See Shapiro & DeMello, *supra* n. 15, at 311–13 (stating that even though scholars share the abolitionist view, there is still tension between “animals-as-constructed and the animals-as-such”).

<sup>109</sup> See *supra* pt. I(B) (describing the main tenets of CAS).

<sup>110</sup> Notable exceptions include Robert Garner and Martha Nussbaum. See Robert Garner, *Animal Welfare: A Political Defense*, 1 J. Animal L. & Ethics 161, 170 (2006) (stating that “the ideological importance attached to liberal individualism” affects the quality of animal welfare laws); Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 22–25 (The Belknap Press 2006) (criticizing the dominant Rawlsian version of liberalism as a framework to help animals, but not criticizing liberalism itself).

<sup>111</sup> Cass R. Sunstein & Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford U. Press 2004).

<sup>112</sup> Shapiro & DeMello, *supra* n. 15, at 309.

structions within their analyses.<sup>113</sup> The leading legal texts in animal law scholarship are seemingly all written from a liberal perspective (that is liberalism as opposed to feminism, post-structuralism, etcetera).<sup>114</sup> This is not to say that important work has not occurred in this area from these theoretical perspectives. Indeed, it has. While these analyses have been important and offer stimulating insights, animal law—as a field of research, study, teaching, and practice—has thus developed in large part without attentive investigations of difference beyond species difference.

When other social differences receive consideration in animal law scholarship, it is usually to point to parallels between the animal rights movement and other social movements. Drawing from Peter Singer's early and continued use of parallels between sexism, racism, and speciesism,<sup>115</sup> animal theorists often point out that the animal rights critique of speciesism—oppression based on cultivated social understandings of a biological difference—shares much in common with the feminist and civil rights movements' concerns with sexism and racism.<sup>116</sup>

Animal law scholarship has also incorporated race and sex analogies to help explain the claim that legal personhood should be extended to all species.<sup>117</sup> The analogy highlights how in all instances beings are excluded from equal moral worth and full dignity because of their perceived status as property instead of as persons.<sup>118</sup> While these

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<sup>113</sup> See e.g. Sunstein & Nussbaum, *supra* n. 111, at 30 (“[E]quality demands that likes be treated alike.”). But if we consider the authors' other writings, most are aware of social justice issues (and one might suspect that these commitments in part have motivated at least some of them to engage with consideration of justice for animals.) See e.g. Nussbaum, *supra* n. 110, at 98 (describing the problems that people with impairments and disabilities face).

<sup>114</sup> See David Favre & Murray Loring, *Animal Law* (Quorum Bks. 1983); Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* (Temple U. Press 1996); Gary L. Francione, *Animals, Property and the Law* (Temple U. Press 1995); Robert Garner, *The Political Theory of Animal Rights* (Manchester U. Press 2005); Bruce A. Wagman et al., *Animal Law: Cases and Materials* (4th ed. Carolina Academic Press 2010); Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Perseus Bks. 2000); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Bks. 2000).

<sup>115</sup> Peter Singer, *Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner*, in Sunstein & Nussbaum, *supra* n. 111, at 79.

<sup>116</sup> Angus Taylor, *Animals & Ethics: An Overview of the Philosophical Debate* 16–17 (Broadview Press 2003).

<sup>117</sup> See e.g. Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* 61 (Colum. U. Press 2008) (“[Animals'] status as property . . . has prevented their personhood from being realized . . . . The same was true of human slavery. Slaves were regarded as chattel property.”); Cass R. Sunstein, *Introduction: What Are Animal Rights*, in Sunstein & Nussbaum, *supra* n. 111, at 3–4 (comparing Jeremy Bentham and John Stuart Mill's analogies of mistreatment of animals to “racial discrimination” and “slavery”).

<sup>118</sup> Francione, *supra* n. 117, at 61–62 (“We eventually recognized that if slaves were going to have morally significant interests, they could not be slaves any more, for the moral universe is limited to only two kinds of beings; persons and things.”).

animal law accounts highlight important similarities and are logically forceful, they leave unexamined the broader connections to be drawn between oppression based on species and oppression based on other presumed biological markers, such as gender, race, or disability, as well as other categories of difference such as culture and ethnicity. Leaving these connections untapped poses a concern for understanding human–animal relations in the law and for addressing real life animal law issues.

