

# BEING HUMAN: BESTIALITY, ANTHROPOPHAGY, AND LAW

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*Every creature that lives and moves shall be food for you; I give you them all, as once I gave you all green plants. But you must not eat the flesh with the life, which is the blood, still in it. And further, for your life-blood I will demand satisfaction; from every animal I will require it, and from a man also I will require satisfaction for the death of his fellow man.*

— Genesis 9: 3-5

*A man who has sexual intercourse with any beast shall be put to death, and you shall kill the beast. If a woman approaches any animal to have intercourse with it, you shall kill both woman and beast. They shall be put to death; their blood shall be on their own heads.*

— Leviticus 20: 15-16

*If in spite of this you do not listen to me and still defy me, I will defy you in anger, and I myself will punish you seven times over for your sins. Instead of meat you shall eat your sons and your daughters.*

— Leviticus 26: 27-30

*The third crimen carnis contra naturam occurs when the object of the desire is in fact of the opposite sex but is not human. Such is sodomy, or intercourse with animals. This, too, is contrary to the ends of humanity and against our natural instinct. It degrades mankind below the level of animals, for no animal turns in this way from its own species... These vices make us ashamed that we are human beings and, therefore, capable of them, for an animal is incapable of all such crimina carnis contra naturam.*

— Immanuel Kant<sup>1</sup>

*The animal is a word, it is an appellation that men have instituted, a name they have given themselves the right and the authority to give to another living creature.*

— Jacques Derrida<sup>2</sup>

It is a fundamental observation that Lacanian ethics is grounded in a theory of the subject as the site of a dialectic between the logic of the signifier and the symptom. Insofar as the subject's particularity (its *jouissance*) and its representability (speech and desire) derive from its positioning with respect to the law, there is an ethics to our conception of this relation between subject and law. By ethics, I mean quite simply a human orientation toward the world, a vigilant reflection of our being in the world and our inescapable engagement with alterity. Such an ethics requires that we go beyond formulaic pronouncements (about never ceding one's desire, and so on) to interrogate the law itself in its function as constitutive of the subject. In other words, how does the law produce human difference? How necessary is such a difference to the functioning of the law? How does the law institute its moral and juridical authority as *identical* to its capacity to produce and secure human difference? Further, how does the law regulate our very conception of non-human alterity, specifically species difference? A psychoanalytic reading of the law positions us at the edge of moral and legal discourse, enabling us to glimpse that which appears at the ontological limit of the human. I propose here to develop a new protocol of reading, one that requires that we think *with* the animal — the animal as and at the limit of human discourses — in order to reinvigorate our engagement with alterity.

With psychoanalysis one can explore the origin of the notion of humanness and the concomitant absolute alterity of non-human creatures. It can also help us clarify the legal transformation of the moral law governing the boundary between human and animal. In its exploration of the moral law, psychoanalysis differs from anthropology and philosophy, two disciplines thought to have privileged access to such law, on at least one significant point: it dwells on prohibition and transgression in a completely non-functionalist way, that is, not as factors of social organization, or the proper or improper workings of reason, but as *symptoms* of what constitutes us as human subjects. Psychoanalysis can no more defend or condemn the moral law than it can offer ethical or sociological prescriptions to cure the fault at the core of human subjectivation. As a discourse on the moral law, psychoanalysis can provide an understanding of the exclusions upon which human difference is founded. Such an understanding would disable our virtually automatic anthropocentrism, the socio-legal celebration of and claims for human sovereignty and transcendence.

Let me clarify at the outset that in approaching the question of the animal through the moral law, I do not mean to harness psychoanalysis for a variant mode of what is now called, within cultural studies, eco-criticism, or to advance the cause of animal rights in a socio-cultural or juridical sense. I believe that the question of the animal is crucial to psychoanalysis because it is at the heart of subject constitution, sexuality, and the law — both moral and juridical. An examination of the exclusions upon which the human is founded may throw light on our contemporary cultural, ethical, and juridical attitudes towards animals. This project, however,

is not about the animal *per se*, but about the way in which the law produces its subject as human. While I am interested in how our understanding of the exclusions upon which humanness is founded may rejuvenate our thinking about responsibility to the other and of its autonomy and singularity, my primary concern is the way in which the authority of the law, as a discourse of the constitution of the subject, is predicated on making the animal disappear even as it appears. To think *with* the animal requires discerning the animal as an *iterative device* deployed by the law for self-authorization. This requires that we do not utilize Lacan's theories of subject constitution in a dogmatic way. In fact, this inquiry proceeds from my investment in the profoundly anti-humanist character of Lacanian ethics, whose radical critical edge prevents it from becoming an orthodoxy. No doubt if one were to approach the question of the animal limit by examining Lacan's presuppositions and attitudes about the animal, as Jacques Derrida does, one may be disappointed. As Derrida argues, Lacan's insistent affirmation of the binary human versus animal falls within the purview of received humanist wisdom about animal essences and human transcendence. In what follows, I concur with Derrida's critique of Lacan, but go on to show that if we are interested in the production of the human limit rather than in the animal, Lacan's theories are indispensable.

