

## A Conspiracy of Life: A Posthumanist Critique of Approaches to Animal Rights in the Law

Barnaby E. McLaughlin

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## **A Conspiracy of Life: A Posthumanist Critique of Approaches to Animal Rights in the Law**

Barnaby E. McLaughlin

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### **ABSTRACT**

Near the end of his life, Jacques Derrida, one of the most influential philosophers of the twentieth century, turned his attention from the traditional focus of philosophy, humans and humanity, to an emerging field of philosophical concern, animals. Interestingly, Derrida claimed in an address entitled *The Animal That Therefore I Am* that,

*since I began writing, in fact, I believe I have dedicated [my work] to the question of the living and of the living animal. For me that will always have been the most important and decisive question. I have addressed it a thousand times, either directly or obliquely, by means of readings of all the philosophers I have taken an interest in. . . .*

Derrida's insistence that the question of the animal has always been the focus of his work reflects an interesting turn in philosophy at the end of the twentieth century, where the primacy of the human was rightfully being challenged, and the lives of animals were being considered on their own terms. Increasingly, the shift in focus from the primacy of the human to a more thoughtful consideration of animals has moved outside of just philosophy into other academic fields. These developments have been reflected in the emerging interdisciplinary field of posthumanism. Posthumanism, inclusive of all disciplines, seeks to shed the legacy of liberal humanism and the primacy of the human and instead consider all the interests of those that the human shares the world with (including animals, plants, technology, et cetera). Curiously however, while posthumanism has had an impact in most disciplines, outside of a few scholars, it is absent in the legal field (both in academia and in practice). Where the status of animals in the law has been challenged, it has largely been done through arguments derived from the legacy of liberal humanism. The two most significant challenges to the status of animals in the law have been mounted by the Nonhuman Rights Project in the United States, and the Great Ape Project, which has primarily been successful in New Zealand and Spain. Both projects have sought to expand legal rights to hominids, though each has adopted

different strategies. The Nonhuman Rights Project has sought to use arguments within existing legal paradigms to force the courts to recognize chimpanzees as “persons,” whereas the Great Ape project has intentionally avoided court (for fear of setting unfavorable precedents) and favored pressing change through legislation. Ultimately however, both projects are thoroughly rooted in liberal humanism and advance their arguments through proximity claims—the idea that certain animals, in these cases, apes, deserve legal consideration because of their similarity to humans.

This paper is an interdisciplinary comparative analysis of the Nonhuman Rights Project’s failures in the United States and the Great Ape Project’s success in New Zealand. The success of the legislative approach of the Great Ape Project demonstrates the need to approach these arguments outside of the courtroom to avoid hostile judges, philosophical legacies, and archaic precedents. However, the Great Ape Project does not go far enough in expanding the rights of other beings as it relies on emphasizing similarities with humans as the sole reason for extending rights, leaving other beings, even higher order mammals like dolphins, without inclusion—and a real possibility that any such inclusion would forever be cut off. Therefore, this paper proposes the need for a posthumanist foundation for pursuing the rights of other beings through legislative means.

#### **AUTHOR’S NOTE**

B.A. Rhode Island College; M.A. University of Rhode Island; Ph.D. University of Rhode Island; J.D. Candidate, 2019, University of Massachusetts School of Law. The author would like to thank, first and foremost, Valerie Karno, for sticking by him and guiding him through his Ph.D. program where he developed much of the theoretical knowledge necessary to write this paper. The author would also like to thank Professors Jeremiah Ho and Richard Peltz-Steele for their edits and feedback while composing this Article. In addition, the author thanks the UMass Law Review editors for their work on this Article.

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## I. INTRODUCTION

In *An Introduction to the Principle of Morals and Legislation*, Jeremy Bentham signaled the complete break from the Cartesian world by stating, “the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?”<sup>1</sup> With that reconfiguration, Descartes’s *Bête machine*<sup>2</sup> (animal-machine), would henceforth be little more than the starting point of properly thinking about animals. Whereas philosophy has taken Bentham’s question as a starting point for two hundred and twenty-eight years of thinking seriously about non-human beings—from Bentham’s utilitarian approach to posthumanism’s shared finitude—the same has not been true in the law.<sup>3</sup> This gap in

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<sup>1</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 n.1 (Hafner Publishing Co. 6th ed. 1948) (1789) (Bentham develops his theory of Utilitarianism in this work and offers a challenge to the dualism present in Descartes’s humanism.). See generally PETER SINGER, ANIMAL LIBERATION (Harper Perennial ed. 2009) which is often seen as the starting point of animal rights discourse in academia. Singer is a utilitarian in the Bentham tradition and is the first to call attention to the obscure note in Bentham’s principle work, sparking four decades of scholarly inquiry into Bentham’s question.

<sup>2</sup> See RENÉ DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY (Donald A. Cress trans., Hackett Publ’g Co. 4th ed. 1998) (1637 & 1641) (where Descartes notoriously argues that the absolute division between animals and humans is a result of humans being the only ones that possess a consciousness (or a rational mind) and therefore, animals (and plants and all other material things) are essentially machines); see, e.g., LAWRENCE CAHOON, THE MODERN INTELLECTUAL TRADITION: FROM DESCARTES TO DERRIDA, THE GREAT COURSES (2010), <https://www.thegreatcourses.com/courses/modern-intellectual-tradition-from-descartes-to-derrida.html> [http://perma.cc/WZZ8-RNHZ] (“Descartes is a dualist . . . there’s only two boxes in which to put any reality . . . regarding anything else that exists [other than humans], either: it’s matter in motion—extended substance—a physical object like a rock, or it’s . . . a human mind and a soul. This means, nonhuman living things, have no soul or mind, they are purely physical, exactly like a machine . . . for Descartes, if I take my pet rabbit and put it in a blender and turn on the blender . . . the scream that the rabbit emits is not an indication that it feels pain. The rabbit feels no pain. It feels no more pain than my fan belt does, which also screams if it needs replacing, or if it’s very loose.”).

<sup>3</sup> See CARY WOLFE, WHAT IS POSTHUMANISM? 49-98 (2010) (tracing the developments in philosophy and liberal humanism post-Descartes and the contemporary shift towards posthumanism); see also CARY WOLFE, BEFORE THE LAW: HUMANS AND OTHER ANIMALS IN A BIOPOLITICAL FRAME (2013)

consideration is reflected in the arguments that are articulated when the law largely remains focused on the Cartesian/Bentham split as reflected by two projects, the Nonhuman Rights Project<sup>4</sup> and the Great Ape Project,<sup>5</sup> and the reactions to them.<sup>6</sup> The Nonhuman Rights project has recently lost attempts at writ of habeas corpus for chimpanzees in New York,<sup>7</sup> whereas the Great Ape Project has had some success, most notably in New Zealand.<sup>8</sup> The two projects have however taken different strategies and lines of argument in pursuit of a similar objective—expanding the legal rights of hominoids. The Nonhuman Rights project has sought to use arguments within existing legal paradigms to force the courts to recognize hominoids as “persons,”<sup>9</sup> whereas the Great Ape Project has intentionally avoided court (for fear of setting unfavorable precedents) and favored pressing change through legislation.<sup>10</sup> The success of the legislative approach of

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[hereinafter WOLFE, BEFORE THE LAW] (discussing liberal humanism’s influence on law, the emergence of biopolitics, and a posthumanist response).

<sup>4</sup> See NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/> [<https://perma.cc/MKY9-9WJN>] (last visited Nov. 29, 2017).

<sup>5</sup> See generally JANE GOODALL ET AL., THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (Paola Cavalieri & Peter Singer eds., St. Martin’s Griffin ed. 1996) (a collection of essays that articulate the need to recognize the incredibly close relationship between humans and great apes).

<sup>6</sup> See Kelsey Kobil, *When it Comes to Standing, Two Legs are Better than Four*, 120 PENN ST. L. REV. 621, 642 (2015) (arguing against changing the status of Apes and other animals to anything other than property).

