

Animals as Subjects

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Considering the way this essay competition has been framed, it would only make sense to take the original essay that won the original competition, back in 1795, as our point of departure. This exercise will also be interesting to do from our perspective, since with all the advancement in theory from that moment until today, we can make an exercise of categorization of Thomas Clarkson's opinions. The essay will build upon his approach, which we will define as one of 'equal capabilities', one focused around a subject that is constructed as a European, and as a bare minimum, Christian, male. Upon this theory we will intervene with the perspective of critical studies. Feminism, critical race theory, postcolonialism, disability studies, they all have attacked the assumptions that are made in an 'equal capabilities based on a liberal subject' approach. The end result of this journey is critical animal studies. This wave contests the barriers that the human has built around itself quite in a unique manner. It goes beyond the exercise of other critical studies, since the lines studied are not painted within the human species. Here, we tackle the understanding of having to be *equal* to have a recognition of protection. This essay defends that the *subject* exists outside of social contracts, citizenship theory, biopower, Kant's rationalism. The subject precedes all these arrangements, the subject exists before the constituent power is even formed. The subject precedes the *anthropomorfication* of the world that humans carry out in their theory. And as such, the subject should be respected, primarily at the state (constitutional) level which is where the subject is first legally recognized.

Thomas Clarkson (1760-1846) was 'one of the first effective publicists of the English movement against the slave trade and against slavery in the colonies'.¹ His approach to why the slave trade is wrong is one based on natural law. Clarkson's natural law is based upon Biblical, Greek and Roman sources for the most part, which obviously makes the worldview very Eurocentric. The natural law that he extracts from these sources would

¹ Entry for Thomas Clarkson, Britannica online. Accessible at: <https://www.britannica.com/biography/Thomas-Clarkson>. Last accessed 06.03.2021.

determine that those that are captured as slaves are as human as any other one, as human as an Englishman, and as such they should not be subject to servitude. Thus to the question ‘is it lawful to enslave the unconsenting?’, Clarkson can answer *no*. This essay on the other hand takes a positivist approach along the lines of H.L.A. Hart² and defends that technically, the answer could always be *yes*, if the system so provides. That being said, the normative aspects of the measure must be at the center, since the question remains ‘*should* it be lawful to enslave the unconsenting?’. To that question this essay would answer *no*.

Some of the reasons provided by Clarkson in defense of the abolition of slavery point directly towards an embrace of what now we define as the embodied vulnerability of humans, he states for example: ‘[...] subjects, though under the dominion, are not the *property*, of the prince. They cannot be considered as his *possessions*. Their *natures* are both the same; they are both born in the same manner, are subject to the same disorders; must apply to the same remedies for a cure; are equal partakers in the grave’.³ The elements of *life* highlighted are not the prowess of their enterprises nor the reach of their intelligence, instead Clarkson refers to birth, sickness, and death. Along these lines he also quotes Seneca: ‘[I]et us consider that he, whom we call our slave, is born in the same manner as ourselves, that enjoys the same sky, with its heavenly luminaries; that he breathes, that he lives, in the same manner as ourselves, and, in the same manner, that he expires’.⁴

But alongside embodied vulnerability reflections are more liberal, rational examples. One of his main arguments towards the protection of slaves is that there have been *geniuses* which were born as slaves. These examples of genius points towards their mental abilities, which stand equal to those of other humans, that they are ‘by no means of an inferior order’.⁵ That *inferior* order is a perilous place, for Clarkson sees no obstacles to dominating

² H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, *Harvard Law Review*, Vol. 71, No. 4, (1958): pp.593-629.

³ Thomas Clarkson, *An Essay on the Slavery and Commerce of the Human Species*, (1786). Edition from ‘The Online Library of Liberty’, available at: <https://oll.libertyfund.org/title/clarkson-an-essay-on-the-slavery-and-commerce-of-the-human-species#preview>: p.41.

⁴ *Ibid*, p.24.