#### IV. HOW WOULD ANIMAL LAW BENEFIT FROM CAS?

Critiques of liberalism are plentiful and multifaceted.<sup>119</sup> In this Part, I focus on two influential arguments in this literature that are of particular relevance to liberal legalism's impact on animals.<sup>120</sup> The first Section of this Part addresses two of liberalism's core values that heavily influence the law's imagination of the ideal legal subject: reason and autonomy. The second Section examines the reliance on liberal legal discourses on sameness logic to accommodate "new" legal claims from equity-seeking actors (animals included). Both discussions expose the limits of these liberal underpinnings to the law to accommodate

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<sup>119</sup> Many theoretical camps have contested liberalism, including communitarianism, feminism, postcolonialism, and poststructuralism. See generally Talal Asad, *Formations of the Secular: Christianity, Islam, and Modernity* 114 (Stanford U. Press 2003) (stating that "the liberal myth has facilitated the entire project of human rights that is so much a part of our contemporary world, and that brings with it a moralism wrongly said to be uncongential to secularism as a system of political governance"); Ronald Dworkin, *Liberalism*, in *Liberalism and Its Critics* 60, 60 (Michael J. Sandel ed., N.Y.U. Press 1984) ("Unfortunately, liberty and equality often conflict: sometimes, the only effective means to promote equality require some limitation of liberty, and sometimes the consequences of promoting liberty are detrimental to equality."); Michael Hardt & Antonio Negri, *Empire* 188 (Harvard U. Press 2000) ("The public spaces of modern society, which constitute the place of liberal politics, tend to disappear in the postmodern world. According to the liberal tradition, the modern individual, at home in its private spaces, regards the public as its outside . . . . Public space has been privatized to such an extent that it no longer makes sense to understand social organization in terms of a dialectic between private and public spaces, between inside and outside. The place of modern liberal politics has disappeared."); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 170 (Harvard U. Press 1989) ("However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimated, and epistemic, it *is* the regime.") (emphasis in original).

<sup>120</sup> An area of much critique against law's liberalism is its focus on rights as a desirable remedy. Critical legal scholars have argued that rights are alienating, while critical race theorists have noted the positive effect of rights for those who have never had them or for whom they are only relatively recently acquired entitlements. While this debate is well established outside of animal law concerns, feminists have also raised it in regard to animal law. See Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy and Property*, 16 *Animal L.* 65, 77–78 (2009) ("Deontological or rights-based views are derived from the tradition of Immanuel Kant . . . who believed that rights are possessed by, and duties are owed to, beings capable of mutual justification and reason-giving . . . . Tom Regan offers a stronger rights-based view that animals' inherent value situates them within our moral community and affords them universal rights."). Given its excellent treatment by Satz, I do not cover this element of critiques of liberalism here.

the interests of animals and suggest that animal law should therefore look outside liberalism for its theoretical foundations. CAS, at the very least, should inform some part of animal law's theoretical base.

### A. *Anthropocentric Limits of Core Liberal Premises*

The first way in which CAS can benefit animal law is to help it move away from a liberal paradigm whose core premises are based on the human model and are thus limiting for animal subjects. As discussed earlier, liberalism shapes our legal order in two critical ways: by placing a premium on reason and by casting a rational and autonomous agent as the central subject of law.

#### 1. *Reason*

As many animal law scholars have themselves noted, the purported absence or deficiency of reasoning capacity in animals has operated pervasively to deny them ethical and legal regard.<sup>121</sup> It then seems odd to base a posthumanist critique (which we can imagine animal law in all its iterations to be) in a theoretical foundation that subscribes to the importance of reason. Indeed, feminists writing outside of animal law have commented on this paradox within mainstream animal ethics generally, noting how the emphasis on reason—a trait denied to animals and still today, in some moments, to women—reflects the androcentric as well as anthropocentric values of who the subject is or should be.<sup>122</sup> Feminists have challenged animal theorists to disrupt the reason/emotion binary in their writings rather than to