<sup>7</sup> See generally Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1 (2010) (discussing the strategy of bringing court challenges to achieve the goals of the Nonhuman Rights Project); see also Debra Cassens Weiss, *Chimpanzees Lose Habeas Bid in New York’s Top Court; a Judge Sees a ‘Manifest Injustice,’*, A.B.A. J. (May 8, 2018), [http://www.abajournal.com/news/article/chimpanzees\\_lose\\_habeas\\_bid\\_in\\_new\\_yorks\\_top\\_court\\_one\\_judge\\_sees\\_a\\_manifest](http://www.abajournal.com/news/article/chimpanzees_lose_habeas_bid_in_new_yorks_top_court_one_judge_sees_a_manifest) [<http://perma.cc/7NBK-9HRC>].

<sup>8</sup> See Rowan Taylor, *A Step at a Time: New Zealand’s Progress Toward Hominid Rights*, 7 ANIMAL L. 35, 37-40 (2001), for coverage of the legislative strategies and successes of the Great Ape Project New Zealand.

<sup>9</sup> See generally Wise, *supra* note 7.

<sup>10</sup> See Taylor, *supra* note 8, at 42; see also, e.g., Alexandra B. Rhodes, *Saving Apes with the Laws of Men: Great Ape Protection in a Property-Based Animal Law System*, 20 ANIMAL L. 191, 227 (2013) (discussing how advocates for Great Apes in the United States should work within the existing property rights system of common law because Americans are not particularly receptive to the legal personhood arguments).

the Great Ape Project demonstrates the need to approach these arguments outside the courtroom to avoid hostile judges<sup>11</sup> and archaic precedent.<sup>12</sup> However, the Great Ape Project does not go far enough in expanding the rights of others, because it largely relies on emphasizing similarities with humans as the sole reason for extending rights.<sup>13</sup> Therefore, the Great Ape Project leaves other beings, even higher order mammals, such as dolphins and elephants, without inclusion—and a real possibility that inclusion will forever be cut off.<sup>14</sup> The expansion of legal rights for nonhuman species should be pursued, not only through legislative means, but also through a posthumanist framework that insists that a multiplicity of species requires a multiplicity of legal considerations.<sup>15</sup>

This Article, because it is interdisciplinary, begins by identifying the similarities between common law identification of animals as property<sup>16</sup> and Descartes's liberal humanist project.<sup>17</sup> From there, this Article traces the developments in philosophy that try to gradually move away from the liberal humanist tradition, beginning with Bentham and Singer's utilitarianism, which emphasizes an ethics of acting in the manner that causes the least suffering,<sup>18</sup> and then moving

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<sup>11</sup> Taylor, *supra* note 8, at 42.

<sup>12</sup> See, e.g., Rhodes, *supra* note 10, at 195 (discussing the status of animals as property under common law in the United States).

<sup>13</sup> Taylor, *supra* note 8, at 41.

<sup>14</sup> See *id.* (arguing that the Great Ape Project New Zealand should not align with arguments about other animals' legal rights and focus instead on the proximity of great apes to humans).

<sup>15</sup> See generally JACQUES DERRIDA, *THE ANIMAL THAT THEREFORE I AM* 32-48 (Marie-Louise Mallet ed., David Wills trans., Fordham U. Press. ed. 2008) (discussing the arrogance of Man for giving themselves the right to encompass all other species within the singular "animal"—and the need to develop an approach that reflects a multiplicity); see also DONNA J. HARAWAY, *WHEN SPECIES MEET* 4 (2008), for her discussion of the multiplicity of being—"[t]o be one is always to *become with many*."

<sup>16</sup> See, e.g., Jessica Eisen, *Liberating Animal Law: Breaking Free from Human-Use Typologies*, 17 *ANIMAL L.* 59, 60 (2010).

<sup>17</sup> See generally CARY WOLFE, *ANIMAL RITES: AMERICAN CULTURE, THE DISCOURSE OF SPECIES, AND POSTHUMANIST THEORY* 1-44 (2003) (providing an intricate discussion of the development of liberal humanism and its ultimate poverty).

<sup>18</sup> See, e.g., BENTHAM, *supra* note 1; see also, e.g., SINGER, *supra* note 1.

to the capabilities approach of Martha Nussbaum.<sup>19</sup> The tracing of the developments of philosophy in regard to nonhuman rights concludes by a discussion of posthumanism as the absolute break from the liberal humanist tradition.<sup>20</sup> This Article then shifts back to the current legal challenges that, like posthumanism, seek to break the Cartesian tradition.<sup>21</sup> Finally, this Article moves to discuss why a legislative approach is more desirable than court challenges, while at the same time the law currently lacks the vocabulary and philosophy to expand beyond arguing to extend rights to the species most closely related to humans.<sup>22</sup> This Article concludes that posthumanism can fill the gaps that are currently lacking in legal discourse and help articulate a true vision for breaking from the Cartesian liberal humanist tradition.<sup>23</sup>

## II. BACKGROUND: ANIMALS IN LAW AND PHILOSOPHY

### A. Animals in Common Law

When English common law was imported to the newly formed United States, so too was the common law status of animals as property.<sup>24</sup> This classification of animals as property in common law dates to the earliest forms of Western legal systems, when animals were simply legal things.<sup>25</sup> Steven Wise, the founder of the Nonhuman Rights Project, clarifies that for the Romans, any being that was “believed to lack free will—women, children, slaves, the insane, and nonhuman animals—were all at some time classified as property.”<sup>26</sup> This classification of animals as property is still one of the greatest

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<sup>19</sup> See generally MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) (discussing the limitations of utilitarianism and articulating an alternative capabilities approach derived from a unique reading of Aristotle).

<sup>20</sup> See WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3, at 49-98.

<sup>21</sup> See generally NONHUMAN RIGHTS PROJECT, *supra* note 4.

<sup>22</sup> See generally Taylor, *supra* note 8, at 41-42 (discussing the concerns with aligning the Great Ape Project with animal rights in general).

<sup>23</sup> See generally WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3.

<sup>24</sup> Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 529-30 (1996).

<sup>25</sup> *Id.* at 543.

<sup>26</sup> *Id.* at 493.



challenges for animal welfare laws because as property, animals have no standing in court.<sup>27</sup>

### **B. Common Law and the Liberal Humanist Tradition**

Steven Wise's demonstration on how animals became property in the law<sup>28</sup> compliments the consideration of animals in philosophy. Perhaps the most significant and still relevant consideration of animals in the seventeenth century was Rene Descartes's *bête machine*, which considered animals as mechanistic—as machines—because they lack consciousness.<sup>29</sup> This Cartesian split, between beings with consciousness (humans), and beings without, machines (animals), is analogous to the Roman law classification as those with free will and therefore legal persons, and those without, as property.<sup>30</sup> Therefore, the legal consideration of animals develops alongside the philosophical development of, and challenges to, the liberal humanist tradition.<sup>31</sup>

### **C. Utilitarianism: Jeremy Bentham and Peter Singer**

As Cary Wolfe pointed out,<sup>32</sup> even though Bentham's now famous rephrasing of the question of the animal to "Can they Suffer?" is now ubiquitous for challenging the Cartesian liberal humanist tradition,

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<sup>27</sup> Rhodes, *supra* note 10, at 195.

<sup>28</sup> See generally Wise, *supra* note 24 (providing an exhaustive account of the historical antecedents that account for the current status of animals under common law).

<sup>29</sup> See generally DESCARTES, *supra* note 2.

<sup>30</sup> See Wise, *supra* note 24, at 493.

<sup>31</sup> See generally Cary Wolfe, *Flesh and Finitude: Thinking Animals in (Post)Humanist Philosophy*, 37 *SUBSTANCE* 8 (2008) (arguing that the core of humanism is the ethical and ontological divide between humans and nonhuman animals).