⁵ Clarkson, *supra* at n. 3: p.24.

what is inferior, and indeed it is there, in that inferior plane, that he sees animals. We know because Clarkson does in fact tackle the human-animal divide in his essay, which is ideal for our purposes here. He states:

“But some person, perhaps, will make an objection to one of the former arguments. ‘If men, from *superiority* of their nature, cannot be considered, like lands, goods, or houses, among possessions, so neither can cattle: for being endued with life, motion, and sensibility, they are evidently *superior* to these’. But this objection will receive its answer from those observations which have already been made; and will discover the true reason, why cattle are justly estimated as property. For first, the right to empire over brutes, is *natural*, and not *adventitious*, like the right to empire over men. There are, secondly, many and evident signs of the *inferiority* of their nature; and thirdly, their liberty can be bought and sold, because, being void of reason, they cannot be *accountable* for their actions.”⁶

From this statement we can draw two conclusions, one is that the ultimate boundary is indeed reason. Without reason there cannot be accountability for actions, which points towards a reciprocal model of moral status, with rights existing necessarily along duties; without reason we can assume *inferiority* becomes ‘evident’; and without reason we can assume one would be defined as a ‘brute’. The second conclusion is that the embodied vulnerability arguments he forwards for slaves only apply *after* reason has been established. For your *animal* condition to be regarded as valuable your *human* condition has to be established first. This is precisely the main object of attack from second wave animal ethics, which is from where we are intervening in Clarkson’s essay.⁷

The arguments of Thomas Clarkson resemble the way in which some strands of animal advocacy have conceptualized the claim for protection of non-humans. The way in which they are similar is that they are based on an in/out test logic, where they are characterized by ‘the exclusionary nature [...] that relies on sameness logic to articulate claims of animal

⁶ *Ibid*, p.40.

⁷ Second wave animal ethics as proposed by Iyan Ofori opposes first-wave ethics’ on four key characteristics: First on its ‘focus on particularly intelligent or able species’, second on its aim of enlarging ‘the circle of moral concern but saying nothing about how to treat those outside the circle’, third on the strong lineage within liberalism and fourthly on its exercise of ‘setting out universal, non-contextualized systems of rules’. Iyan Ofori, ‘Second Wave Animal Ethics and (Global) Animal Law: A View from the Margins’, *Journal of Human Rights and the Environment*, Vol. 11, No. 2, (2020): p.270.

justice’⁸. Steve Wise can be considered a crucial figure in the movement, currently being involved in one of the most influential non-profit organizations fighting for legal recognition of (some) animals. Wise’s approach is based on what he terms ‘practical autonomy’, which he deems a subject to have when 1) they can desire, 2) they can intentionally try to fulfill their desire, and 3) possesses a sense of self sufficiency to allow them to understand, even dimly, that she is a being who wants something and is trying to get it.⁹ This, while it can be considered a step forward, is locked within the same line-drawing exclusionary matrix that Clarkson used 300 years ago (which was based also on a 3-step-test including the right of empire over the brute, inferiority, and lack of reason/accountability).

Clarkson and Wise share a particular worldview, one where the worthy entity is the one that has self-sufficiency (to understand, or to act). This is connected to how Clarkson sees the state of nature—as a place of individual freedom, one of prepolitical arrangements. Clarkson’s view is paradigmatic as well as problematic, because it is that prepolitical independent individual upon which the whole system of thought is built. Clarkson’s independent individual is free, but he is also smart (a genius, preferably) and industrious, and that is why he is worthy. The first reason for government to be established is for Clarkson precisely to ‘at once afford a security to the acquisitions of the industrious’.¹⁰ That industrious subject carried *very well* into capitalism. And here we are, in a system built around a marketized citizenship¹¹, around slow death¹², around a necropolitics deployed along racial lines¹³. Around a human rights system that calls itself to universality, being based in an Enlightened, European, white, rational, heterosexual, Christian, cisgender, able, disembodied—but thin—, independent, industrious, (powerful, violent), male. There

⁸ Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, (Toronto: University of Toronto Press, 2021): p.143.