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<sup>121</sup> See e.g. Taimie L. Bryant, *Similarity of Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 L. & Contemp. Probs. 207, 207 (2007) (“Leakey suggests that dramatic consequences could flow from finding similarities between chimpanzees and humans. If chimpanzees are accepted as humans and if justice requires that like entities be treated alike, justice would require legal protection of chimpanzees from exploitation to which chimpanzees—but not humans—are subject.”); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L.J. 531, 569 (1997–1998) (“Although not an undisputed point, it has been asserted that the physiology of thinking seems to occur in animals much like it does in humans . . . . It appears then that there are strong reasons under modern science and moral theory to suppose that rationality is not a characteristic justifying a morally relevant distinction between humans and non-human animals. Again, the supposed gulf between humans and non-human animals on which the common law idea of animals as property is based is non-existent.”); Lesley Rogers & Gisela Kaplan, *Think or Be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 Animal L. 151, 159 (2005–2006) (discussing recently discovered cognitive abilities of certain animals and asking “how many aspects of higher cognition a species would need to possess before we would consider moving it into a legally protected category”); Steven Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623, 629 (2002) (noting that the “Stoics did deny reason to animals, and thence all serious ethical concern”).

<sup>122</sup> See Josephine Donovan, *Animal Rights and Feminist Theory*, in *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* 34, 35 (Josephine Donovan & Carol J. Adams eds., The Continuum Publg. Co. 1996) (discussing the “inherent bias in contemporary animal rights theory toward rationalism”).

invest in this exclusionary and suspect binary.<sup>123</sup> Feminists have also noted the alienating effects of a reason-valORIZING theory on those whose subjectivities have historically been dismissed as “sentimental” and “emotional,” and those whose concern for animals arises from more emotional responses.<sup>124</sup>

Influential (male) mainstream animal ethics scholars have resisted this call to acknowledge and theorize through emotions, despite being well aware of how the same premium on reason that historically discounted animals did so, in part, because animals were associated with the disparaged realm of emotions in Enlightenment thought.<sup>125</sup> In spite of reason’s ongoing role in dismissing animals’ subjectivities, the “rigorous” and “persuasive” accounts that rational critique purportedly produces are a strong reason for which even animal theorists abjure emotional accounts as a way to educate others about animal issues.<sup>126</sup> While animal law scholars have not been so pronounced in their dismissal of scholarship that seeks to recuperate emotions and, in particular, care as the ethical basis by which to theorize about animals, a few have echoed these concerns.<sup>127</sup> Yet, the feminist warning of the potential alienating effects of a reason-based discourse deserves serious attention. Further, it seems unnecessary to take the risks of liberalism’s alienating effects when CAS is available as a plausible alternative theoretical paradigm.

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<sup>123</sup> Feminists have also critiqued the binary for its inaccuracy about how humans actually make decisions. Feminist intervention into critiques of liberalism in general has advanced the view that good reasoning capacity involves emotions and feelings. Rather than continuing to discount and disparage the affective realm to good decision-making, as the law does through an insistence that reason should not be “sullied” by emotion, we should affirm the shared and entwined role both play in how humans make choices. See Nedelsky, *supra* n. 11, at 121 (“The problem is . . . how to combine the claim of the continuativeness of social relations with the genuine scope for the value of autonomy.”).

<sup>124</sup> Kathy Rudy, *Loving Animals: Toward a New Animal Advocacy* 184 (U. Minn. Press 2011) (“It’s that intermingling of lives, that shared communication that stands outside language, that I think needs to be embraced in the laboratory. Scientists might say this way of connecting seems silly and sentimental. Animals themselves don’t deserve such recognition, they say; they are ‘only’ animals.”).

<sup>125</sup> Philip Armstrong, *Cetaceans and Sentiment*, in *Considering Animals: Contemporary Studies in Human–Animal Relations* 169, 169 (Carol Freeman et al. eds., Ashgate e-Book 2011) (“In accordance with the emphasis on reason and empirical observation that is the legacy of the European Enlightenment, attentiveness to emotional realities has come to be associated with subjectivism, lack of scholarly rigour, [and] intellectual weakness.”).