<sup>32</sup> *Id.*; see also WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3, at 49-98 (tracing the development of the question of the animal through the analytical, and ultimately liberal humanist, philosophical tradition to the emergence of posthumanism in continental philosophy and biopolitics). It is important to note that while Wolfe's analysis is excellent, it is by no means exhaustive and only focuses on contemporary philosophers. *Id.* For instance, Martin Heidegger, a significant figure when discussing the question of the animal, is only discussed in relation to Jacques Derrida's treatment of Heidegger's work. *Id.* The strength of Wolfe's work is that it links his treatment of his contemporaries to the philosophical traditions that they represent—providing an impressive historical accounting of a philosophical divergence (perhaps more nuanced than analytic versus continental) that explains how we got to where we are. *Id.*

Bentham's profound question was largely forgotten for nearly two hundred years.<sup>33</sup> It was not until Peter Singer "drew attention to a passage buried . . . in a footnote in Jeremy Bentham's *An Introduction to the Principles of Morals and Legislation*," in his seminal *Animal Liberation*, that Bentham's question became a focal point of the question of the animal for philosophers.<sup>34</sup> In Singer's foundational work, he took up Bentham's question and tried to answer it within a utilitarian framework.<sup>35</sup> Singer's utilitarian approach argued that if animals and humans share an equal interest in something, like "the interest in avoiding physical pain," then "those interests are to be counted equally, with no automatic discount just because one of the beings is not human."<sup>36</sup> Singer's utilitarianism, following Bentham's, identified "the capacity for suffering as the vital characteristic that gives a being the right to equal consideration,"<sup>37</sup> and therefore, any question of how animals should be treated should be answered in the way that most minimizes suffering.<sup>38</sup>

#### **D. Limits of Utilitarianism and Martha Nussbaum's "Capabilities"**

While utilitarianism does a great deal to challenge the Cartesian world, it ultimately fails to escape a humanist discourse.<sup>39</sup> Though never articulated specifically, utilitarian insistence on "suffering" as the prerequisite, applied analytically and dispassionately, does little to articulate animals having interests in and of themselves that may be separate from simply a shared and identifiable human-like "suffering."<sup>40</sup> Additionally, Martha Nussbaum pointed out, because utilitarianism focuses on calculations of pleasure/suffering to determine the ethical, the cruel treatment of animals is not foreclosed as unethical.<sup>41</sup> In other words, "utilitarianism provides no way for

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<sup>33</sup> Wolfe, *supra* note 31, at 9.

<sup>34</sup> *Id.*

<sup>35</sup> See generally SINGER, *supra* note 1 (establishing the connection between a utilitarian ethic and the necessity of animal rights).

<sup>36</sup> WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3, at 58 (quoting Peter Singer, "Prologue: Ethics and the New Animal Liberation Movement").

<sup>37</sup> SINGER, *supra* note 1, at 7.

<sup>38</sup> *Id.* at 21.

<sup>39</sup> WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3, at 62-64.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

animals to be *direct* subjects of justice.”<sup>42</sup> The internal contradictions of utilitarianism—in which not all animal interests are considered and cruelty to an animal could be seen as the ethical choice—leads Wolfe to consider Nussbaum’s Aristotelian<sup>43</sup> “capabilities” approach.<sup>44</sup> Nussbaum derived the capabilities approach from an ambiguity in Aristotle’s configuration of humans as “political animals.”<sup>45</sup> Man as political animal locates man not as distinct being, wholly other, but as a category of animal.<sup>46</sup> For Nussbaum, this collapses the Cartesian divide and therefore “the rightness or wrongness of our treatment of . . . human or nonhuman . . . is . . . determined by the extent to which it enables or impedes their ‘flourishing.’”<sup>47</sup> Ultimately, flourishing as an ethic argues “that no sentient animal should be cut off from the chance for a flourishing life.”<sup>48</sup> Wolfe was quick to point out that ultimately Nussbaum suffered two fundamental flaws in her approach: first, does human flourishing necessarily depend on animals suffering, and second, the utilitarian problem of competing rights is also a problem for Nussbaum’s flourishing.<sup>49</sup> When confronted with competing interests, Nussbaum’s capabilities approach amounts to a human essentialism that prioritizes individual human capabilities against each other, while also revealing a deep strain of humanism informing her work.<sup>50</sup>

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<sup>42</sup> *Id.* at 64 (quoting Nussbaum).

<sup>43</sup> *Id.* at 65. Wolfe takes care to note that Nussbaum does a lot of work reading into an “ambiguity” in Aristotle to avoid the issue of “rationality as an ethical and ontological dividing line.” *Id.*

<sup>44</sup> *Id.* For whatever reason, Wolfe only briefly mentions an intermediary between utilitarianism and Nussbaum, which is the contractarian theory of John Rawls and others, which predicates rights on the ability to enter into contracts or some other form of reciprocal relationship. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971). Perhaps the quick logical dead-end to contractarianism—with rights largely deriving from the reciprocal relationship between equals—does not warrant a detailed consideration. *See* NUSSBAUM, *supra* note 19, at 327. Ultimately, contractarianism is simply another way to articulate the Cartesian splint on different grounds. *Id.*

<sup>45</sup> WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3, at 65-66.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 66.

<sup>48</sup> *Id.* at 67 (quoting Nussbaum).

<sup>49</sup> *Id.* at 67.

<sup>50</sup> *See id.* at 66-68 (discussing Nussbaum’s “List of Central Human Functional Capabilities” and her ranking of some humans as apparently not-quite-human);

### E. Shared Finitude and Anti- and Post-humanist Philosophy

Wolfe’s exploration of the implications of Bentham’s utilitarianism embodied in the work of Peter Singer and Martha Nussbaum’s Aristotelian capabilities approach revealed that despite valiant attempts to break from Cartesian humanism, Bentham, Singer and Nussbaum ultimately were all unable to do so.<sup>51</sup> Wolfe then moved through Cora Diamond’s challenge to the very discourse of rights.<sup>52</sup> For Diamond, there was an important distinction between rights and justice.<sup>53</sup> Wolfe explained that “rights” are “trivialized” and not equal the same as justice.<sup>54</sup> Wolfe explained that “the language of rights still bears the imprint of the context in which it was shaped: Roman law and its codification of *property* rights—not least, of course, property rights over slaves.”<sup>55</sup> Therefore, rights discourse invariably fails because the “tie between rights and a system of entitlement that is concerned, not with evil done to a person, but with how much he or she gets compared to other participants in the system.”<sup>56</sup> Diamond confronted the problem of rights discourse by arguing that what should actually be the impetus of our moral concern for animals is our shared vulnerability.<sup>57</sup> In other words, rights discourse in the analytic tradition, always itself inherently humanist, can never purport to be about justice because it is inevitably based on the “possession (or lack) of morally significant characteristics that can

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*see also* NUSSBAUM, *supra* note 19, at 76-78 (listing the “Central Human Capabilities” as follows: “1. *Life* . . . 2. *Bodily Health* . . . 3. *Bodily Integrity* . . . 4. *Senses, Imagination Thought* . . . 5. *Emotions* . . . 6. *Practical Reason* . . . 7. *Affiliation* . . . 8. *Other Species* . . . 9. *Play* . . . 10. *Control over One’s Environment*.”).

<sup>51</sup> *See generally* WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3, at 49-69.

<sup>52</sup> *Id.* at 70-78. Importantly, Wolfe notes that Diamond, though deeply skeptical of what it means to “do” philosophy, is still herself very much of the analytic tradition.

<sup>53</sup> *Id.* at 73.

<sup>54</sup> *Id.* (quoting Diamond).

<sup>55</sup> *Id.* (paraphrasing Diamond).

<sup>56</sup> *Id.* at 73-74 (quoting Diamond). It should be obvious that the classification of animals as property under common law, which also derives from the Romans, is a nearly unbreakable category when attacked through rights discourse because it is, at its core, an epistemological dilemma.

<sup>57</sup> *Id.* at 74 (arguing that the precarious nature of being alive, with death always approaching, is where moral obligation arises).

be empirically derived.”<sup>58</sup> Diamond also took care to note that those in the analytical tradition who seek to eliminate the lines between humans and animals as the basis for animal rights, as well as those who oppose animal rights because of this distinction, are both wrong.<sup>59</sup> Wolfe explained that “for Diamond, it is not by denying the special status of human being but by intensifying it that we can come to think of nonhuman animals not as bearers of interests or as rights holders but rather as something much more compelling: fellow creatures.”<sup>60</sup> Although Diamond’s work is impressive and groundbreaking, it is of the analytical tradition, and therefore there is an internal limitation that prevents her from being able “to open the question of justice beyond the human sphere alone.”<sup>61</sup>

To get past the limitations inherent in the analytical tradition, Wolfe turned to the French continental philosopher, Jacques Derrida.<sup>62</sup> With this shift from analytic to continental, Wolfe also signaled a necessary shift away from liberal humanism and toward antihumanist and posthumanist discourses.<sup>63</sup> Wolfe’s move is instructive, and this Article will argue that a similar move is necessary to truly challenge the status of animals in the law.<sup>64</sup>

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<sup>58</sup> *Id.* at 75.