⁹ Steven M. Wise, ‘Animal Rights, One Step at a Time’, in *Animal Rights: Current Debates and New Directions*, Cass R. Sunstein and Martha C. Nussbaum (eds.), (Oxford: Oxford University Press, 2004): p.32.

¹⁰ Clarkson, *supra* at n. 3: p.35.

¹¹ Margaret Somers, *Genealogies of Citizenship*, (Cambridge: Cambridge University Press, 2008): p.71.

¹² Lauren Berlant, ‘Slow Death (Sovereignty, Obesity, Lateral Agency)’, *Critical Inquiry*, Vol. 33, (2007): pp. 754-780.

¹³ Achille Mbembe, ‘Necropolitics’, *Public Culture*, Vol. 15, No. 1, (2003): pp.11-40.

is a fundamental need to move past him.¹⁴ Ultimately the focus should not be how able to act (be it in self-interest or politically) the individual is but the simple fact that there is an individual in the first place, and that in the case of both human and non-human animals, 'it is as individuals that [they] experience the consequences of oppression'.¹⁵ Subjectivity is not tied to how you live, to what you do with your subjectivity, to what you do with your sovereignty, but simply to *being* alive.

And this is not a statement that has appeared only with critical studies or from so-called positions *from the margins*. The logic of these feelings, as we have already seen, is already present in Clarkson, in his embodied vulnerability stance (*only* after already having established the rationality of the subject): 'their *natures* are both the same; they are both born in the same manner, are subject to the same disorders; must apply to the same remedies for a cure; are equal partakers in the grave'. James Stanescu attacks the fact that we conduct an analysis to ensure humanness first and that only once that boundary is drawn we can focus on how we are all affected by the same sicknesses. He states 'we invest a vast amount of intellectual work in trying to figure out what separates and individuates the human species, rather than in what makes us part of a commonality with other lives. This separation produces a valorization of those traits that *we believe* are uniquely human—rationality, production, what have you—rather than valorizing those traits we obviously share with other lives—we are finite, interdependent, embodied, capable of pleasure and pain, vulnerable, born to, and one day will, die'.¹⁶ This he follows by asserting that 'the human is not a pregiven subject position, it is not a category that exists outside political contestations and ontological battles'.¹⁷ Indeed, as we have mentioned before, the *human* subject is not pregiven, but the *embodied vulnerable subject* exists before any arrangement. For instance, when Cary Wolfe intervenes in Judith Butler's theory of precarious life he does so to point out that Butler's effort to locate ethical consideration

¹⁴ Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side', *Sydney Law Review*, Vol. 28, No. 665, (2006).

¹⁵ Carol Adams, *Neither Man nor Beast: Feminism and the Defense of Animals*, (London: Bloomsbury, 2018): p. 34.

¹⁶ James Stanescu, 'Species Trouble: Judith Butler, Mourning, and Precarious Lives of Animals', *Hypatia: A Journal of Feminist Philosophy*, Vol. 27, No. 3, (2012): p.569-570.

¹⁷ *Ibid*, p.571.

based on embodied vulnerability ‘runs aground precisely on the question of non-human beings’.¹⁸ He follows ‘after all why should the dangers and vulnerabilities that accrue from the fact of embodiment be limited to a common *human* vulnerability? Why shouldn’t *non-human* lives count as grievable lives?’¹⁹ One of the stumbling blocks on Butler’s approach is that her ‘notion of subjectivity’ is ‘too committed to the primacy of *agency* for ethical standing’, given that she puts emphasis on members of the community ‘striving for recognition’.²⁰ But as Wolfe points out, why focus on moral agents when that means leaving out a whole set of *patient* agents (that cannot strive for recognition)?²¹ A similar argument along these lines has been forwarded by Christine Korsgaard, who has set ‘Kant against Kant’, proposing moral standing for animals as moral patients using Kantian arguments.²² But these remain largely theoretical considerations. It is once we reach the law, that theory becomes reality, citizens are shaped, power distributed, and controlled, it is in law that subjects become written down.

