

# **The Philosophical Implications of Zoophilia**

A Response to Peter Singer and his Critics

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# Abstract

## The Philosophical Implications of Zoophilia

Stefan Andreas Kiraly

The Canadian Criminal Code currently prohibits any contact with a non-human animal for the purpose of human sexual gratification. This prohibition dates back unbroken to the creation of a Canadian jurisdiction, and was in existence under British law prior to that. Peter Singer has recently asked whether zoophilia is always worthy of legal sanction and moral condemnation. More specifically: Singer wonders whether instances of zoophilic contact that cause no apparent harm to participants can rightly be considered liable to such sanction or condemnation. Critics of Singer's stance most frequently cite the supposed inability of a non-human animal to render genuine consent to zoophilic contacts as sufficient grounds to make zoophilia morally problematic without exception. If one takes non-human consent seriously, however, then one cannot avoid making human interventions into the lives of non-human animals almost universally problematic. Zoophilia is prohibited despite the fact that no similar legal restrictions have ever been (or are, or are likely ever to be) levied against the wide variety of far more overt harms to which non-human animals are routinely subjected in human industries – both agricultural and scientific – harms to which no non-human animal is even presumed to have given consent. This examination suggests a different approach to determining the proper moral and legal status of zoophilic activities by regarding any such interactions within the moral and legal contexts of fiduciary relationships. Under such a scheme, the only permissible human interventions into the lives of non-human animals would be those aimed at promoting the best interests of the weaker (i.e., non-human) party and, therefore, obligated by fiduciary duty.

# Contents

## Chapter 1: Introductory Matters

A Brief Disclaimer .....	1
The Historical Context, and a Definition of Zoophilia .....	6
Peter Singer's Statements .....	11
The Tactics of this Examination .....	17

## Chapter 2: Consent's Centrality

A Closer Examination of Singer's Position .....	23
Piers Beirne: Singer's Most Cogent Critic .....	29

## Chapter 3: The Importance of Speech

Taking Non-Human Consent Seriously .....	33
Introducing Verbal Sexual Consent: the Antioch Example .....	34
Casting Doubt on the Primacy of Language .....	40
Lois Pineau: "Communicative" Sexuality .....	45
Bringing Antioch, Pineau, and "Token" Resistance Together .....	52

## Chapter 4: Verbal Consent in a Canadian Legal Context

Does Pineau's Model Apply in Canadian Society Today? .....	55
Pineau's Inconsistencies and Carson Livermore .....	61
Lois Pineau's Gross Misrepresentation .....	66
Robin. D. Wiener on Verbal Assertions of Consent .....	68
Wiener's Fatal Error .....	69

## Chapter 5: Taking Non-Human Consent Seriously

Genuine Consent .....	72
The Notion of Force and Carol J. Adams .....	75
The Stance Taken by Carol J. Adams .....	80
Taking Non-Human Consent Seriously (Again) .....	87
Not Equating Sexually Mature Non-Human Animals and Children .....	92

## Chapter 6: Sexual Assault

(Seriously) Comparing Zoophilia to Sexual Assault .....	96
Non-Human Rape .....	98
The Moral Relevance of Species Distinctions .....	101
An “Honest” Belief in Consent .....	102
The Problem of Domestication .....	103
Seriously Comparing Zoophilia to Sexual Assault (Again) .....	106
“Communicative” Sexuality and <i>R. v. Ewanchuk</i> .....	111

## Chapter 7: Implications Cannot be Ignored

Where Matters Stand .....	119
Distinguishing Between Capable and Incapable .....	120
The Anachronism of Statutes Prohibiting Bestiality .....	123
Informed Consent .....	127
The Fate of Section 160 and the Crime of Bestiality .....	133
In the Name of Science, the Pursuit of Wealth, or Political Expediency ...	136
The Proper Grounds for Moral Judgments of Zoophilic Activities. ....	143