According to Derrida, Lacan reproduces conventional assumptions about species difference, which are stated as dogmatic truths necessary for the constitution of the human subject. Derrida follows Lacan in *Écrits* closely, tracking his remarks on the animal and species difference to show how his unexamined notions about animals serve to contradict and subvert crucial aspects of his theories. (Derrida coins the term *animot* — a pun on the plural *animaux* and *le mot* for “word” — to point to our way of referring to all animals, the rest of creation, as the signifier that subtends the binary logic.) Because of the specular nature of animal sexuality in Lacan's work on the mirror stage, the animal is confined to the imaginary and distinguished routinely from the human as lacking access to the symbolic — language, law, desire, agency, and the unconscious. According to Derrida, Lacan relies too heavily on a Cartesian economy of the subject whose speech is distinguished as human in that it is a response to the other and not an automatic reaction or a coded fixed correlation (distinctive of the animal-machine) between signs and reality. Derrida writes: “My hesitation concerns only the purity, the rigor, and the indivisibility of the frontier that separates — already with respect to ‘us humans’ — reaction from response; and as a consequence, especially, the purity, rigor, and indivisibility of the concept of responsibility that ensues.”<sup>3</sup> Derrida is skeptical of Lacan's pronouncements regarding response and reaction because such a notion of human agency discounts the impact of the unconscious on human freedom, on the automaticity of responses given the logic of repetition endemic to the unconscious, and the location of ethics and the concept of the human itself in the distinction between reaction and response.

For Derrida, Lacan's discourse on the animal, dependant as it is on Enlightenment humanist certainties regarding the so-called human response, is a form of disavowal. This is most evident in Lacan's discussion of negation and its implication in the logic of pretense and lying. Briefly, Lacan suggests that the form of negation involved in double deception, as in the Jewish joke recounted by Freud ("Why do you tell me that you are going to X in order to have me believe you are going to Y whereas you are indeed going to X?"), is precisely what the animal cannot do. The animal can deceive the hunter or lure its sexual partner; it can make false tracks, but it cannot erase its own tracks. It cannot, in other words, make true tracks appear false. Such an erasure, according to Lacan, would entail the animal becoming a subject of the signifier, which is essentially impossible. Therefore, the animal's existence in the imaginary, where it merely reacts to "vital situations,"<sup>4</sup> also means that it cannot be conditioned by its own word — as in vouching for something or lying — which more or less expels it from time and mortality. The implication here is that the animal lacks the lack that constitutes the human subject. It is a wholly sufficient entity in that it lives in a state that is anterior to good and evil. It is neither a subject of language, nor subjected to language in the manner that the human necessarily must be because of the biological fact of his or her premature birth. Thus, as Derrida points out, the human subject in Lacan is constituted by its lack, which is what distinguishes human from animal.

Another moment of disavowal that Derrida discerns in Lacan pertains to the radical alterity of the Other, which cannot be a fellow subject even if the latter speaks in the place of the Other, the Other as that which goes beyond specular duality. And here Derrida is compelled to ask:

Must not this place of the Other be ahuman? If this is indeed the case, then the ahuman or at least the figure of some — in a word — *divinanimality*, even if it were to be felt through the human, would be the quasi-transcendental referent, the excluded, foreclosed, disavowed, tamed, and sacrificed foundation of what it founds, namely, the symbolic order, the human order, law, and justice. Is not this necessity performed secretly in Levinas and in Lacan...? That is one of the reasons why it is so difficult to utter a discourse of mastery or of transcendence with regard to the animal and to simultaneously claim to do it in the name of God, in the name of the name of the Father or in the name of the Law. Must not one recognize Father, Law, Animal, and so on, as being, in the final analysis, the same thing — or, rather, indissociable figures of the same Thing?<sup>5</sup>

Derrida is no doubt right in identifying the Other as the place of the ahuman. Indeed, Lacan speaks of the Other as a locus where *it* speaks. As Derrida acknowledges, for Lacan there is no Other of the Other. Lacan suggests in *Encore*, however, that jouissance, insofar as it is in excess of the Other, serves this function.<sup>6</sup> This is the productive moment in Lacan: the Other as ahuman, the jouissance of the Other, and the law that subjects us all — AnimAll — to the moral order. While I sympathize with his project of interrogating the absolute binary between human and animal, Derrida fails to acknowledge the multiplicity — the fungibility even — of the

psychoanalytic subject. “Divinanimality” is not disavowed in Lacan; it is, rather, at the heart of Lacan’s notion of the moral law.

## ANIMOT/ANIMALL

In the Names-of-the-Father seminar, Lacan takes up the institution and origin of the moral law and the paternal metaphor. He focuses on two scenarios: the Freudian myth of the father of the primal horde and the Biblical story of Abraham and Isaac. In both scenarios, Lacan introduces the figure of the animal. The animal appears first in the context of his discussion of Freud’s *Totem and Taboo*:

If the Other is as I say, the place where “it” — *ça* — speaks, it can pose only one kind of problem, that of the subject prior to the question. And Freud intuited this admirably...Mythically, the father — and that is what *mythically* means — can only be an animal.

The primordial father is the father from before the incest taboo, before the appearance of law, of the structures of marriage and kinship, in a word, of culture. The father is the head of that horde whose satisfaction, in accordance with the animal myth, knows no bounds. That Freud should call him a *totem* takes on its full meaning in the light of the progress brought to the question by the structuralist critique of Lévi-Strauss, which, as you know, brings into relief the classificatory essence of the totem.<sup>7</sup>

For Lacan, though the story of the primal horde explains the origin of the moral law and the structures of kinship, it does not delineate the function of “the paternal metaphor”: “We thus see that as a second term what is needed at the level of the father is that function whose definition I believe I developed further in one of my seminars than had ever been done until now — the function of the proper name.”<sup>8</sup> The second scenario Lacan takes up is the sacrifice of Isaac as depicted by Caravaggio’s famous painting, which offers a supplementary reading of the proper name. There is a relation between these two scenarios, with the second functioning as the supplement to the first.