Within the current anthropocentric paradigm, subjectivity is established in law through concepts such as citizenship and legal personhood. This list is not exhaustive by any means, since law has no problem in creating new categories in order to form non-normal subjects, for example the ‘Indian’ status in the United States and Canada, where such status is constituted in opposition ‘to the ideal, proper citizen-subject, the self-possessive individual’.²³ It is against this legal instrumentalization that second wave animal ethics stands, proposing notions such as ‘more-than-human legalities’²⁴, ‘legal beingness’²⁵, ‘creatureliness’²⁶ and ultimately, state (constitutional) subjectivity.

¹⁸ Cary Wolfe, ‘Before the Law: Animal in a Biopolitical Context’, *Law, Culture and the Humanities*, Vol. 6, No.1, (2010): p.14.

¹⁹ *Ibid.*

²⁰ *Ibid*, p.14-15.

²¹ *Ibid*, p.15.

²² Juan Pablo Mañalich Raffo, ‘Animalidad y Subjetividad. Los Animales (No Humanos) como Sujetos-de-Derecho’, *Revista de Derecho (Valdivia)*, Vol. 31, No.2, (2018): p.330.

²³ Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, (Durham: Duke University Press, 2018): p.151.

²⁴ Eva Bernet Kempers, ‘Animal Dignity and the Law: Potential, Problems and Possible Implications’, *Liverpool Law Review*, Vol. 41, (2020): pp.173-199.

²⁵ Deckha, *supra* at n.8.

²⁶ Anat Pick, ‘Turning to Animals Between Love and Law’, *New Formations*, Vol. 76, (2012): pp.68-85.

In the current Westphalian sovereignty set-up, legal systems are built in the framework of individual nations through constitutional texts that establish the state, and represent the voice of a people. While not opposing arguments that seek, in the context of an interdependent globalized world, an international ‘global animal law’ approach to animal protection²⁷, the reality remains that the subject is formed at the national—constitutional—level. Additionally, it is important to point out that positions forwarding animal legal personhood normally are situated below the level of constitutional law. Recognizing personhood for non-human is not something that necessarily affects the political structure of the state, in a similar manner than the acceptance of companies as persons is a sub-constitutional affair. In essence, these are not considered to be subjects of the state. But this has to be seen as limiting, as it does not properly address the position that a *life* should have within an organized relational (political) community. It is here that the concept of animals as constitutional subjects presented by Jessica Eisen breaks doors and lets in a gust of fresh air into the way that we have conceptualized the way we relate to each other.

In recognizing the existing human-bound limitations of constitutional law, Eisen defends that ‘constitutional animal protection requires an account of whether and how constitutionalism might embrace the interests of subjects who will not and cannot speak in the language of law with their own voices’.²⁸ Beyond considerations of the problems relating to the representation of those that are not able to speak for themselves, the fundamentally important notion that Eisen introduces is that of the constitutional subject, and the recognition of animals as constitutional subjects. It is interesting that the subject for Eisen, while *constitutional* in a way *precedes* the constitution, since animals are identified as being constitutional subjects, even though they are *technically* not. This is an approach that stems for a worldview that sees entities as existing vulnerably before any social contract is entered into, before any citizen status has been formalized—before any excluding category can be introduced in the community. There is no need to draw lines

²⁷ Anne Peters, ‘Global Animal Law: What It Is and Why We Need It’, *Transnational Environmental Law*, Vol. 5, No. 1, (2016): pp.9-23.

²⁸ Jessica Eisen, ‘Animals in the Constitutional State’, *International Journal of Constitutional Law*, Vol. 15, Issue 4, (2017): p.910.

because there is no ‘normal’ to be formed, there is no step into flesh²⁹, no step into the construction of the white liberal subject. *Life*, is what comes first. And life is precisely what the state should protect.³⁰ Eisen states ‘I have suggested that [the] principle might be described as a constitutional imperative to protect and support the polity’s most vulnerable subjects, including when those subjects are incapable of constitutional self-assertion’.³¹ We can easily assume that those most vulnerable are those unable to voice or express their consent, which leads me to defend that it *should not* be lawful to enslave the unconsenting.