<sup>59</sup> *Id.* at 76.

<sup>60</sup> *Id.* at 77.

<sup>61</sup> *Id.* at 80. Wolfe is concerned here with Diamond’s understanding of language in a philosophical sense, or perhaps her lack of accounting for language. *Id.* Wolfe sees Jacques Derrida’s theory of language and trace as a necessary component of opening the question of justice. *Id.* at 80-98.

<sup>62</sup> *Id.* at 80.

<sup>63</sup> *Id.* at 80-98. *See also, generally*, GILLES DELEUZE & FÉLIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 232-310 (Brian Massumi trans., U. of Minn. Press ed. 1987) (developing an anti-humanist position through the concepts of “becoming,” including most famously, “becoming-animal.” Becoming is a resistance to the hierarchical structure of humanism by arguing for shifts from majority to minority positions, but importantly, not absolute shifts from one position to another—or one identity to another—but rather an always ongoing process of making anew). *Contra*, HARAWAY, *supra* note 15, at 30 (“Despite the keen competition, I am not sure I can find in philosophy a clearer display of misogyny, fear of aging, incuriosity about animals, and horror at the ordinariness of flesh, here [in *A Thousand Plateaus*] covered by the alibi of an anti-Oedipal and anticapitalist project.”).

<sup>64</sup> *See generally* WOLFE, *BEFORE THE LAW*, *supra* note 3 (a thoughtful exploration of the status of animals before the law and how biopolitics can be understood in that context); *see also* GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER*

### III. APPROACHES TO ADVANCING ANIMAL STATUS UNDER THE LAW: A POSTHUMANIST CRITIQUE

#### A. NONHUMAN RIGHTS PROJECT & THE GREAT APE PROJECT

The Nonhuman Rights Project is perhaps the best-known organization working on animal rights *in the law*.<sup>65</sup> Founded by Steven M. Wise, the Nonhuman Rights Project aims to advance the status of animals primarily through court challenges.<sup>66</sup> Although the group has a variety of objectives, five in all, this Article's focus is on its first objective, to recategorize animals under the law.<sup>67</sup> In this objective, the Nonhuman Rights Project aims "[t]o change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity."<sup>68</sup> In order to do this, the Nonhuman Rights Project has identified favorable jurisdictions and judges and seeks to file writs of habeas corpus and *de homine replegiando*.<sup>69</sup>

The most recent and one of the most prolific challenges from the Nonhuman Rights Project concerns two chimpanzees named Hercules

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AND BARE LIFE (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Stanford U. Press ed. 1998) (discussing how law functions under sovereign power and the possibilities, or lack of possibilities, of anomic space—a space that conceivably nonhuman entities would inhabit).

<sup>65</sup> See NONHUMAN RIGHTS PROJECT, *supra* note 4.

<sup>66</sup> See *Who We Are*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/who-we-are/> [<http://perma.cc/L4BL-EJ23>] (last visited Dec. 1, 2017).

<sup>67</sup> *Id.* The five objectives of the Nonhuman Rights Project are: 1) To get great apes, elephants, dolphins, and whales recognized as "legal persons," 2) to expand the considerations of other qualities that could further expand animals that could be considered "legal persons," 3) to promote recognition of ethical and legal consideration of nonhuman animals, 4) to build a coalition to help secure legal rights for nonhuman animals, and 5) "To foster understanding of the social, historical, political, and legal justice of our arguments and the scientific discovery of other species' cognitive and emotional complexity that informs them." *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Wise, *supra* note 7, at 8.

and Leo that were leased to Stony Brook University.<sup>70</sup> Hercules and Leo were experimented on for six years, having electrodes inserted into their muscles so that researchers could study how humans evolved to walk upright.<sup>71</sup> The Nonhuman Rights Project filed a writ of habeas corpus in a New York state court on behalf of Hercules and Leo.<sup>72</sup> The court denied the petition<sup>73</sup> and the Nonhuman Rights Project appealed.<sup>74</sup> The appeal was erroneously denied,<sup>75</sup> and the Nonhuman Rights Project subsequently took advantage of the ability to file writs of habeas corpus multiple times under New York law and re-filed on behalf of Hercules and Leo.<sup>76</sup> Surprisingly, the judge ordered the New York Attorney General to appear and “show cause” why an order should not be granted to the Nonhuman Rights Project for relief.<sup>77</sup> The judge’s order stated that “upon a determination that Hercules and Leo are being unlawfully detained, [they are ordered for] immediate release and transfer forthwith to Save the Chimps.”<sup>78</sup> This is a significant victory for the Nonhuman Rights Project because a hearing to determine whether a nonhuman was properly detained had never been granted.<sup>79</sup> Unfortunately, the judge, although seemingly cognizant of the potential merits of the case, denied the writ of habeas corpus.<sup>80</sup> Nevertheless, the Nonhuman Rights Project declared that even getting into the courtroom to hear the rights of a nonhuman animal was a

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<sup>70</sup> *Clients: Hercules and Leo*, NONHUMAN RIGHTS PROJECT, <https://www.nonhumanrights.org/hercules-leo/> [http://perma.cc/T9L7-2Q8X] (last visited Oct. 2, 2018).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Order to Show Cause Declined, Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. Suffolk Cty. Dec. 5, 2013) (No. 13-32098).

<sup>74</sup> *Clients: Hercules and Leo*, *supra* note 70.

<sup>75</sup> Decision & Order on Motion, Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley, (N.Y. App. Div. 2d Dep’t Apr. 3, 2014) (No. 2014-01825).

<sup>76</sup> *Clients: Hercules and Leo*, *supra* note 70.

<sup>77</sup> Amended Order to Show Cause, Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. N.Y. Cty. Apr. 21, 2015) (No. 152736/15).

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

<sup>79</sup> *Clients: Hercules and Leo*, *supra* note 70.

<sup>80</sup> Matter of Nonhuman Rights Project Inc. ex rel. Hercules & Leo v. Stanley, 16 N.Y.S.3d 898, 917-18 (Sup. Ct. 2015).

victory.<sup>81</sup> On this point, the Nonhuman Rights Project's success and strategy are admirable, however, as will be shown, from a posthumanist perspective they can be dangerous.<sup>82</sup>

While the Nonhuman Rights Project seeks to advance nonhuman animal rights through court challenges, a similar project, The Great Ape Project, employs a different strategy.<sup>83</sup> The Great Ape Project has had much more success in accomplishing tangible victories in securing certain fundamental rights for Great Apes.<sup>84</sup> The Great Ape Project has been successful in getting legislation passed that helps protect great apes, sometimes even extending human like rights to great apes.<sup>85</sup> One of the ways that the Great Ape Project has made progress is by deliberately avoiding courts for fear of longstanding bias and speciesism causing judges to set negative precedents.<sup>86</sup> The Great Ape Project's successes, particularly in New Zealand and Spain are impressive.<sup>87</sup>

The Great Ape Project's greatest successes so far have come in New Zealand, beginning with the passage of the Animal Welfare Act of 1999.<sup>88</sup> The Great Ape Project New Zealand had pressed for the inclusion of both a guardianship model for representation as well as specific rights for great apes.<sup>89</sup> Although Great Ape Project New Zealand's admittedly lofty demands were quickly rejected, Great Ape Project New Zealand was successful in carving out special recognition for hominids.<sup>90</sup> This special recognition of the status of hominids was made tangible by a ban on the use of great apes in teaching, product testing, and research.<sup>91</sup> However, the ban is not categorical and can be

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<sup>81</sup> *Clients: Hercules and Leo*, *supra* note 70.

<sup>82</sup> See generally LEONARD LAWLOR, THIS IS NOT SUFFICIENT: AN ESSAY ON ANIMALITY AND HUMAN NATURE IN DERRIDA (2007).

<sup>83</sup> See generally GREAT APE PROJECT BRAZIL, <http://www.projeto-gap.org.br/en/mission-and-vision/> [http://perma.cc/D5ZR-AS4Z] (last visited Oct. 2, 2018).

<sup>84</sup> Rhodes, *supra* note 10, at 210-15.

<sup>85</sup> *Id.*

<sup>86</sup> Taylor, *supra* note 8, at 42.

<sup>87</sup> See, e.g., *id.* for a discussion of the Great Ape Project's successes in New Zealand; see also, e.g., Rhodes, *supra* note 10, at 210-15.