In the primal horde story, the father, who is an animal, is killed. He is thereupon symbolized by an (other) animal, the totem, that names the tribe. The tribe derives its name from the animal ancestor that has been sacrificed for the sake of the law. According to Freud and Lacan, the law, derived from the horrific murder of the father, is the moral prohibition against incest, or the unrestricted and unregulated sexuality of the horde. What is usually overlooked is that this fundamental law of social organization is itself supported by a complex of other taboos that are ontologically prior. Let us recall Freud:

The most primitive kind of organization that we actually come across — and one that is in force to this day in certain tribes — consists of bands of males; these bands are composed of members with equal

rights and are subject to the restrictions of the totemic system, including inheritance through the mother. Can this form of organization have developed out of the other one? and if so along what lines?

If we call the celebration of the totem meal to our help, we shall be able to find an answer. One day the brothers who had been driven out came together, killed and devoured their father and so made an end of the patriarchal horde. United, they had the courage to do and succeeded in doing what would have been impossible for them individually. (Some cultural advance, perhaps, command over some new weapon, had given them a sense of superior strength.) Cannibal savages as they were, it goes without saying that they devoured their victim as well as killing him. The violent primal father had doubtless been the feared and envied model of each one of the company of brothers: and in the act of devouring him they accomplished their identification with him, and each one of them acquired a portion of his strength. The totem meal, which is perhaps mankind's earliest festival, would thus be a repetition and a commemoration of this memorable and criminal deed, which was the beginning of so many things — of social organization, of moral restrictions and of religion.<sup>9</sup>

Freud's emphasis here is on the incorporation of the father by the brothers — anthropophagy is primary. This act, according to Freud, is followed by remorse:

A sense of guilt made its appearance, which in this instance coincided with the remorse felt by the whole group. The dead father became stronger than the living one had been — for events took the course we so often see them follow in human affairs to this day...They revoked their deed by forbidding the killing of the totem, the substitute for their father; and they renounced its fruits by resigning their claim to the women who had now been set free. They thus created out of their filial sense of guilt the two fundamental taboos of totemism, which for that very reason inevitably corresponded to the two repressed wishes of the Oedipus complex. Whoever contravened those taboos became guilty of the only two crimes [murder and incest] with which primitive society concerned itself.

The two taboos of totemism with which human morality has its beginning are not on a par psychologically.<sup>10</sup>

Clearly, the prohibition of incest that engenders kinship relations is founded on, even causally related to, the prohibition against murder. For Freud, both prohibitions emerge out of the social contract devised by the brothers, who in order to avoid the fate of the father agree to regulate sexual relations with their clanswomen and guarantee one another's lives. However, if we take seriously Lacan's view that the father of the primal horde was an animal (the horde itself a group of ahuman animals), distinguished by his enjoyment, his unrestricted sexual freedom, something more than inexplicable guilt and the pragmatism of the social contract comes into view — the problem of the subject prior to the question. We must read the murder of the father as the moment not only of the institution of the prohibitions against murder and incest, but of the very notion of the human, of the separation between human and animal, and of their interrelation.

The prohibition on murder, from which the sexual taboos and kinship structures derive, now takes on an additional meaning. It must also be the moment when murder itself is distinguished

from other forms of killing as a specific transgression against human life and law.<sup>11</sup> In other words, the newly instituted concept of murder organizes acts of killing according to the object: those that can be killed (sanctioned slaughter) and those that cannot be killed (murder). The former group is comprised of the animal, in its difference from the human, as food or as sacrificial object. There is thus a prohibition not only against killing humans, but also against eating them. Freud is quite right to designate the totem meal as the key to the origin of the moral law, but what Lacan leads us to note in addition is the relation between murder and food, which founds species difference, perhaps on a relation of specular likeness and difference.

How then does species difference, emerging as it does out of these newly instituted prohibitions against murder and anthropophagy, impact sexual relations? Does it have any bearing on the incest taboo and kinship relations? Lacan makes the answer clear. If the father of the horde was an animal, then surely the time before the law is also the *anachronistic* scenario of bestiality: sex before differentiation. Introducing the question of the subject prior to the question — species difference — enables us to see that the moral prohibitions against murder and incest are shadowed by prohibitions against cannibalism and bestiality. In fact, the former prohibitions cannot possibly function without the latter set of ancillary taboos. The totem memorializes the time before the law, before the moral prohibitions against incest and murder, before species difference. The moral law is supported in a sense by two supplementary laws that are ontologically necessary: the prohibitions on bestiality and anthropophagy. Lacan seems to suggest that the Freudian myth of the primal horde is also the myth of the constitution of the cannibal and the bestialist — the transgressors of the law before the law. This submerged matrix of prohibitions comes more sharply into view when we consider that one of the functions of the moral law is to establish a mutually exclusive opposition between those we use for food and those we use for sex (that is, we may not have sex with the food object or turn our sexual object into food). In *The Savage Mind*, Claude Lévi-Strauss, though not on the track of species difference, acknowledges the “profound analogy which people throughout the world seem to find between copulation and eating.”<sup>12</sup> He provides several examples of languages, including French, which use the same word to denote both activities; interestingly, he insists that it is hopeless “to attempt to establish a relation of priority between nutritional prohibitions and rules of exogamy. The connection between them is not causal but metaphorical.”<sup>13</sup> Lévi-Strauss explains this “universal” association by suggesting that “the lowest common denominator of the union of the sexes and the union of eater and eaten is that they both effect a *conjunction by complementarity*.”<sup>14</sup> Undoubtedly, our contemporary association of food and sex functions on the analogy of incorporation (if not heterosexist complementarity), but the issue of species difference discloses the inherent practical connection between food and sex.<sup>15</sup> It is not so much that food prohibitions are prior in some way, but that the simultaneity of the prohibitions against anthropophagy and bestiality