<sup>126</sup> *Id.*

<sup>127</sup> See e.g. Francione, *supra* n. 117, at 186–90 (noting that “the ethic of care is an important and useful notion for achieving the ‘unified sensibility’ of feeling and thought necessary to overcome admittedly patriarchal misuses of reason,” but lamenting that in application, the ethic of care can become “quite a reactionary view that is consistent with, and relied upon, by those who exploit nonhuman animals”).

## 2. *Autonomy*

Another obstacle presented by liberalism is its exaltation of the autonomous (along with the rational) agent. It is not so much autonomy as a principle that is problematic for animals as it is liberalism's particular understanding of autonomy that is dominant in law. As relational theorists have pointed out, liberalism's conventional understanding of autonomy is a narrow one.<sup>128</sup> Law assumes that hypothetical individuals seek to maximize their independence and self-interest at all times, leading lives as individuated and egocentric units, rather than embedded in relationships with others with a sense of duties and obligations. This autonomous actor, like the rational actor, is a fiction. Law's autonomous actor does not cohere with the facts: all of us come into this world attached and dependent; many of us will continue to experience a high degree of attachment and/or dependence on others for our care and success as our life proceeds and when it ends; some of us may remain dependent throughout our lives. However, the impossibility of this idealized autonomy to apply to all humans has not prevented it from dominating as a norm in legal liberalism. Nor has the fact that the idealized type of human life the norm promotes disproportionately excludes those who do not share the presumed gender, ability, class, and age of this ideal autonomous actor.

Law's liberal valuation and vision of autonomy does not only visit adverse effects on disadvantaged human groups, it also excludes animals. Certainly, domestic animals will never match the requisite autonomy of law's central subject, the humanism of this actor notwithstanding. Even some animal law scholars seem to concede this.<sup>129</sup> Those in animal law who have addressed the unique situation of domestic animals and their dependence on humans have argued that this dependence justifies a lesser-personhood status in law,<sup>130</sup> as compared to wild animals who live independently of humans.<sup>131</sup> When animal law, however well intentioned and strategic, reflects liberal legalist norms that are demonstrably narrow and discriminatory in application, it establishes a reductive standard by which to measure the value of animal life. Incorporating CAS's sophisticated understanding of how such norms Other and objectify both marginalized human groups and animals could help avoid this result.

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<sup>128</sup> See Nedelsky, *supra* n. 11, at 159 (“[T]he prevailing stripped down image of the ‘rational agent’ of both law and political theory is unnecessarily and destructively narrow.”).

<sup>129</sup> See e.g. David Favre, *Living Property: A New Status for Animals Within the Legal System* 93 Marq. L. Rev. 1021, 1024 (2010) (stating that “animal rights are not equal to the legal rights of humans”).

<sup>130</sup> See *id.* at 1038–39 (explaining that a pet has limited legal personhood); David Favre, *Wildlife Jurisprudence*, 25 J. Envtl. L. & Litig. 459, 478 (2010) (arguing that domestic animals depend upon humans as guardians whereas wild animals are independent, and that wild animals should therefore have different rights from those of domestic animals).

<sup>131</sup> Favre, *supra* n. 129, at 1066.

Does this mean that all aspects of liberalism must be dislodged from animal law for it to be effective? Are there no redeemable aspects? Although some worry that liberal societies may not deliver the equality they promise, liberalism does have valuable tenets. In articulating her relational theory of autonomy referred to above, Jennifer Nedelsky admits that she finds compelling liberalism's insistence on equal moral worth.<sup>132</sup> Nevertheless, she notes that a relational version of autonomy, rather than a liberal one, can actually deliver on the promise of equal moral treatment that liberalism fails to achieve.<sup>133</sup> What is more, liberalism's focus on equal moral worth is by no means distinctive; many other theories, including critical scholarship, share that tenet.