²⁹ Zakiyyah Iman Jackson, ‘Suspended Munition: Mereology, Morphology, and the Mammary Biopolitics of Transmission in Simone Leigh’s *Trophallaxis*’, *e-flux journal*, Vol. 105, (2019): p.4.

³⁰ I am aware of the intertwining of these arguments with bioethical issues such as abortion. I am fully aware of them, sadly there is no space in this essay to address them carefully.

³¹ Eisen, *supra* at n.28: p.942.

Bibliography

- Adams, Carol. *Neither Man nor Beast: Feminism and the Defense of Animals*. (London: Bloomsbury, 2018).
- Berlant, Lauren. 'Slow Death (Sovereignty, Obesity, Lateral Agency)'. *Critical Inquiry*, Vol. 33, (2007): pp. 754-780.
- Bernet Kempers, Eva. 'Animal Dignity and the Law: Potential, Problems and Possible Implications'. *Liverpool Law Review*, Vol. 41, (2020): pp.173-199.
- Bhandar, Brenna. *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*. (Durham: Duke University Press, 2018).
- Deckha, Maneesha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, (Toronto: University of Toronto Press, 2021).
- Clarkson, Thomas. *An Essay on the Slavery and Commerce of the Human Species*, (1786). Edition from 'The Online Library of Liberty', available at: <https://oll.libertyfund.org/title/clarkson-an-essay-on-the-slavery-and-commerce-of-the-human-species#preview>.
- Eisen, Jessica, 'Animals in the Constitutional State', *International Journal of Constitutional Law*, Vol. 15, Issue 4, (2017): p.909-953.
- Somers, Margaret. *Genealogies of Citizenship*. (Cambridge: Cambridge University Press, 2008).
- Hart, H. L. A. 'Positivism and the Separation of Law and Morals'. *Harvard Law Review*, Vol. 71, No. 4, (1958): pp.593-629.
- Iman Jackson, Zakiyyah. 'Suspended Munition: Mereology, Morphology, and the Mammary Biopolitics of Transmission in Simone Leigh's *Trophallaxis*'. *e-flux journal*, Vol. 105, (2019).
- Kapur, Ratna. 'Human Rights in the 21st Century: Take a Walk on the Dark Side', *Sydney Law Review*, Vol. 28, No. 665, (2006): pp. 665-687.
- Mañalich Raffo, Juan Pablo. 'Animalidad y Subjetividad. Los Animales (No Humanos) como Sujetos-de-Derecho'. *Revista de Derecho (Valdivia)*, Vol. 31, No.2, (2018): p.321-337.
- Mbembe, Achille. 'Necropolitics'. *Public Culture*, Vol. 15, No. 1, (2003): pp.11-40.
- Offor, Iyan. 'Second Wave Animal Ethics and (Global) Animal Law: A View from the Margins'. *Journal of Human Rights and the Environment*, Vol. 11, No. 2, (2020): p. 268-296.
- Pick, Anat. 'Turning to Animals Between Love and Law'. *New Formations*, Vol. 76, (2012): pp.68-85.
- Peters, Anne. 'Global Animal Law: What It Is and Why We Need It'. *Transnational Environmental Law*, Vol. 5, No. 1, (2016): pp.9-23.
- Stanescu, James. 'Species Trouble: Judith Butler, Mourning, and Precarious Lives of Animals'. *Hypatia: A Journal of Feminist Philosophy*, Vol. 27, No. 3, (2012): p.567-582.
- Wise, Steven M. 'Animal Rights, One Step at a Time'. *Animal Rights: Current Debates and New Directions*. Cass R. Sunstein and Martha C. Nussbaum (eds.). (Oxford: Oxford University Press, 2004): p.19-50.
- Wolfe, Cary. 'Before the Law: Animal in a Biopolitical Context'. *Law, Culture and the Humanities*, Vol. 6, No.1, (2010): pp.8-23.