## Chapter 8: More Than a Duty of Care

Fiduciary Relationships and Sexual Exploitation .....	146
Inherently Fiduciary Relationships .....	150
The Necessity of Harm .....	151
Community Standards of Conduct .....	152
What Fiduciary Relationships Are (and Aren't) .....	155
Not Equating Sexually Mature Non-Human Animals and Children (Again)	157
Benevolence .....	160
A 21st Century Effort to Reform Animal Abuse Laws by the Canadian Parliament .....	162
The Crime of Bestiality Under the Proposed Reform .....	167

## Chapter 9: Philosophy in Society

The Aim of Philosophical Inquiry .....	169
How Not to Do Philosophy .....	171
Concluding Remarks .....	176
Works Cited .....	179

# Chapter 1

## Introductory Matters

Philosophy ought to question the basic assumptions of the age. Thinking through, critically and carefully, what most people take for granted is, I believe, the chief task of philosophy, and it is this task that makes philosophy a worthwhile activity. (Singer, All 81)

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the [Canadian Criminal Code] expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. (*R. v. Ewanchuk* 348)

### A Brief Disclaimer

Ethics is not a scientific endeavour. There is no single procedure by which a person may determine -- once and for all -- how to properly categorize any particular instance or category of human activity with a moral descriptor. This is not to say that the only option is to adopt a nihilistic attitude towards morality and shift society towards anarchy. The study of ethics begins to assume a pseudo-scientific guise once it adopts a set of grounding principles. Such principles serve as the basis for a more sophisticated morality, as their implications are made explicit.

The foundational principles of ethical systems vary.

Utilitarians employ some version of the Principle of Utility, according to which securing the greatest good for the greatest number determines the morally obligatory course of action. Utilitarian ethical systems have convincing failings attributed to them, but -- advantageously -- such outlooks are consequentialist. Utilitarians judge the rightness or wrongness of actions according to the harm or benefits that result. This seems fundamentally decent, but moral agents are fallible and possessed of only very limited access to the consequences that may follow from even their best intentions. The guidance provided by any version of a Principle of Utility is too often insufficient for situational application, and every moral

agent cannot but constrain consideration of likely consequences to a human scale.

A major failing of utilitarianism is the requirement that individual moral agents routinely and universally make decisions that seek the greatest good for the greatest number. Typical human agents all too frequently find it difficult to choose between just two courses of action in the light of mere self interest. The amount of suffering that nearly everyone permits to exist and to endure throughout the world, without so much as a thought, gives no grounds to think people capable of doing real justice to a utilitarian founding principle. Utilitarian standards of conduct are impractical given the limitations of human perception and reason, and the fact that self-interest confounds pursuit of the greatest good for the greatest number.

Law codes recognize some version of a principle of utility whenever degrees of punishment are used. The most serious harms carry the most serious penalties. Punishments for exceeding the limits of a law are also often nuanced in accordance with utilitarian principles. Simple assault is generally less severely punished than assault with a weapon. Allowing emergency vehicles to flaunt movement-of-traffic restrictions while executing their duties is warranted because the prevention of crime and the treatment of serious injury are of greater moral import than is the smooth flow of ordinary traffic. A society cannot function on utilitarian principles alone. To prevent morally offensive actions from becoming not only pardonable but morally obligatory according to some version of the principle of utility, one must augment one's ethical framework with deontological principles.

No society in the world is governed solely by a Principle of Utility. The oldest codes of law to which we have any access outline not utilitarian principles, but deontological ones. Deontological principles do not consider consequences. There have been many attempts to outline a code of behaviour to properly govern societies of morally upright human animals. Immanuel Kant's Categorical Imperative is likely the best known (at least, in philosophy departments) version of a deontological response to utilitarianism's Principle of Utility. The degree to which any deontological (that is, duty-based, non-consequentialist) edict can be given credence, however, seems tied to its plausibility as a utilitarian rule of thumb. The thought-experiment in which the Gestapo beats down one's front door and asks if one has seen a Jewish family seeking refuge comes to mind.

The deontological requirement to be truthful seems wholly out of place here. It is hard to find a deontological morality that can avoid such embarrassing judgments, unless the rules are nuanced enough to take consequences into account, albeit indirectly.