Critical scholarship has impugned some universals, which are most commonly associated with liberalism, as false advertising that mask privilege; this theoretical disdain applies primarily to authors from the Global North who try to foist their purportedly universal theories on the Global South, where they may not actually apply well.<sup>134</sup> Laying claim to a legal principle—such as the notion that no animals should be classified as property—for a specific, limited jurisdiction does not lend itself to the same level of criticism. But it is not only scholars working within animal law who seek to establish this legal status for animals. CAS literature shares a firmly established commitment to the moral equivalence of humans with animals.<sup>135</sup> It is not as if CAS dispenses with this principle. Perhaps the influence of liberalism is so pervasive as a theory even critical theories that impugn it do not renounce it completely. Whether CAS's commitment to the equivalence of human and animal beings is an unacknowledged theoretical borrowing from liberalism or the logical conclusion of CAS's own main tenets, the end result is that what is seductive about liberal principles need not be abandoned if animal law were to shift theoretically toward CAS. These fields can share common ground.

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<sup>132</sup> Nedelsky, *supra* n. 11, at 86–87.

<sup>133</sup> *Id.*

<sup>134</sup> Consider, for example, the criticism that Martha Nussbaum's version of the "Capabilities Approach" for human development has generated. See Ratna Kapur, *Imperial Parody*, 2 *Feminist Theory* 79 (2001) (generally critiquing Nussbaum's imperial stance in her representation of women in India as well as her insistence on universals).

<sup>135</sup> Moreover, with CAS's more robust understanding of difference and the epistemic violence that property status on animals enacts, it should be difficult to find a CAS scholar in favor of the legal regulation of animal exploitation rather than its abolition altogether as a meaningful instance of social change for animals. Yet, it is only some scholars in the animal law field—abolitionists—who advance the non-property claim for all animals. See Favre, *supra* n. 129, at 1023 (describing the abolitionist position). Thus, integrating CAS into animal law may alter the balance between abolitionists and welfarists in favor of abolitionists. While the author personally sees this as a positive development for animals and thus animal law, it is beyond the scope of the paper to demonstrate this suggestion. To be clear, the focus of this Article is to demonstrate CAS's potential to benefit all perspectives in animal law scholarship.



### B. Liberalism Values Sameness Not Difference

Another reason that animal law scholars should think deeply about their field's liberal framework arises from liberalism's reliance on sameness logic. Claims for equality, dignity, and personhood have proceeded through liberal societies through arguments by each group of rights claimants that they are the same as the dominant group, rather than different. Consider how the rights of gay and lesbian couples to marry proceeded and eventually earned legal and public favor in the countries where same-sex marriage is now legal. A discourse of sameness is pervasive.<sup>136</sup> Despite the discomfort that same-sex advocates may have with sameness discourse, liberal legalism almost demands it to achieve success, because sameness logic is so important to equality analyses in constitutional jurisprudence in liberal common law jurisdictions.<sup>137</sup> Even where a country's equality jurisprudence recognizes that equality may require differential treatment between groups, the difficulty liberal legalist regimes have in understanding difference, especially intersections of difference, and accommodating it is well-canvassed.<sup>138</sup>

The chances that marginalized groups have to win a campaign for rights today through sameness logic seems markedly better than those of animals. Much of society still sees humans as physically and mentally distinct from other animals.<sup>139</sup> The animals that may surmount the biologically based legal and social divisions are those to whom humans bestow "honorary human" status.<sup>140</sup> Which animals societies have humanized in this way vary across cultures and time.<sup>141</sup> In the current Canadian and American context, companion animal dogs and

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<sup>136</sup> Claire Young & Susan Boyd, *Losing the Feminist Voice?: Debates on the Legal Recognition of Same-Sex Partnerships in Canada*, 14 *Feminist Leg. Stud.* 213, 228–29 (2006).

<sup>137</sup> *Id.* at 219; see also Lise Gotell, *Litigating Feminist "Truth": An Antifoundational Critique*, 4 *Social & Leg. Stud.* 99 (1995); Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 *Queen's L.J.* 179 (1993); Hester Lessard, *Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and Trociuk v. British Columbia (Attorney General)*, 16 *Can. J. Women & L.* 165 (2004).

<sup>138</sup> See e.g. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. Contemp. Leg. Issues* 701, 707 (2000–2001); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1242 (1991); Kathleen A. Lahey, *Women, Substantive Equality, and Fiscal Policy: Gender-Based Analysis of Taxes, Benefits, and Budgets*, 22 *Can. J. Women & L.* 27, 29 (2010); Iris Marion Young, *Structural Injustice and the Politics of Difference in Intersectionality and Beyond: Law, Power and the Politics of Location* 273–74 (Emily Grabham et al. eds., Routledge-Cavendish 2009).