effectively disarticulates sex from food, leaving us with little but the meaty metaphor of ingestion and union. The extraordinary depth of the interrelation of these prohibitions is perhaps most evident in our relations with the family pet, which, like one's kin, may not be regarded as food or sex object.<sup>16</sup>

Lacan's assertion that the primal father must have been an animal, insofar as the so-called animal is characterized by a satisfaction that knows no bounds, also raises the question of the animal as such as a mythic creature, a grammatical function that must be posited to grasp the organization of (sexual) meaning.<sup>17</sup> I am alluding here to the graph of sexual difference that Lacan develops in *Encore*.<sup>18</sup> We can read the first set of formulae as mapping the structure of the primal horde myth and the relation of all subjects to castration. In fact, given the implications of thinking through the primal father as an animal for the institution and significance of the moral law, the question of the existence of the animal as an ontic category becomes impossible. From an angle of approach completely different from Derrida's, Lacan leads us to ask: does the animal exist?

If the fantasy of the uncastrated animal/father makes a genealogy of the moral law possible, it does not fully account for the linguistic function of the proper name, of the Name-of-the-Father. After his brief exposition of the top half of the graph of sexual difference, Lacan goes on to speak about the symbols below: "Underneath, beneath the line going across where it intersects with the vertical division of what is incorrectly called humanity, inasmuch as it can be divided up into sexual identifications, you have a rough lay out of what goes on."<sup>19</sup> I suggest we read this ambiguous sentence as meaning that the horizontal division marks the split between (what is incorrectly called) humanity and ahumanity, as well as the division within humanity along lines of sexual difference.

For Lacan, the attribution of totality to the father as the place of unmitigated *jouissance* cannot account for the *functionality* of the Other as barred or lacking, for the state of language as always already compensatory, entailing the necessity of the proper name, the ensuing necessary difference between desire and *jouissance* required for the functioning of the proper name (as in the Oedipal scenario) and the formation of the superego. There is a perceived need to locate the logos in its function not only as constitutive of the subject, but also of the order of being in relation to the moral law. In the Names-of-the-Father seminar, Lacan says:

It is clear that, in his myth, Freud finds a singular balance, a kind of co-conformity — if I may be allowed to thus double my prefixes — of Law and desire, stemming from the fact that both are born together, joined and necessitated by each other in the law of incest and what? — the supposition of the pure erotic bliss of the father viewed as primordial.

Except, if that is alleged to give us the formation of desire in the child, ought we not — I have insisted on this at length for years — to pose the question of knowing why all this yields neuroses?<sup>20</sup>

To grasp the condition of the subject as lacking, caught up in an economy of desire and anxiety, one requires a supplementary genealogy, another narrative of the law. And this time, it is not the primordial father's bliss, veiled and inscrutable, but his demand that is significant. For Lacan, it is the category of perversion that discloses most clearly the desire of the Other, here interpreted as Eternal God or supreme being. What becomes salient in this particular problematic is God's desire (as opposed to his *jouissance*) "as interested in the order of the world" and neurosis (perverse or normal desire) as the "flight from the term of the father's desire."<sup>21</sup> It is in order to delineate this complex of relations that Lacan turns to the Biblical story of Abraham and Isaac. Interestingly, he particularizes this story as distinctly Judeo-Christian, one that helps distinguish this tradition from all other mystical traditions by its hook into the eye of God's demand to man, of his desire in the world. This emphasis on the subject's relation to the desire of the Other introduces an added juridical dimension to our understanding of the status of the animal in psychoanalysis and the moral law.

Lacan offers a complex reading of Abraham's sacrifice, or the *Akedah* (the binding) as it is known in the Jewish tradition, as the intervention of the function of the signifier: as the mark of lack (prohibition of *jouissance*) and of difference and signification (naming). Two aspects of this God are significant: first, he is the one whose name is ineffable, whose name we are forbidden to pronounce; second, he is indicated by the affect of anxiety. Several names come into play here: *Shem* (the Forbidden Name), *Elohim* (the Almighty), and *El Shadday* (the Guardian of the Doors of Israel).<sup>22</sup> It is in the name of *El Shadday* that the angel speaks and restrains Abraham's hand as he is about to sacrifice his son. The unutterable signifier of God prohibits Abraham from serving God's *jouissance*. This is the key point of the *Akedah* according to Lacan: it marks the cut between God's *jouissance* and his desire. "Here may be marked the knife blade separating God's bliss from what in that tradition is presented as his desire."<sup>23</sup> The logic of substitution that is then introduced engenders the play of difference — metaphor (the ram) and metonymy (the foreskin). Lacan insists that the ram is "not a metaphor of the father at the level of phobia." In other words, the ram is not what he refers to in *Encore* as *la bêtise*, the nonsense that characterizes animal phobia. He introduces the term *Shofar* (the ram's horn), which refers to the hollow sounding horn used to herald freedom and assemble the community. In the Jewish tradition, it is a reminder of the sacrifice of Abraham. The ram that rushes onto the scene of sacrifice, Lacan suggests, is the "primeval ram." It was present during the seven days of creation and is therefore originary — an *Elohim*, an "ancestor of the race of Sem, he who links Abraham, through a rather short path, to origins." The ram is Abraham's "eponymous ancestor, the God of his race"; it is the material manifestation of Abraham's "biological origin" for "[t]he thing whose downfall it is a matter of provoking is biological origin."<sup>24</sup>