<sup>88</sup> See Taylor, *supra* note 8, at 37.

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.* at 37-38.



overcome if the use is “in the best interest of the individual great ape or is in the interest of that great ape’s species and the benefits are not outweighed by the likely harm to the great ape.”<sup>92</sup> Significantly, although it does not codify “rights” for great apes, it does introduce a concept of “interests,” for both the species and the individual ape.<sup>93</sup> In addition, where conflicts between species and individuals may arise, the act prioritizes the individual by making sure any benefits do not “outweigh” any potential harm to the individual.<sup>94</sup> Although Great Ape Project New Zealand did not achieve a recognition of rights, it did secure some form of recognition that had never before been conferred to a non-human animal.<sup>95</sup> With that said, the Great Ape Project’s legal strategy, like the Nonhuman Rights Project’s approach, has some fundamental limitations that might set back animal rights under the law.<sup>96</sup>

### B. A POSTHUMANIST CRITIQUE

Though the Nonhuman Rights Project and the Great Ape Project are fundamentally different in both tactics and objectives, they nevertheless share the same limitations and problems, which derive from tradition.<sup>97</sup> Much like Singer, Nussbaum and Diamond are fundamentally limited by the humanist core of the analytic tradition; so too are the Nonhuman Rights Project and the Great Ape Project

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<sup>92</sup> *Id.* at 38 n.16 (quoting Primary Production Committee, *Primary Production Committee Reports Back on Animal Welfare Legislation* (press release) (May 17, 1999)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The valuing of the individual, rather than the group, is an interesting acknowledgement of the individual’s interest in their self—in other words, it implicitly recognizes that the individual has some sense of self.

<sup>95</sup> *Id.*

<sup>96</sup> *See generally* JANE GOODALL ET AL., *THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY* (Paola Cavalieri & Peter Singer eds., U.S. ed. 1994) (a collection of essays from well-known academics in various fields that are unified in arguing for rights for great apes because of their similarities to humans).

<sup>97</sup> *See generally* WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3, at 49-98 (discussing the analytic tradition and the pervasiveness of liberal humanism ‘as they relate to the question of the animal); *see also, e.g.*, Wise, *supra* note 24, at 8-10 (demonstrating how tradition shapes common law notions of how to account for animals).

limited by both the humanist core of common law tradition and their ultimately humanist approach to attaining animal rights.<sup>98</sup>

The Nonhuman Rights Project has two fundamental problems with its approach and objective.<sup>99</sup> First is what Great Ape Project New Zealand identified as the problem with bringing court challenges.<sup>100</sup> The second is that the Nonhuman Rights Project's strategy risks making an argument for a biological continuum.<sup>101</sup> In both cases, the negative consequences of the Nonhuman Rights Project could hinder any progress that has been made in animal rights law.<sup>102</sup>

The first problem that the Nonhuman Rights Project's approach faces is what Taylor describes as the "hominid cringe,"<sup>103</sup> and the possibility of a resistance to their efforts because of slippery slope arguments.<sup>104</sup> These two issues are the main problems with having judges decide cases and set possible precedent.<sup>105</sup> The "hominid cringe" refers to the reluctance of humans to admit that they vary only slightly in genetics from their ape counterparts.<sup>106</sup> This resistance can be the basis of a speciesist disposition that many people possess.<sup>107</sup> Such a disposition might lead judges automatically, regardless of reason and logic, to dismiss any challenge that calls into question human exceptionalism.<sup>108</sup> Worse still, decisions derived primarily from a

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<sup>98</sup> See, e.g., Wise, *supra* note 24.

<sup>99</sup> See generally NONHUMAN RIGHTS PROJECT, *supra* note 4.

<sup>100</sup> See Taylor, *supra* note 8, at 42 (highlighting the possibility of encountering conservative justices and setting unfavorable precedent).

<sup>101</sup> See generally LAWLOR, *supra* note 82.

<sup>102</sup> *Contra* Wise, *supra* note 7 (arguing that the only way to change the existing common law is to systematically identify states, districts, and even particular judges, that might be receptive to the Nonhuman Rights Project's arguments and therefore, be willing to go against precedent).

<sup>103</sup> Taylor, *supra* note 8, at 41-42.

<sup>104</sup> Kobil, *supra* note 6, at 639-40.

<sup>105</sup> *Id.* at 636-37. Much of Kobil's argument is that only a "rogue" court could change precedent and therefore, the common law tradition of treating animals as property should be protected against the threat of judicial activism.

<sup>106</sup> Taylor, *supra* note 8, at 41-42.

<sup>107</sup> See generally Frank Newport, *In U.S., 42% Believe Creationist View of Human Origins*, GALLUP (June 2, 2014) <http://news.gallup.com/poll/170822/believe-creationist-view-human-origins.aspx> [<https://perma.cc/35CP-TF7V>] (42 percent of Americans do not believe in evolution but rather, that a deity created humans in their exact present form).

<sup>108</sup> Taylor, *supra* note 8, at 42.

speciest logic would set precedent for future cases, making animal legal recognition even more difficult to attain.<sup>109</sup>

The second problem that the Nonhuman Rights Project's approach faces is the fear of a slippery slope.<sup>110</sup> If Great Apes receive personhood, then what's next? Dolphins? Pigs? Dogs? Salamanders? Microbes?<sup>111</sup> There is a real fear among humanists (a valid fear, but not for the reasons they articulate) that by admitting our Ape cousins into the sphere of ethical and legal consideration, eventually every animal will have to be admitted to the once exclusive domain of humans.<sup>112</sup> The slippery slope argument, as will be shown, is valid—however, not because of this humanist logic.<sup>113</sup>

The Great Ape Project's approach faces similar problems that largely derive from their utilitarian origins.<sup>114</sup> The Great Ape Project's utilitarian logic opens it up to all of the same critiques that Diamond and Wolfe level at utilitarianism in philosophy, namely that the analytic empirical calculation of suffering invariably excuses and permits a great deal of suffering.<sup>115</sup> In addition, the Great Ape Project's narrow focus on great apes might foreclose the possibility of other animals, such as dolphins, whales and octopuses, from receiving similar legal consideration because we cannot articulate the same arguments of proximity to humanness.<sup>116</sup> Finally, another issue that the Great Ape Project's approach faces is the common law property problem, because where the Great Ape Project sees its strategy as a way of working within the property system by simply removing great apes from a classification as property, it inevitably leaves all other species still classified as property.<sup>117</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> Kobil, *supra* note 6, at 639-40.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Kobil goes further to worry that environmentalist might seize on the success of animal rights activist and start articulating similar lines of arguments for the rights of trees or rivers to bring court challenges. *See id.* at 641.

<sup>113</sup> LAWLOR, *supra* note 82.

<sup>114</sup> GOODALL ET AL., *supra* note 96.

<sup>115</sup> WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3, at 64.

<sup>116</sup> *See* Taylor, *supra* note 8, at 41 (discussing the need to avoid aligning great ape rights with a larger animal rights discourse).

<sup>117</sup> *See generally* Rhodes, *supra* note 10 (advocating for working within the property system in spite of its limitations because Americans are not receptive to perceiving animals as beings with personhood).

### C. POSTHUMANISM OFFERS AN ALTERNATIVE APPROACH

Posthumanism offers an alternative to the problems that emerge from the largely humanist projects of the Nonhuman Rights Project and the Great Ape Project.<sup>118</sup> As noble as the Nonhuman Rights Project and the Great Ape Project are, the very concept of saving animals with the laws of men is specious.<sup>119</sup> To combat the legacy of liberal humanism, which manifests in common law, a posthumanist perspective must be adopted.<sup>120</sup>

#### 1. The Anthropological Limit, Multiplicities, and Avoiding the Slippery Slope

The first and most significant problem that posthumanism addresses is the valid concern of a slippery slope.<sup>121</sup> The slippery slope argument is the concern that the recognition of one species of animal in any capacity other than property will necessarily lead to endless expansion of considerations that overburden courts and result in absurdities.<sup>122</sup> Perhaps more than any other argument, the concern of a slippery slope is the most commonly articulated.<sup>123</sup> For example, the

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<sup>118</sup> See generally *Posthumanities*, U. OF MINN. PRESS, <https://www.upress.umn.edu/book-division/series/posthumanities> [<http://perma.cc/RJ2A-CK6G>] (last visited Oct. 2, 2018) (an interdisciplinary book series edited by Cary Wolfe that contributes to the growing field of Posthumanities).