Any system of ethics that utterly disregards consequences cannot hope to find widespread application in any free human society. Consequences must be given consideration in any viable scheme of moral conduct, and schemes of moral conduct which are not viable are simply intellectual exercises with no application in the real world. Useful as such ideas are in the classroom for prompting debate and elucidating concepts, stepping back out into the wider society necessitates a literal return to reality. Deontology enters the real world as systems of social mores and legal edicts. Fulfillment of the criteria that constitute a violation of such a rule suffices to run afoul of it. All codes of human conduct are to some degree deontological in so far as they set out certain activities as taboo, but such restrictions are rightly tempered by a concern that the punishment “fit the crime.” Some rules are necessary, particularly in any sizable, pluralistic, democratic society, since the “guidance” that can be provided by any form of a Principle of Utility is so utterly minimal as to stymie moral agents.

A third broad approach to morality is based upon a consideration of the virtues. Many individual moral agents try to act in accordance with, and to foster in themselves, virtuous traits. Certain virtues do not seem liable to dismissal without a consequent imperilment of the very enterprise of establishing a guide to proper conduct. It seems impossible to do away with benevolence. Similarly, courage seems an indispensable virtue since right action out of many a dilemma calls for personal sacrifice and exposure to personal risk rightly described as “courageous.” Many situations, particularly those which cause morally upright individuals grief, are not open to uncontroversial judgments of virtuous and non-virtuous behaviour, however.

Aside from cases where a Gestapo comes calling, virtue ethics seems open to a far greater depth of potential confusion with regards to right conduct than either utilitarian or deontological systems of ethical reasoning. Rosalind Hursthouse makes frequent reference to a “standard list” of virtues but fails to provide any

such accounting (Hursthouse 20 et al). Virtues are not ranked: there is no guidance in situations where a moral agent is faced with (say) a choice between honesty or benevolence. Virtues are not distinct. There is no guidance in precisely those situations which call out loudest for ethical introspection, when (say) one is at a loss whether the action(-s) under consideration are courageous or foolhardy. Virtues themselves are sometimes purely cultural artifacts, and their bounds are even more strongly so. Benevolence is almost ubiquitously virtuous, but doing honour to one's clan or tribe is a virtue characteristic of non-Western societies. What constitutes courage among Spartans is certainly otherwise among Quakers.

Despite the difficulties inherent in accommodating ideas of virtuous behaviour in a code of moral conduct, the virtues nonetheless find application in any well ordered and viable human society. There is close affiliation even between Plato and Hursthouse, though separated by millennia. The respective results of their introspections don't much resemble each other in the details, but a foundational selling point of virtue ethics is shared: "the life of physical fitness, and spiritual virtue too, is not only pleasanter than the life of depravity but superior in other ways as well" (Plato 200; compare Hursthouse chapter 8). Virtues enter codes of conduct governing actual human societies ubiquitously. Societies tend to punish most severely the greatest breaches of those virtues which they elevate highest. Virtues of honesty are upheld by laws that punish false-dealing. Virtues of benevolence are upheld by laws that punish the infliction of harms. Virtue based theories of ethics have not yet provided a description of "justice" (Hursthouse 5), but attempts to secure justice for the virtues held by any given society lie behind their systems of law and social conduct.

Another way that virtues enter into actual, living social practices is through a consideration of intentions. Virtue ethics benefits from considering the agent as a psychological being -- a being with a mind, beliefs, and desires -- liable to developing both good and bad habits. Doing wrong is more than simply breaking a rule, it is also deciding to do so. Legal punishments often overtly make reference to the potential threat of further harm(-s) inherent in a given predilection, a given personal habit, and the severity of a sentence if adjusted accordingly. The fact that intentions are relevant to (say) a determination of guilt in an instance of

sexual assault demonstrates that the possession or absence of virtue matters within a judicial context.

There is hardly room to doubt that the most effective guides to right conduct combine worthy features of all three “schools” of ethical thought:

1. A concern for consequences.
2. A set of broad rules to outline proper conduct.
3. Arising from both a concern that the punishment “fit the crime” and the guidance that comprehensive rules can provide, the virtues that a society elevates are, in a sense, embodied in its codes of right conduct.