We can perhaps understand this "provocation," in which the eponymous ancestor is surrendered as origin, by way of Derrida's commentary on Adam's naming of the animals in Genesis.

Working with two French translations of Genesis, Derrida remarks on the command issued by God to man (in another translation, man and woman) to command the animals, and then to name them: “he has created man in his likeness *so that* man will *subject, tame, dominate, train,* or *domesticate* the animals born before him and assert his authority over them...However, everything seems to happen as though God still wanted to oversee, keep vigil, maintain his right of inspection over the names that were about to echo out and by means of which Ish [Adam], Ish all alone, Ish still without woman, was going to get the upper hand with respect to the animals.”<sup>25</sup> Derrida makes two significant points: first, Adam names “these living things that came into the world before him but were named after him”; second, this God who summons the animals to Adam marks “an all powerful God *and* the finitude of a God who doesn’t know what is going to happen to him with language. And with names. In short, God doesn’t yet know what he really wants; this is the finitude of a God who doesn’t know what he wants with respect to the animal.”<sup>26</sup> For Derrida, Adam’s naming of the animals, his being *after* the animals — in the sense of both coming after their birth, and after them as in capture or domination — is not in time but is the genesis of time. Thus God’s “exposure to surprise, to the event of what is going to occur between man and animal, [is] this time before time” itself.<sup>27</sup> But there is another sense in which man is after the animal: he names himself after the animal that he names. The totem animal is not *yet* the moment of the logos. It is an entirely immanent signifier of man’s origins. It is surely this *secular* relation between human and animal that is addressed and annulled through the story of Abraham and Isaac.

In the “later” scenario of the Abrahamic sacrifice, God revokes the names that man has given to his creatures and to himself. The substitution of the ram, his ancestor, for Isaac, his progeny, can be understood as accomplishing two things. First, Abraham distinguishes God’s desire from his *jouissance* thereby preserving the place of the Other as barred (what Derrida terms his “finitude”) — lacking, incomplete, yet paradoxically all-powerful in its insatiability. Second, the totemic ancestor is now subordinated to the name of God as ineffable. In other words, the (once autonomous) animal, the source of the name and origin of the community, is sacrificed to the name of the father, thus orienting man to the transcendental. Henceforth, the community will be assembled through the voice of the ram, the *Shofar*, in the name of God and his desire. The law of circumcision — the little piece of flesh sliced off — marks God’s desire towards his chosen people. Between the metaphor of the *Shofar* and the metonym of the foreskin, God institutes an order, a moral order that subjects all — AnimAll — to his law. God institutes the difference between human and animal by imposing his law of hierarchy upon all creation: the logos as a great disciplinary apparatus disclosing its hierarchical function even as it subjects all — human and animal — to a univocal and calibrated law. In other words, the intervention of the logos as God’s desire expressed through the name fixes, once and for all, an ethico-juridical imperative,

the difference between human and animal by imposing what was once called “The Great Chain of Being.”<sup>28</sup>

The sovereignty of God, the subordination or subjection of the animal ancestor to the Other, has paradoxical consequences for species difference. There is an intensification of the line separating human and animal, even as there is an increased anthropomorphization of the animal. This paradox is demonstrably enshrined in Western juridical discourse through the ages, and founds the unacknowledged discursive conditions of possibility for our contemporary debates about animal rights and species difference.

#### (ANIM)ALL ARE SUBJECT TO THE LAW

Because we understand the legal system as a quintessentially human institution, it is not surprising that contemporary law does not hold animals responsible for their actions. While the law addresses animals either to protect them from extinction and wanton cruelty, or to prevent them from being used as instruments of legal violation against other humans, this has not always been the case. A historical exploration of the law in relation to animals discloses an altogether forgotten archive. In his *The Criminal Prosecution and Capital Punishment of Animals*, E. P. Evans shows that contrary to modern practice, it was routine in many parts of Europe to prosecute animals in courts of law and to stage punishments as spectacles if they were convicted of criminal wrongdoing. Evans’ book is an exhaustive discussion of the trials — ecclesiastical and juridical — of various largely domestic animals and insects that caused injury to human beings. In a tone of incredulity bordering on contempt, he cites numerous cases, beginning with one recorded by the distinguished sixteenth-century French jurist Bartholomew Chassenée, who defended (as he did in several cases of animals charged with criminal behavior) a group of rats being sued for the wanton destruction of a barley crop.<sup>29</sup> For Evans, the anthropomorphization evident in the treatment of so-called criminal animals is suggestive of the kind of superstition that led to the persecution of witches. Arguing against nineteenth-century scholar Léon Ménébrea, who suggested that such trials should be interpreted as noble evidence of the respect for creation and all creatures in Western civil society, Evans writes:

So far from originating in a delicate and sensitive sense of justice, it was...the outcome of an extremely crude, obtuse, and barbaric sense of justice. It was the product of a social state, in which dense ignorance was governed by brute force, and is not to be considered as a reaction and protest against club-law, which it really tended to foster by making a travesty of the administration of justice and thus turning it into ridicule. It was also in the interest of ecclesiastical dignities to keep up this parody and perversion of a sacred and fundamental institute of civil society, since it strengthened their influence and extended their authority by subjecting even the caterpillar and the canker-worm to their dominion and control.<sup>30</sup>

Despite the richness and peculiarity of the archival material Evans exhumes, his work is marked by sweeping generalizations, and displays a marked impatience for making distinctions across cultures, histories, and meanings. Evans' attitude is echoed much later by legal philosopher Hans Kelsen in his classic work *General Theory of Law and State*. Kelsen notes that “[i]n primitive law, animals, and even plants and other inanimate objects are often treated in the same way as human beings and are, in particular, punished. However, this must be seen in its connection with the animism of primitive man. He considers animals, plants, and inanimate objects as endowed with a ‘soul,’ inasmuch as he attributes human, and sometimes even superhuman, mental faculties to them. The fundamental difference between human and other beings, which is part of the outlook of civilized man, does not exist for primitive man.”<sup>31</sup>

For a more nuanced approach to this archive, it is necessary to turn to J. J. Finkelstein, whose brilliant monograph, *The Ox That Gored*, also addresses the criminal prosecution of animals. Finkelstein cites the above passage from Kelsen as typical of assumptions made by social theorists ignorant of the historical and unconscious bases of their own laws. As Finkelstein writes, “my purpose here is not to take issue with Kelsen or with others whose approach to legal institutions is much in the same vein. Rather, I wish to stress here...how the failure to become conscious of one’s unconscious premises, and to subject them to the most searching scrutiny, effectively undermines the grandest schemes.”<sup>32</sup> Finkelstein’s rather surprising research, based on a comparative study of Biblical and Mesopotamian law regarding accidental human death caused by animals, offers an altogether more thoughtful and philosophically satisfying explanation than do either Evans or Kelsen. He suggests that “[s]ocieties of non-Western derivation and primitive peoples *did not and do not* attribute ‘human’ will or ‘human’ personality to animals or things, and *never* have tried them or punished them as they did human offenders. The notion that trials and punishments of irrational creatures and of inanimate things are a valid legal procedure occurs *uniquely* in Western society.”<sup>33</sup> Finkelstein sifts through the historical evidence of the trial and punishment of domestic animals in medieval and Enlightenment Europe, distinguishing between the mock trials (magico-ritual acts) conducted by the church to rid society of a menace and the authentic juridical trials of offending animals. The former scenario, in which weevils or rodents are excommunicated or anathematized, mimics legal processes to solicit the aid of supernatural powers to resolve a problem. In the latter, the question is one of “a human verdict and a social action” directed at a domestic animal that is ostensibly in violation of the law.<sup>34</sup> The earliest case, recorded in 1266, is the trial of a pig.<sup>35</sup>

While Finkelstein is attentive to geographical and rhetorical differences in the trial and punishment of animals, in his view the trials were not much different from morality plays that offered simple lessons in good conduct. He insists that, rather than revealing a residue of



**Execution of a Sow in front of the Church at Falaise**

done so disturbed the cosmological environment in a way that could not be tolerated: the act appeared to negate the *hierarchically* differentiated order of creation by which man was granted sovereignty in the physical world.<sup>37</sup>

Finkelstein's observation about the significance of these animal trials as part of a cosmological worldview resonates with Lacan's discussion of the moral law as instituted by the intervention of the logos and the Name-of-the-Father. It stands to "reason" that in a universe where God's dominion is manifested by the Great Chain of Being, an ox that gores or a pig that molests threatens the entire order.

The same rationale, and perhaps something more, is also at work in the numerous trials and executions of humans and animals for engaging in buggery or bestiality (severely proscribed in

"primitive mentality," as propounded by Evans and Kelsen, for example, such trials were attempts, with the increased influence of Canon Law, to bring society into greater conformity with Biblical prescriptions and principles of classification.<sup>36</sup> Finkelstein writes:

It is, however, vital for us to perceive that the medieval rationale for the execution of homicidal domestic animals is not the consequence of any confusion in Western thinking about the capacity for will or intention in animals or in inanimate things, even though there have been times, as we have seen, when such ideas did become manifest on the folk level. On the whole, however, the reverse is true: there is an unbridgeable gulf between mankind and the rest of creation, and there is beyond that an acute sensitivity towards boundary breaching between kinds within the world of living things. This is indeed the key to this strange and apparently irrational practice. Animals that have killed persons were to be extirpated because the very fact of their having

Exod. 22:19 and Lev. 20:13-16). According to Evans, such acts were “uniformly punished by putting to death both parties implicated, and usually by burning them alive.”<sup>38</sup> The severity of the punishment of both partners — flaying, burning alive, scattering of ashes — attests to the great anxiety and perceived threat associated with such crimes. Examples abound: in 1466, a man and a sow were burned in Corbeil by order of the parliament of Paris; in 1546, the same court ordered a man and cow hanged and burned; in 1609, in Niederrad a man and a mare were executed and buried in a carrion-pit; in 1606, a man and a bitch were burned in Chartres; in 1662, in New England one Mr. Potter was forced to witness the hanging of his partners in crime before he was himself executed.<sup>39</sup> In this litany of crimes and horrific punishments, one trial stands out as remarkable: that of Jacques Ferron, who was caught in the act with a she-ass in Vanvres in 1750. After much deliberation, the court acquitted the donkey, reasoning that she was a victim of the crime, not a willing sexual partner. Having known her for several years, the parish priest and the community of Vanvres vouched that the ass was a virtuous and well-behaved creature. In a signed certificate, the community asserted that “they were willing to bear witness that she is in word and deed and in all her habits of life a most honest creature.”<sup>40</sup> Ferron, however, was executed, thus containing a threat that surely must have been perceived as more than rebellion against the cosmic order.