<sup>119</sup> *Contra* Rhodes, *supra* note 10 (arguing that all the existing frameworks are there to advance animal rights, and challenging them with too radical of propositions will be a self-defeating strategy).

<sup>120</sup> See generally Maneesha Deckha, *Critical Animal Studies and Animal Law*, 18 ANIMAL L. 207 (2012) (arguing that a more aggressive subset of posthumanism, Critical Animal Studies, is where legal scholars should turn to escape the liberal humanist legacy). Although Deckha is correct, a more general intervention of Posthumanism will allow for more possibilities and a general consideration of the biopolitical, and therefore, should be pursued alongside the goals of Critical Animal Studies.

<sup>121</sup> See Kobil, *supra* note 6, at 639-40.

<sup>122</sup> *Id.*

<sup>123</sup> See generally Richard A. Epstein, *The Next Rights Revolution?: It's Bowser's Time at Last*, 51 NAT'L REV. 44 (1999) (suggesting that all of human society would cease to exist if animals were regarded as anything other than property). Presumably, the chaos that would result from allowing animals standing or some other form of recognition in court is because of the abysmal conditions in which many animals live their lives under human domain.

slippery slope argument often arises when pet owners pursue claims of negligent infliction of emotional distress.<sup>124</sup> In *Rabideau v. City of Racine*, the judge explicitly denied the claim of negligent infliction of emotional distress as a matter of public policy.<sup>125</sup> Judge Bablitch states that “[w]e are particularly concerned that were such a claim [as negligent infliction of emotional distress] to go forward, the law would proceed upon a course that had no *just* stopping point.”<sup>126</sup> He continues, “[w]ere we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.”<sup>127</sup> Although it would seem that a rational test could be developed to distinguish between the companionship that a goldfish provides from the companionship that a dog provides, it is irrelevant to the underlying logic that a slippery slope would result in chaos<sup>128</sup> and the possible collapse of human society.<sup>129</sup>

The fear of a slippery slope—the impending biological continuum—that emerges in law is the result of the liberal humanist tradition that posthumanism seeks to challenge.<sup>130</sup> The terror that Epstein, Judge Bablitch, and others express is the result of a possible destabilization of the supremacy of the human<sup>131</sup> and, therefore, a collapse of liberal humanism. Although the supremacy of the human under liberal humanism is precisely the location of the permissible atrocities committed by humans to animals, the unease of a biological continuum is not without warrant.<sup>132</sup> However, the reason for that unease is not because of upsetting the supremacy of the human, rather

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<sup>124</sup> See *Rabideau v. City of Racine*, 627 N.W.2d 795, 797-98 (Wis. 2001), where a companion animal, a dog, was shot and killed by a police officer and the dog’s human companion sought damages for negligent infliction of emotional distress. The court concludes that the only damages available are for property loss.

<sup>125</sup> *Id.* at 798.

<sup>126</sup> *Id.* at 799.

<sup>127</sup> *Id.*

<sup>128</sup> Kobil, *supra* note 6, at 638.

<sup>129</sup> Epstein, *supra* note 123.

<sup>130</sup> See generally WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3.

<sup>131</sup> See generally Taylor, *supra* note 8, at 41-42 (discussing the “hominid cringe”).

<sup>132</sup> See DERRIDA, *supra* note 15, at 29-30, where Derrida insists that the absolute division between human and nonhuman animal must be maintained.

a much more sinister concern with dissolving the anthropological limit.<sup>133</sup>

French Philosopher Jacques Derrida expressed the anti-humanist, or posthumanist, insistence on maintaining a human/animal divide during his ten-hour address to the 1997 Cerisy conference.<sup>134</sup> Derrida was aware that his attack on the anthropological limit would have two risks: first, the obvious risk of slipping back into the liberal humanist paradigm, and second, the specter of biological continuism.<sup>135</sup> Derrida states that he “never believed in some homogeneous continuity between what calls *itself* man and what *he* calls the animal” and that he wasn’t “about . . . to do so now.”<sup>136</sup> Derrida continued to insist that anyone who argues for some complete dissolution of the anthropological limit should be met with suspicion, stating:

*When that cause or interest seeks to profit from what it simplistically suspects to be a biologicistic continuism, whose sinister connotations we are well aware of, or more generally to profit from what is suspected as a geneticism that one might wish to associate with this scatterbrained accusation of continuism, at that point the undertaking becomes in any case so aberrant that it neither calls for nor, it seems to me, deserves any direct discussion on my part.<sup>137</sup>*

Derrida’s insistence on maintaining the anthropological limit is derived from the “sinister connotations” of dissolving the limit,<sup>138</sup>

<sup>133</sup> *Id.* at 30. The anthropological limit is the “rupture . . . between those who say ‘we men,’ . . . and . . . what he *calls* the animal or animals.” *Id.* Essentially, the rupture created by the Cartesian moment—the division between man and all other animal life—that liberal humanism is predicated upon.

<sup>134</sup> See generally *id.* *The Animal that Therefore I Am* is the subsequent translation and publication of Derrida’s address to the Cerisy conference. The *Colloques de Cerisy* are a series of seminars by important, primarily French, intellectuals that take place at the *Centre culturel international de Cerisy-la-Salle*. They are foundational to building contemporary French intellectual culture.

<sup>135</sup> *Id.* at 30. Derrida is using biological continuism to describe a hierarchy of beings that contains no absolute divisions between species.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Derrida is challenging both the consideration of animals and rights in the analytic tradition, which inevitably results in a deterioration of the anthropological limit, but also the more “sinister” result of continuism.

<sup>138</sup> *Id.*

however, he failed to elaborate on this point.<sup>139</sup> Leonard Lawlor, in his essay about Derrida's address, clarified that "if one raises animals to the level of humans, or if one lowers humans to the level of animals, one ignores the difference that requires living beings to be treated in a variety of ways."<sup>140</sup>

Derrida's—and by extension, posthumanism's—insistence on maintaining the anthropological limit negates the concern for a slippery slope.<sup>141</sup> By securing an absolute position of difference from all other animals for all humans, Derrida prevents the inevitable catastrophe and apocalyptic collapse "of human society" that Epstein is concerned about.<sup>142</sup> However, unlike the Cartesian divide in liberal humanism, Derrida explains that the anthropological limit cannot be seen as single and indivisible.<sup>143</sup> Instead the limit must be conceptually thought of as abyssal.<sup>144</sup> Derrida states that it must be abyssal:

*Not just because . . . [this talk] will concern what sprouts or grows at the limit, around the limit, by maintaining the limit, but also what feeds the limit, generates it, raises it, and complicates it. Everything I'll say will consist, certainly not in effacing the limit, but in multiplying its figures, in complicating, thickening, delinearizing, folding, and dividing the line precisely by making it increase and multiply.<sup>145</sup>*

This "delinearizing" and "multiplying" of limits is recognition that the absolute position of the human is mirrored by the absolute position of

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<sup>139</sup> *Id.*

<sup>140</sup> See generally LAWLOR, *supra* note 82, at 25-26. Essentially, the creation of a continuum allows for any being on that continuum to slide up and down—and when we consider that Derrida is an Algerian Jew, the "sinister connotations" are likely a reference to anti-Semitic ideologies, particularly Nazism, that slid Jews down the continuum and therefore Nazis were able to justify their atrocities as permissible. *Id.* at 24-27. Slavery in the Americas and colonialism are also examples where the elimination of the limit allowed for some humans to be more human than others. *Id.* Derrida insists that the limit be maintained to prevent human atrocities from ever becoming permissible. *Id.*

<sup>141</sup> See generally Kobil, *supra* note 6, at 639-41 (discussing the "slippery slope").

<sup>142</sup> Epstein, *supra* note 123.

<sup>143</sup> DERRIDA, *supra* note 15, at 31.

<sup>144</sup> *Id.*; see Serge Margel, *Derrida and the Power of Words*, 36 OXFORD LITERARY REV. 254, 255-56 (2014) (discussing how Derrida uses "abyssal" in his work).