<sup>139</sup> Birke et al., *supra* n. 52, at 173; Taylor, *supra* n. 63, at 4.

<sup>140</sup> Marie Fox, *Reconfiguring the Animal/Human Boundary: The Impact of Xeno Technologies*, 26 *Liverpool L. Rev.* 149, 158 (2005).

<sup>141</sup> Cary Wolfe & Jonathan Elmer, *Subject to Sacrifice: Ideology, Psychoanalysis, and the Discourse of Species in Jonathan Demme's The Silence of the Lambs*, in *Animal Rites*, *supra* n. 25, at 97, 101 (stating that people humanize animals, chiefly pets, and "exempt [them] from the sacrificial regime by endowing them with ostensibly human features").

cats, as well as nonhuman primates (gorillas, orangutans, chimpanzees, and bonobos), approach the border between animals and humans most closely—the former for the relations they have with humans who then come to see their companion animals as part of their families,<sup>142</sup> and the latter for their cognitive abilities.<sup>143</sup>

For example, the logic of sameness is the normative catalyst for the Great Ape Project (GAP), spearheaded by Peter Singer and Paola Cavalieri, which seeks to extend the right to life, freedom, and non-torture to nonhuman Great Apes.<sup>144</sup> Arguably, the countries that have adopted a resolution or otherwise signaled support for this international initiative have meaningfully disrupted the anthropomorphism of their legal systems. Given the entrenched anthropomorphism of these systems, this would be a fair argument. Yet, it is difficult to ignore how the valuation of sameness that mobilizes this campaign (and thus presumably informs its successes so far) would exclude animals whose cognitive capacities are putatively too far removed.<sup>145</sup> The GAP adopts a “correspondence approach,”<sup>146</sup> more commonly referred to in constitutional jurisprudence as “treating likes alike,”<sup>147</sup> to make its claim. This approach elevates a particular trait as the threshold criterion for moral worth and legal personhood.<sup>148</sup> Thus, the logic is similar to long-standing arguments that animals did not deserve entitlements. It measures animals by what dominant humans have always found important. Viewed from this perspective, the GAP appears much less of a threat to the current anthropocentrism of legal orders.

As many scholars have noted, another problem with correspondence approaches is that they depend on seeking new elevating traits each time scientific studies demonstrate that at least some nonhuman animals possess the trait once presented as uniquely human and as the anchor for the human–animal divide.<sup>149</sup> Reason, language, tool use, self-awareness, and the use of tools to make tools all took their turn as “the” special ability of humans that distinguishes and elevates

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<sup>142</sup> Emma Power, *Furry Families: Making a Human–Dog Family Through Home*, 9 *Soc. & Cultural Geography* 535, 536 (2008).

<sup>143</sup> Fox, *supra* n. 140, at 158–59.

<sup>144</sup> Paola Cavalieri & Peter Singer, *The Great Ape Project: Equality Beyond Humanity* 4 (St. Martin’s Press 1993); see also Great Ape Project, *Home*, <http://www.greatapeproject.org> (accessed Apr. 7, 2012) (describing the mission of the Great Ape Project).

<sup>145</sup> Francione & Garner, *supra* n. 13, at 112–15, 187.

<sup>146</sup> Paola Cavalieri, *The Animal Question: Why Non-Human Animals Deserve Human Rights* 73–75 (Oxford U. Press 2001).

<sup>147</sup> Robin L. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* 149–51 (Ashgate Publ. Co. 2003).

<sup>148</sup> Cavalieri & Singer, *supra* n. 144, at 1; but see Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 *Rutgers L.J.* 247, 252–54 (2008) (criticizing the practice of granting legal personhood to animals based on similarity to humans).