It is obvious that bestiality threatens the very foundations of the moral law as the demarcation of species categories and kinship relations. Historian Jonas Liliequist suggests that though bestiality became a capital offense in Sweden in the thirteenth century, animal prosecutions reached their peak in the seventeenth and eighteenth centuries when bestiality accounted for 25-35 per cent of all capital punishments. Liliequist notes that in the formulation of the questions at such trials, “an implicit analogy was set up between bestiality and cannibalism: making love to a beast is like eating human flesh. This correspondence reveals an essential meaning of bestiality, as it implies not only moral corruption and foolishness but a defilement in the most physical sense. This is also the connotation of the word *abominable* used in the Pentateuch and in legal texts.”<sup>41</sup> The offending animal was invariably ostracized and publicly executed along with its human lover to rid society of the abomination. Finkelstein suggests that bestiality was punished as severely and dramatically as it was because the act was an offense against divine creation by violating the hierarchical order of the universe that places man above all other creatures, upsetting the fundamental principle of creation as the separation and ordering of species and their boundaries. However, I argue that, given the extreme and severe measures against the offenders, what is threatened is not just the abstract order of creation, the divine decree “that propagation shall be ‘each after its own kind.’”<sup>42</sup> Rather, bestiality threatens more specifically the one boundary separating human and animal, a boundary that has been very jealously guarded by theologians, philosophers, and lawmakers: speech and discourse as the

preserve of man. Bestiality, the fantasmatic scenario of what a human being may do, the positions he or she may assume with respect to quadrupeds, threatens not so much the degradation of man to the level of animal but the opposite: it threatens to bring the animal into discourse, as an agent and a subject. The animal's cries, moans, and grunts in the act of coition are an address to the human partner. Here in the buggery stable, the animal does not merely react as a Cartesian animal-machine, it *responds*. The laws against bestiality disclose above all the pornographic foundation of the moral law itself. And, of course, the pornography of the law is also its own self-authorization.

### HUMANIMALISM

What do we make of the fact that in contemporary legal discourse, bestiality as a perversion or a legal infraction seems almost totally absent? Culturally, it seems archaic, outmoded, at best a practice associated with the rural farmhand. Judging from the fact that it is rarely mentioned in the study of sexuality, it seems to have been eclipsed by other (more sophisticated) sexual perversions. According to the Animal Sexual Abuse Information and Resource Site (ASAIRS), however, bestiality is an all-too-popular form of abuse.<sup>43</sup> Along with the Humane Society of the United States (HSUS), it aims to enforce existing laws that criminalize bestiality, and also supports wider legislative measures targeting so-called zoophiles. They hold that bestiality, even when the human partner professes to love his dog or horse or cow, can never be anything but abuse, as the animal is always physically injured and often killed in the process. In spite of their efforts, only roughly half of the United States consider bestiality a criminal act.<sup>44</sup>

It is significant that the history of animal prosecutions has been deliberately excised from official historical narratives; a similar deafening silence has surrounded bestiality in contemporary discourse. I would suggest that what we have seen over time is a discursive shift from enacting laws against the criminal animal and the inter-species practice of bestiality, to the expunging of the non-human from legal discourse. In a reversal of the Foucauldian scenario, in which power and discourse produce sexuality, what we have now is an alliance between silence and power, the progressive muting and desexualization of the animal.

Within this context, the struggle of animal rights activists, for example, lobbying in cases of wrongful death of companion animals for recognition of emotional distress rather than mere market value of the animal, actually enforces species difference. The human is even more human for his or her sensitivity to animals, and the animal is even more animal because it is the mute and pathetic victim of superior human cruelty. The human is compensated for his or her delicate sensitivity and consequent suffering from loss, whereas the animal is not recognized as having innate rights to life or dignity. In fact, we could say that the ethics of the animal rights movement