<sup>145</sup> DERRIDA, *supra* note 15, at 29.

the great ape and the absolute position of the octopus—creating a multiplicity of limits between species and necessitating individual evaluations of interspecies relationships.<sup>146</sup>

To facilitate the conceptualization of the multiplicity of the limits, Derrida challenged the use of the word animal—“a word that men have given themselves the right to give.”<sup>147</sup> Derrida argued that “[m]en would be first and foremost those living creatures who have given themselves the word that enables them to speak of the animal with a single voice and to designate it as the single being.”<sup>148</sup> Derrida, therefore, identified the lexical anthropological limit that results in the binary division between human and the multiplicity of all other species, collapsed into the singular animal.<sup>149</sup> This lexical problem is precisely the problem that confronts the Great Ape Project as it at once seeks to maintain the limit but also to allow a single species to jump to the human side.<sup>150</sup> Derrida challenges the singular generality of “the animal” by purposing the neologism, *animot*.<sup>151</sup> *Animot*, in French, “sounds like *animaux*, animals in the plural.”<sup>152</sup> Derrida’s neologism is designed for “us to hear in the term *animot* animals in their plural singularity rather than their generality (i.e., The Animal).”<sup>153</sup> Again, by insisting on this neologism, Derrida tried to destabilize the Cartesian single and indivisible anthropological limit, while maintaining

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<sup>146</sup> LAWLOR, *supra* note 82; *see also* HARAWAY, *supra* note 15, at 3-45 (Haraway, another foundational figure in posthumanism, further complicates this notion of abyssal limits between species by also suggesting at the same time that the species do not exist without the encounter of the other—in other words, species (to the microbial level) make each up. This suggests that the multiplicity of limits must also account for a multiplicity and the necessity of contact zones between species).

<sup>147</sup> DERRIDA, *supra* note 15, at 32.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1-50.

<sup>150</sup> *See generally* Taylor, *supra* note 8, at 41.

<sup>151</sup> *See generally* DERRIDA, *supra* note 15.

<sup>152</sup> MATTHEW CALARCO, *ZOOGRAPHIES: THE QUESTION OF THE ANIMAL FROM HEIDEGGER TO DERRIDA* 144 (1972).

<sup>153</sup> *Id.* (Calarco suggests Derrida’s desire is for a plural singularity in *animot*—in other words, each species, like the human, is absolute in its species being, however there are infinite abyssal limits between each species (a plurality of limits) and therefore, there must also be a plurality of relationships and ethical obligations between species).



absolute divisions between species.<sup>154</sup> In doing so, Derrida at once avoided the slippery slope<sup>155</sup> and avoided the “hominid cringe.”<sup>156</sup> At the same time, Derrida opened the possibility of a multiplicity of relationships (and therefore, a need for a multiplicity of legal considerations) between species.<sup>157</sup>

## 2. Great Apes Are Not Enough: Thinking Obligations Beyond Familiarity

Both the Nonhuman Rights Project and the Great Ape Project, unsurprisingly, have focused their efforts on securing legal rights for great apes.<sup>158</sup> The reasons for pursuing rights for great apes are based on an argument for familiarity because of familial proximity.<sup>159</sup> However, two issues with this approach arise: first, any victories won would not in and of themselves extend to other species,<sup>160</sup> and second, the proximity or familiarity arguments risk further entrenching liberal humanism in law.<sup>161</sup> Posthumanism offers a way to address these issues by proposing a clear break from the liberal humanist tradition and thinking anew where ethical obligations between species arise.<sup>162</sup>

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<sup>154</sup> See generally DERRIDA, *supra* note 15, at 29-50.

<sup>155</sup> LAWLOR, *supra* note 82.

<sup>156</sup> Taylor, *supra* note 8, at 41-42.

<sup>157</sup> LAWLOR, *supra* note 82.

<sup>158</sup> See NONHUMAN RIGHTS PROJECT, *supra* note 4; see also GOODALL ET AL., *supra* note 5.

<sup>159</sup> GOODALL ET AL., *supra* note 5, at 4-5. Humans are part of the great ape family and therefore the extension of rights to other great apes, chimpanzees, gorillas, and orangutans, makes sense.

<sup>160</sup> Taylor, *supra* note 8, at 41 (arguing that aligning The Great Ape Project with other animal rights would be a strategic error and that Apes are a worthy enough cause in and of themselves, and thus there need not be any larger consideration of other animals); see also WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3 (identifying that the utilitarianism, and ultimately all analytical philosophy, both of which have a foundation in liberal humanism, always allow for a great deal of animal, and sometimes human, suffering to continue unabated).

<sup>161</sup> Deckha, *supra* note 120, at 232 (arguing that The Great Ape Project’s “trait-based” argument, or proximity to humanness, ultimately just reinforces anthropocentrism (the liberal humanist legacy) of the current legal order).

<sup>162</sup> See generally WOLFE, *supra* note 17 (outlining how liberal humanism develops and affects our understanding of animals and by extension, how we understand ourselves).

The philosophies that flow out of the analytic tradition, including the utilitarianism that animates so much of the legal discourse around animal rights, largely serve to only reinforce liberal humanism and reduce “questions of justice to questions of entitlement.”<sup>163</sup> Posthumanism however seeks to relocate the nexus of ethical consideration away from the identification of human-like-ness—through traits and capabilities—to shared vulnerability, shared finitude.<sup>164</sup> Wolfe explained:

*[T]here are two kinds of finitude here [that human and non-human animals share], two kinds of passivity and vulnerability. The first type (physical vulnerability, embodiment, and eventually mortality) is paradoxically made unavailable, inappropriable, to us by the very thing that makes it available—namely, a second type of “passivity” or “not being able,” which is the finitude we experience in our subjection to a radically ahuman technicity or mechanicity of language, a technicity that has profound consequences, of course, for what we too hastily think of as “our” concepts, which are therefore in an important sense not “ours” at all.*<sup>165</sup>

Finitude, therefore, exists in both our shared mortality and proximity to death, but also in the limitation of the human’s relationship with itself.<sup>166</sup> In other words, man’s knowing of himself, which only happens through the technicity of language, is the second limitation—second vulnerability—and a form of finitude.<sup>167</sup> The rendering of man’s relationship to himself is unstable, so too then, is man’s relationship to all other beings rendered unstable.<sup>168</sup> Wolfe explained that the “most radical sense of Derrida’s posthumanism” is in the location of the “generative force of the *nonliving* at the origins of any living being, human *or* animal, who communicates (and this in the

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<sup>163</sup> WOLFE, WHAT IS POSTHUMANISM?, *supra* note 3, at 79.

<sup>164</sup> *Id.* at 80 (Wolfe latches on to Derrida’s conception of ethics as the ethical foundation posthumanism—the sharing of finitude among species).

<sup>165</sup> *Id.* at 88.

<sup>166</sup> *Id.* at 90.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

broadest sense) with another.<sup>169</sup> Wolfe continued: “For these reasons—because of the estrangement of the “the human” from the “auto-” that “we” give to ourselves—the relation[ship] between the human and the nonhuman animals is constantly opened anew and, as it were, permanently.”<sup>170</sup> Therefore, it is through this relocation of ethics, of obligations between species, to this passivity—to shared finitude—that posthumanism offers a radical departure from the humanist tradition.<sup>171</sup> The “estrangement” between species is mirrored by the “estrangement” through the technicity of language for man to himself<sup>172</sup> and thus, places man not in some vaulted category above all else, but rather in the same position as other species.<sup>173</sup>

The shift to shared finitude upends the legacy of liberal humanism and opens the possibility of new considerations.<sup>174</sup> It removes blanket categorizing of ethical obligations and instead insists on a heterogeneity of obligations.<sup>175</sup> This insistence removes the possibility of proximity arguments—of how human like another species is<sup>176</sup>—from the equation and instead insists on the heterogeneity of considerations that may be offered and the multiplicity of the solutions possible.<sup>177</sup> Moreover, this heterogeneous approach to ethical considerations necessarily would entail a move that never forecloses the possibilities of considerations for other species or other rights.<sup>178</sup>

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<sup>169</sup> *Id.* at 91.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See generally* CALARCO, *supra* note 152.

<sup>174</sup> *See generally* WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3.

<sup>175</sup> *Id.* at 96.

<sup>176</sup> *See generally* Taylor, *supra* note 8, at 41.

<sup>177</sup> *See generally* WOLFE, *WHAT IS POSTHUMANISM?*, *supra* note 3, at 95-97 (discussing how the local versus the universal could apply in Derrida).