This examination’s approach is not to outline how a Utilitarian (-a Kantian, -an Aristotelian, etc.) would respond to Peter Singer’s controversial question. It will not be to spin out some subjective opinion reflective of my own situationalist, virtue based code of personal conduct. Instead, this examination will ground the question of zoophilia’s moral status within the concrete setting of contemporary Canadian law. This is by no means a novel approach to ethics. For Plato, the “proper aim of the legislator” is to ask: “Which of our regulations encourages virtue, and which does not?” (334). Things haven’t changed since. “The legislator will list and classify certain things as disgraceful and wicked, and others as fine and good” (Plato 190-191).

Being both pluralistic and tolerant, democratic and economically advantaged, Canadian society holds the values of individual autonomy and equal (i.e., non-discriminatory) treatment in the highest regard. Canadian laws reflect the virtues of tolerance, fairness, and liberty idiosyncratically, however, since its laws have evolved to reflect a society’s prevailing views of virtue in some areas more than in others. Its deontological edicts, and the consequences associated with violating them, have likewise changed over time -- keeping pace with society to a greater degree in some areas while lagging behind in others. This examination will address the question of zoophilic activities within the system of laws currently in place in Canada. By doing so, it hopes to provide a treatment of the issue that is of the greatest possible relevance to Canadians.

## The Historical Context, and a Definition of Zoophilia

It isn't clear just what the foundational source of Canadian restrictions against engaging in zoophilia might have been. Laws regulating (i.e., prohibiting) any form of sexual contact between humans and non-human animals pre-date the modern "animal rights" movement. In some cases, prohibitions have been in place for thousands of years. Thus, it was likely not concern for non-human animals' supposed incapacity for consenting to sexual contacts with human animals which motivated the inclusion of laws against zoophilia in the earliest version of the Canadian Criminal Code -- or of English legislative regulations that preceded it:

Canada did not adopt its first criminal code until 1893. So, English law was the primary foundation of Canadian criminal law. As Canadian courts gradually added to the English jurisprudence, our [Canadian] criminal common law increasingly became a blend of English and Canadian authorities. (Jobidon 729)

Any legal foundation for prohibitions against sexual contacts between human and non-human animals isn't likely to have been formed around a consideration of (non-human) "animal welfare," since such is the product of 20th-century moral perspectives resulting from observations like those made by Peter Singer in his *Animal Liberation*. Much more likely, the original purpose of anti-zoophilia legislation was to punish so-called "crimes against nature." Biblical moral instructions formed the sexual legislation that became the Canadian Criminal Code. The Bible clearly prohibits zoophilia, naming death as suitable punishment for both human and non-human participants alike (Miletski 8-9):

Whoever lies with a beast, shall be put to death.

You shall not lie with a man as with a woman: that is an abomination. You shall not have sexual intercourse with any beast to make yourself unclean with it, nor shall a woman submit herself to intercourse with a beast: that is a violation of nature. You shall not make yourselves unclean in any of these ways . . .

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 the woman and the beast.

Cursed be he who lies with any kind of beast.

Biblical prohibitions, and whatever prior prohibitions (if any) they are based on themselves, supplied the grounds for the legislative evolution that led to existent

Canadian legal prohibitions against zoophilic activities.

Zoophilia, in this examination, refers to sexual contacts between a human and a non-human animal. Some definitions of zoophilia include becoming sexually aroused merely by observing the sexual activity of non-human animals, or the use of fetishistic objects (such as fur) and do not feature any actual contact between human and non-human animals (Miletski 6). In many modern codes of law, including Canada's, zoophilia has at times either been subsumed under, or otherwise closely associated with, laws barring the more general offences of buggery or sodomy. Both of these terms were used to refer to "crimes against nature" (Miletski 5) -- sexual activities which are not procreative. Thus, zoophilia was originally banned for the same reason as homosexuality. Most recently, some of those who would undertake (or who have undertaken) sexual activity with non-human animals have attempted to employ titles that define their activities and themselves, so as to dissociate "zoophilic" (i.e., sexually and emotionally bonding with a non-human animal) from "bestial" (i.e., merely lusting after a non-human animal) behaviour. Miletski adopts the following distinctions: "bestiality" refers to "any sexual contact between a human being and a non-human animal" while "zoophilia" describes "an emotional attachment and-or sexual attraction to an animal" (Miletski 6). The distinction turns on whether the non-human animal is treated as a mere means towards the achievement of (human) sexual gratification or an end in itself (if not an equal) by the human animal partner.