<sup>149</sup> See Corbey, *supra* n. 69, at 168 (describing the idea of “shifting goalposts”: once it is clear that animals share an elevated trait, humanists seek a new trait and reset the “goalpost” as to what defines humanity and thus the social and legal entitlements that flow from humanity).

us from other animals; they also all took their turn falling off this pedestal as new developments in ethology emerged. This “merry-go-round,” as one CAS scholar has called it, of finding the next new trait, and even returning to old ones, has no end.<sup>150</sup> While under today’s dominant trait or set of traits, the Great Apes look like they can be adoptive humans, the humanist paradigm does not shift. Although the GAP’s efforts are valuable, the campaign’s successes so far derive from the fact that it works within the confines of liberal legalism. Those animals who appear radically different will not benefit from this type of initiative because liberal legalism cannot accommodate their heightened level of “difference” from the normalized rational and autonomous subject. As with some other marginalized human groups (international migrants, sex workers, prisoners), the difference of what Cary Wolfe terms “animalized” animals<sup>151</sup> from the legal norm is too “troubling” for the liberal model of subjectivity.<sup>152</sup>

CAS offers newer theories built from animals’ perspectives, which steer away from correspondence approaches. Scholars are proposing new frameworks for ethical regard—the valuation of difference, beingness, and life in general.<sup>153</sup> As challenging as it is, CAS scholars are beginning to theorize ethical status for animals from an animal-centric framework rather than a metric deemed important to humans.<sup>154</sup> This does not mean that those conventional metrics—cognition, emotions, self-awareness—are not discussed, just that they are not valued simply because humans prioritize these traits as the markers of ethical worth. As Linda Birke writes:

It is imperative that such re-theorizing takes nonhuman animals seriously, treating them as aware actors on the social stage; it must recognize their awe-inspiring abilities rather than pointing to other species’ inability to do things like write poetry or software. And, in a world where these others are treated as mindless, disposable, our theories must emphasise their mindfulness.<sup>155</sup>

Birke emphasizes the importance of valuing animals for who they are, not how close they are to what humans are imagined to be.<sup>156</sup> At the same time, given the long-standing belief in a sharply delineated human–animal divide, Birke stresses that it is also necessary to illuminate how impoverished views of animals’ capabilities really are.<sup>157</sup>

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<sup>150</sup> Taylor, *supra* n. 63, at 4.

<sup>151</sup> Wolfe, *supra* n. 25, at 101.

<sup>152</sup> Kapur, *supra* n. 71, at 675–82.

<sup>153</sup> Maneesha Deckha, *Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 J. Animal L. & Ethics. 189, 224–25 (2007); Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 Animal L. 199, 199–200 (2002).

<sup>154</sup> See generally *Knowing Animals* (Laurence Simmons & Philip Armstrong eds., Brill 2007); Taylor, *supra* n. 63, at 1–6.

<sup>155</sup> Birke, *supra* n. 27, at xx.

<sup>156</sup> *Id.* at xix.

<sup>157</sup> *Id.* at xx.

Human relationships with companion animals may be especially instructive here. Many who form close relationships with animals see them as beings whose lives have value and who are capable of a range of responses. While the dominant regulatory framework for these relationships is still the ownership model, a world in which we respect the ethical value of animals as we do humans despite their differences—real or imagined—seems plausible given the respectful and reciprocal relationships many humans have with their companion animals.<sup>158</sup>

CAS is not alone in terms of disciplines evincing a desire to re-imagine conventional representations of animals. Even ethology is witnessing a shift from passive objectified accounts of animals to those that represent animals as agentic and deliberative.<sup>159</sup> Animal law has also been part of this call to shift our representations of animals. Yet it has been relatively accepting of the liberal framework. Liberalism undermines the possibility of change for animals. Its core subject and logic of sameness are entrenched within its theoretical base. Liberalism began with these and other exclusionary foundations, and they are not easily extracted now.<sup>160</sup>

At best, liberalism as a theoretical home for animal-centric or even animal-friendly theories lays out a superficial welcome; perhaps animals can be guests from time to time, but because they deviate sharply from liberalism's core idea of the rational and autonomous agent, they can never comfortably reside there for the long term. Liberalism's core premises about rationality and autonomy are hierarchically imagined and, as fictions in any case, are not that persuasive. To locate animal law within liberalism is to try to fit animals into a theory that neither values animals for who they are nor values the range of responses that humans have to them.