1. Immanuel Kant, *Lectures on Ethics*, trans. Louis Infield (New York: Harper & Row, 1963), 170-171.
2. Jacques Derrida "The Animal That Therefore I Am (More to Follow)," trans. David Wills, *Critical Inquiry* 28 (winter 2002), 392.
3. Derrida, "And Say the Animal Responded?" trans. David Wills, in *Zoontologies: The Question of the Animal*, ed. Cary Wolfe (Minneapolis: University of Minnesota Press, 2003), 127. I thank Cary Wolfe for making this essay available to me before its publication.
4. *Ibid.*, 131.
5. *Ibid.*, 134.
6. See Jacques Lacan, *The Seminar of Jacques Lacan, Book XX: Encore: On Feminine Sexuality, The Limits of Love and Knowledge, 1972-1973*, ed. Jacques-Alain Miller, trans. Bruce Fink (New York: Norton, 1998), esp. 1-13.
7. Lacan, "Introduction to the Names-of-the-Father Seminar," in *Television/A Challenge to the Psychoanalytic Establishment*, ed. Joan Copjec, trans. Denis Hollier, Rosalind Krauss, and Annette Michelson (New York: Norton, 1990), 88.
8. *Ibid.*
9. Sigmund Freud, *Totem and Taboo*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. and trans. James Strachey et al. (London: Hogarth Press, 1953-1974), 13:141-142.
10. *Ibid.*, 143-144.
11. This is a point that Derrida does not recognize when he writes apropos the general singular of "the animal": "The confusion of all nonhuman living creatures within the general and common category of the animal is not simply a sin against rigorous thinking, vigilance, lucidity, or empirical authority; it is also a crime. Not a crime against animality precisely, but a crime of the first order against the animals, against animals. Do we agree to presume that every murder, every transgression of the commandment 'Thou shalt not kill' concerns only man...and that in sum there are only crimes 'against humanity'?" "The Animal That Therefore I Am," 416.
12. Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966), 105. See also his *Totemism*, trans. Rodney Needham (Boston: Beacon Press, 1963).
13. Lévi-Strauss, *The Savage Mind*, 105.
14. *Ibid.*, 105-106.
15. For an amusing and erudite study of the metaphor of incorporation in Western culture, see Maggie Kilgour's *From Communion to Cannibalism: An Anatomy of Metaphors of Incorporation* (Princeton: Princeton University Press, 1990). See also C. J. Rawson, "Cannibalism and Fiction," parts 1 and 2, *Genre* 11 (spring 1977-1978): 667-711 and 227-313 respectively.
16. Midas Dekkers' *Dearest Pet: On Bestiality* (London: Verso, 1994) is an engaging romp through the ages on the representation of bestiality. The book gained notoriety after Peter Singer's endorsement of the book (and implicitly of bestiality itself) in a review entitled "Heavy Petting," <http://www.nerve.com/Opinions/Singer/heavyPetting/main.asp>.
17. In *Encore*, Lacan writes the (animal) father before the moral law, prior to castration as  $\exists X \Phi X$ : there is One that is not subject to the paternal metaphor. This is a necessary presupposition for the organization of sexual difference (78).
18. Lacan's formula for sexual difference using symbolic logic reads roughly as follows: on the male side, "There is one that is not subject to the phallic function; All are subject to the phallic function"; on the female side, "There is not one that is not subject to the phallic function; Not all are subject to the phallic function."

19. Quoted in Lacan, *Feminine Sexuality*, ed. Juliet Mitchell and Jacqueline Rose, trans. Jacqueline Rose (New York: Norton, 1985), 150. Fink translates this sentence in *Encore* as follows: "Underneath — that is, below the horizontal bar where the vertical bar (*division*) is crossed over, that division of what is improperly called humanity is divided up into sexual identifications — you have a scanded indication of what is in question" (80).
20. Lacan, "Names-of-the-Father," 89.
21. Ibid.
22. D'vorah, *Hebrew Glossary*, <<http://www.headcoverings-by-devorah.com/HebglossA.html>> (1 April 2003).
23. Lacan, "Names-of-the-Father," 94.
24. Ibid.
25. Derrida, "The Animal That Therefore I Am," 386.
26. Ibid.
27. Ibid., 387.
28. For an intellectual history of the concept, see Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (Cambridge: Harvard University Press, 1936).
29. E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1906; rpt. New Jersey: Lawbook Exchange, 1998), 18.
30. Ibid., 41.
31. Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York: Russell & Russell, 1961), 3-4.
32. J. J. Finkelstein, *The Ox That Gored*, Transactions of the American Philosophical Society, n.s., 71, pt. 2 (Philadelphia, 1981), 49.
33. Ibid., 64.
34. Ibid., 66.
35. Pigs were rather popular victims of the law in general. In *Dearest Pet*, Dekkers cites a 1394 case of a pig in Mortaigne that was tried and sentenced to death by hanging for having committed the sacrilege of eating a blessed host. Finkelstein refers to another trial (1386) of a sow accused of mangling an infant to death. Upon conviction, it was paraded in men's clothing (no discussion here of cross-dressing) and solemnly executed by the public hangman, its body mangled afterward. Scores of other such trials were recorded almost through to the end of the eighteenth century.
36. Finkelstein, 68-69.
37. Ibid., 73.
38. Evans, 147.
39. Ibid., 148-149.
40. Ibid., 150.
41. Jonas Liliequist, "Peasants against Nature: Crossing the Boundaries between Man and Animal in Seventeenth- and Eighteenth-Century Sweden" in *Forbidden History: The State, Society, and the Regulation of Sexuality in Modern Europe*, ed. John C. Fout (Chicago: University of Chicago Press, 1992), 68.
42. Finkelstein, 71.
43. *ASAIRS*, 27 July 2002, <[http://www.asairs.com/main\\_index.htm](http://www.asairs.com/main_index.htm)> (1 April 2003).
44. According to the HSUS, at present only twenty-four states in the U.S. have laws against bestiality on the books. It is considered a felony in five states, and a misdemeanor in the remaining nineteen. However, Richard A. Posner and Katharine B. Silbaugh claim that bestiality is a felony in seventeen states, including Washington D.C., and a misdemeanor in twelve, whereas twenty-two states have no relevant statutes. See *A Guide to America's Sex Laws* (Chicago: University of Chicago Press, 1996), 207-212.