For the purposes of this essay, Miletski's adopted definitions are inadequate. Her definition of "bestiality" allows for the human participant's role in the activity to be completely asexual. A dog latching onto a person's leg to masturbate certainly qualifies as "sexual contact" -- yet the human animal hasn't necessarily derived any sexual gratification from the experience. In fact, the human animal in this situation may only feel revulsion. Miletski's definition of the characteristics of "zoophilia," on the other hand, are too broad. Even if it were narrowed to a straightforward conjunction, making sexual attraction a necessary component, it would not necessarily describe any actual sexual behaviour. Being sexually "attracted" to a non-human animal is neither acting in any overtly sexual manner nor engaging in anything which might properly be described as sexual

activity.

With regards to what Miletski calls “bestiality,” the Canadian Criminal Code does not regulate the masturbatory activities of dogs or other non-human animals, even in public. It likewise stipulates no punishments for the development of emotional attachments to non-human animals -- with or without sexual connotations (i.e., zoophilia). Similarly to being sexually attracted to children, simply being sexually attracted to non-human animals (or anything else, for that matter) is not worthy of criminal prosecution. It is only after such feelings are acted on that agents of the law can rightly intervene. This examination of zoophilia is concerned with whether any mutually gratifying sexual contact between human and non-human animals might properly be liable to legalization in Canada, where it is currently illegal to engage in any form of zoophilic contact.

To make matters clear: the troublesome issue is whether any sexual contacts between human and non-human animals are morally and legally unproblematic when the purpose(-s) of such contact includes the sexual gratification of the human participant. Towards that end, the following definition of zoophilia is proposed:

1. zoophilia is a description of a human behaviour (i.e., a human animal is either involved or it isn't zoophilia), and:
2. zoophilia is physical interaction with a living non-human animal for the purpose of sexual gratification (i.e., looking isn't enough, nor is a veterinary procedure or otherwise professional contact such as might occur on farms or in kennels), therefore:
3. zoophilia is committed whenever a human animal, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a living non-human animal.

This definition deliberately adopts the wording of Section 151 of the current Canadian Criminal Code (Greenspan, Rosenberg 250), having replaced “a person under the age of fourteen years” (i.e., a minor under Canadian legal statutes) with “a living non-human animal.” Section 151 of the Canadian Criminal Code defines crimes against living children (Section 178 addresses indecencies or indignities towards human remains). The stipulation here, that zoophilia is an act

involving a living non-human animal, is meant to preclude inclusion of instances such as a human's masturbating with (e.g.) a scrap of fur. Due to differences between how humans regard their fellows and how they regard non-humans, implications such as these need to be made overt so as to avoid confusion. It indicates the gap that is held to obtain between human "beings" and non-human "animals" -- a distinction that is frequently "speciesist" (i.e., not based on relevantly legitimate distinctions). The term "zoophilia" has been adopted here, in accordance with DSM-IV terminology (APA 532).

Though the clinical term used by the APA has been adopted for the purposes of this examination, the clinical diagnosis has not. Zoophilia is here understood to apply in any instance of sexual contact between a human and a non-human animal for the purpose of human sexual gratification. The clinical diagnosis of zoophilia calls for "intense sexually arousing fantasies, sexual urges, or behaviors involving [non-human animals] that occur over a period of at least 6 months" (APA 522-523). Furthermore, zoophilic fantasies, urges, and behaviours are not inherently worthy of clinical consideration, but:

must be distinguished from the *nonpathological use of sexual fantasies, behaviors, or objects* [i.e., non-human animals] *as a stimulus for sexual excitement* . . . Fantasies, behaviors, or objects are paraphiliac only when they lead to clinically significant stress or impairment (e.g., are obligatory, result in sexual dysfunction, require the participation of nonconsenting individuals, lead to legal complications, interfere with social relationships). (APA 525)