<sup>178</sup> *See generally* Barnaby McLaughlin, *Life vs. Unlife: Interspecies Solidarity and Companionism in Contemporary American Literature* 24-53 (2015) (unpublished Ph.D. dissertation, University of Rhode Island) (on file with author) (discussing John Steinbeck’s reconfiguration from finitude to fortitude and the future possibilities of microbial ethics. Unlike Derrida, Steinbeck argues that what actually binds all life together is not our shared inevitable death, but rather, our biological drive to persist—that is to say, all life is defined by its desire to continue its species being and life in general. The shift from shared finitude to shared fortitude opens up a possibility for considering ethics on a

### 3. There Are No Models: Species Specific Legislation and a New Paradigm

What exactly a posthumanist application of the law to animals would look like is difficult to conceive because it has never been done—the closest thing to a model that exists is in Switzerland.<sup>179</sup> In Switzerland, beginning in 1999, several changes were made to its constitution to gradually allow for the inclusion of animals.<sup>180</sup> First, the constitution was rewritten to include protection, but not rights, of animals.<sup>181</sup> Next, in 2002, animals were acknowledged as explicitly not things in the Swiss Civil code.<sup>182</sup> And finally, in 2009, Switzerland further amended its constitution to recognize that animals are beings and not things.<sup>183</sup> However, even with the seemingly progressive nature of Switzerland's approach, a 2010 referendum that would have granted standing to domestic animals was defeated, suggesting that the status of animals under the law, even in a place like Switzerland, is always precarious.<sup>184</sup> Moreover, the 2010 referendum was only for companion species, so even if passed, animals with significantly higher cognitive abilities would still not have standing.<sup>185</sup>

Although the status of animals under the law in Switzerland is promising, there is still no indication that animals are being considered in their multiplicity, which a posthumanist approach would require.<sup>186</sup> Interestingly, the United States has previously recognized the multiplicity of species through federal legislation with both the Endangered Species Act<sup>187</sup> and the Humane Methods of Slaughter

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microbial level that fully accounts for the multiplicity of being that Haraway identifies).

<sup>179</sup> See generally PATRICIA MACCORMACK, *THE ANIMAL CATALYST: TOWARDS AHUMAN THEORY* 33 (2014) (discussing the modifications to Switzerland's constitution in regard to animals).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (MacCormack points out that a similar provision in the Czech Civil Code, which explicitly defines animals as not objects, is similarly shallow in its application).

<sup>186</sup> *Id.*

<sup>187</sup> Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2013).

Act.<sup>188</sup> The Endangered Species Act allows for the identification of vulnerable species and the enactment of protective measures for those identified species.<sup>189</sup> Similarly, the Humane Methods of Slaughter Act recognizes the difference between species because it does not cover chickens, which, by volume, are the most slaughtered animals in the United States.<sup>190</sup> Both of these acts promote animal welfare and recognize that different animal species require different forms of protection.<sup>191</sup> Unfortunately, because of the legacy of liberal humanism, the Endangered Species Act falls short because, although it recognizes the difference between animal species by being based on categories of species vulnerability, it does not actually recognize species multiplicity.<sup>192</sup> The same is true for the Humane Methods of Slaughter Act, which again recognizes the difference between species implicitly by carving out protections for certain species, but fails to account for a multiplicity of ethical obligations based on the multiplicity of species.<sup>193</sup>

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<sup>188</sup> Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1907 (2012).

<sup>189</sup> *See generally* Endangered Species Act § 1533.

<sup>190</sup> *See generally* JONATHAN SAFRAN FOER, EATING ANIMALS 133 (2009) (discussing the fact that the USDA's interpretation of the Humane Methods of Slaughter Act as not applying to chickens and therefore, the slaughter of chickens is particularly brutal. *Id.* "The conveyer systems drags the birds through an electrified water bath. This most likely paralyzes them but doesn't render them insensible. . . . the voltage is kept low—about one-tenth the level necessary to render the animals unconscious. After it has travelled through the bath, a paralyzed bird's eyes might still move. Sometimes the birds will have enough control of their bodies to slowly open their beaks, as though attempting to scream. The next stop on the line for the immobile-but-conscious bird will be an automated throat slitter." *Id.*).

<sup>191</sup> *See generally* Endangered Species Act §§ 1531-1544 ; *see also* Humane Methods of Slaughter Act §§ 1901-1907.

<sup>192</sup> *See* Endangered Species Act § 1533.

<sup>193</sup> *See generally* Humane Methods of Slaughter Act §§ 1901-1907 (which, as mentioned, does not apply to the most commonly slaughtered animal, chickens); *see also* FOER, *supra* note 190 (in addition to the inhumane ways that chickens are currently slaughtered and their general lack of protection under the law, about 180 million chickens are improperly slaughtered, meaning that the arteries are missed when their throats are cut. Moreover, about four million chickens are alive and conscious when they are plunged into the scalding tanks).

#### IV. CONCLUSION

The current state of animal welfare and animal rights before the law is rightfully being challenged on numerous fronts—with the Nonhuman Rights Project and the Great Ape Project being the most prominent examples. Both the Nonhuman Rights Project and the Great Ape Project have sought to expand the legal rights of non-human animals by focusing on great apes, though they have adopted different approaches. The Nonhuman Rights Project pursues ape rights through court challenges, while the Great Ape Project explicitly avoids the courts and works on passing legislation. Ultimately, the Great Ape Project has been successful in some countries, primarily Spain and New Zealand, whereas the Nonhuman Rights Project has largely been unsuccessful in the United States. The discrepancy in outcomes between the two projects demonstrates the value of legislative approaches over court challenges. Moreover, if legislation fails, as opposed to court challenges, no precedent is set; therefore, the Great Ape Project's strategy is preferable. However, both the Great Ape Project and the Nonhuman Rights Project articulate arguments steeped in liberal humanism—these arguments might succeed in getting nominal rights for apes, but also might forever foreclose the possibility of “lower” species from getting access to any sort of legal rights. Therefore, an alternative to the liberal humanist tradition must form the basis for challenges to the legal order.

Posthumanism offers the framework and vocabulary to move beyond the liberal humanist tradition when considering rights. Posthumanism's insistence on the anthropological limit prevents the possibility of permitting all forms of human atrocities by insisting on a division between the human and all other species. However, posthumanism multiplies the limits and insists on absolute limits between each species and among each species. This re-articulation disrupts the humanist grasp on animal rights discourse by suggesting that anything less than considering the multiplicity of species—by considering heterogeneity—is a failure. In addition, by considering the individual species in its uniqueness, the slippery slope argument is rendered invalid. First, the relocation of the nexus of ethical obligations from human-likeness to shared finitude negates the possibility of liberal humanist articulations of rights. All that can die, that grapples with mortality, must be considered. This radical articulation unsettles the liberal humanist discourse because it does not matter how human-like your species is—the species uniqueness must

be given consideration. Therefore, there is the possibility that a highly intelligent creature, such as an octopus, may gain access to legal consideration that the liberal humanist tradition would preclude. Ultimately, the lack of consideration for animals stems from the liberal humanist origin of common law, and therefore, any meaningful change must come not from working within the liberal humanist framework, but rather from a radical challenge to that framework. Posthumanism offers both the theoretical foundation and the vocabulary to mount that challenge. In addition, because of the radical nature of posthumanism, the Great Ape Project's legislative approach is the only real avenue for change; court challenges are simply too set in tradition to be amenable to opening the possibilities that heterogenic ethical considerations require.

Ideally, the best approach to take would be to target state constitutions to pursue such a radical reconfiguration of how animals are viewed under the law. However, Switzerland's model of recognizing animals in its constitution as "beings" and not "things" unfortunately also shows the limitation of a constitutional approach. The constitutional recognition of all animals as beings did not, however, automatically change the relationship between humans and animals, and therefore the practical effect of "being" status is little more than a rhetorical nicety. Therefore, it is essential that any legislative or constitutional approaches be firmly rooted in posthumanist discourse to avoid being more than rhetorical. Legislation must recognize the multiplicity of species and offer various relationships between those species and the law. The Endangered Species Act and the Humane Methods of Slaughter Act are in a sense legal recognition of Derrida's *animot*, but they both collapse under interrogation. The starting point must be that all animals are beings, but that all beings are not the same animal.