CAS, with its focus on embodied subjectivity and Otherness beyond the human sphere, has tools to help in the recuperation of the marginalized differences associated with animals. It offers a more productive route by avoiding correspondence logics. Although line drawing does occur in these new proposals, for practical and strategic reasons, the lines drawn are much "lower down" the animal hierarchy, going beyond just the "honorary humans" and, for some, reaching to plants.<sup>161</sup> While liberalism will likely remain part of our legal landscape for decades to come, animal law, through the incorporation of CAS insights, can join with other law reform movements conversant with critical theory to help engender a lasting change based on respect for embodied difference rather than partial sameness.

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<sup>158</sup> Haraway, *Species*, *supra* n. 25, at 47–50, 134, 314; Harrington, *supra* n. 78, at 224–29; Lisa Jackson-Schebetta, *Mythologies and Commodifications of Dominion in The Dog Whisperer with Cesar Millan*, 7 *J. for Critical Animal Stud.* 107, 110–13 (2009).

<sup>159</sup> Birke et al., *supra* n. 52, at 174.

<sup>160</sup> Kapur, *supra* n. 11, at 24.

<sup>161</sup> Houle, *supra* n. 42, at 110–12; Hasana Sharp, *Animal Affects: Spinoza and the Frontiers of the Human*, 9 *J. for Critical Animal Stud.* 48, 64 (2011).

### C. *Coalitional and Intersectional Ethic*

In addition to the theoretical benefits of incorporating difference and embodiment within animal law scholarship, a considerable potential practical impact also bears mentioning. Incorporating some or all of CAS's insights into animal law may help to raise the profile of animal law as a field of inquiry attentive to the inequalities within the human sphere. A common criticism against animal advocates concerns their purported lack of empathy for human rights issues.<sup>162</sup> Some voices have extended this critique to complain that animal advocates are all white, middle-class urbanites who neither understand the perspectives of the *humans* marginalized in society nor take issues of racism and poverty seriously.<sup>163</sup> Demonstrating theoretically the connections between human inequality and injustice and animal law can help diffuse some of these arguments. While some may still perceive such connections as an affront to their humanity, others may question their original assumptions. Whether it is exposing the difficulties with sameness logics or core liberal values of reason and autonomy, CAS provides a framework for an intersectional analysis. This, by definition, communicates to its audience that CAS is concerned with a wide variety of injustices and does not espouse a linear focus.

## V. CONCLUSION

Animal law has achieved an unprecedented visibility in American law schools. It is the main subject matter for many courses, special lectures, conferences, clinics, and faculty scholarship. This increased exposure to posthumanist critiques of the legal system and its status for and treatment of animals challenges an increasing number of those involved in legal education to rethink the law's species-based hierarchy that places humans at the apex (with corporations nearby). Yet despite its rising stature and growth and its critique of humanism, animal law has implicitly and explicitly espoused liberal values. In addition to liberalism's overall humanist orientation, its privileged actor is the human subject whose prized trait is a certain standard of reasoning ability. Liberalism's framework cannot thereby adequately capture a full subjectivity for animals. Animal law is thus a hybrid variation of oppression-based critiques in law, adopting a difference-based framework without problematizing liberalism's conception of difference. Animal law should aim for a higher standard, one that it can reach by drawing from CAS. There is also a praxis-related benefit of this incorporation. A formative principle emphasizes the entwined relationship between issues identified as human injustices and those

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<sup>162</sup> Cathryn Bailey, *We Are What We Eat: Feminist Vegetarianism and the Reproduction of Racial Identity*, 22 *Hypatia* 44, 44–58 (2007).

<sup>163</sup> Amie Breeze Harper, *Race as a "Feeble Matter" in Veganism: Interrogating Whiteness, Geopolitical Privilege, and Consumption Philosophy of "Cruelty-Free" Products*, 8 *J. for Critical Animal Stud.* 5, 8, 11–19 (2010).

identified as animal injustices. CAS stresses the interconnection, not simply the parallels, between human and animal issues. It is thereby better positioned to convince those who discount animal issues or want to prioritize human issues that animal issues should matter more. The interconnected principle is a hopeful tool for subverting the marginal position of animal issues in the justice sphere.