The vast majority of the minority of persons who fantasize about, feel attracted to, or engage in zoophilic activity do not suffer any clinically relevant pathology. For most persons who indulge in zoophilic fantasy or behaviour, it is neither compulsive nor resultant in sexual dysfunction (see below). Peter Singer's critics adopt the approach that non-human animals implicated in zoophilia are in fact non-consenting individuals, thereby rendering zoophilia inherently pathological. The soundness of their approach will be determined over the course of this examination.

The suggestion that a diagnosis of the disorder of zoophilia involves "legal complications" is jarring, since this implies that a determination of whether or not a given behaviour is pathological rests on which laws prevail in a given region. A person who practices zoophilia in a jurisdiction with laws prohibiting that practice is

pathological; a person who practices zoophilia in a jurisdiction with no similar prohibition is not. Changing one's physical address ought to have no effect on a diagnosis of the health of one's psyche, which presumably gets carried intact from one jurisdiction to another. The fact that zoophilia can "interfere with social relationships" makes it no different from homosexuality or an inclination towards any other minority sexual orientation. Yet, how one's acquaintances react to one's sexual behaviour should not in and of itself determine whether or not one is pathological. A gay man living in a liberal district of a liberal city is no more or less pathological for his being gay than a similar man living in a conservative small town. Certainly the APA ought to employ the facts it lists as criteria for pathology as a guide to proper diagnosis, since the necessity of treatment may well be pragmatically correlated with the impact (or lack thereof) any given behaviour has had on a patient's life, but it ought not employ them as a sort of check-list in which any positive response elicited from a patient automatically leads to a diagnosis of pathology.

The definition of zoophilia proposed here does not adopt the wording of Section 152 of the Canadian Criminal Code: "invitation to sexual touching" (Greenspan, Rosenberg 252), which would have added "inviting, counseling, or inciting" a non-human animal to engage in zoophilic activity, because it attempts an accurate definition of certain actual sexual behaviours -- not a criminal offence (see below). The coaxing of a non-human to engage in zoophilic activities, and concomitant moral and legal concerns, will be addressed at length below. The definition of zoophilia does not adopt the wordings of either Sections 153 or 153.1 for similar reasons. The issues embodied in these sections, and particularly those which protect against "sexual exploitation" (Greenspan, Rosenberg 253-257) are relevant to a discussion of whether zoophilia in any form ought to be legally permissible in Canada, and are addressed in the course of this examination. The proposed definition of zoophilia is completely in keeping with the development of Canadian law. It avoids ambiguous or irrelevant aspects of other definitions and it allows for the inclusion of sexual activity involving non-human animals in the statutes of the Canadian Criminal Code in what Singer might term a "non-speciesist" fashion. In keeping with Canadian jurisprudence, the term

“child” shall consistently be used in this examination to refer to human animals under 14 years of age.

## Peter Singer’s Statements

Peter Singer has stated that “sex with animals is still definitely taboo,” unlike the use of contraception, indulging in masturbation, oral sex, or sodomy, or being “openly gay or lesbian” (Singer, *Heavy*). By this statement, Singer raises nearly nobody’s hackles anymore. The contemporary Criminal Code of Canada explicitly bans very few sorts of sexual activity from the repertoire available to consenting adults in their own privacy: sex with children or child-like adults, incest, and sex with non-human animals, although the applicability of an implicit tolerance in the Criminal Code for mildly forceful or sado-masochistic sex between adults has recently been questioned by the courts (*R. v. Welch (J.)*; *Jobidon* 733-734).

Of these activities, only incest is to be prohibited on grounds not related to the issue of consent. Incest, as a criminal offence under Canadian law, is a remarkably narrow concept: sexual intercourse [penetration] -- not merely sexual contact -- between siblings and half-siblings, -parents, or -grand-parents (Greenspan, Rosenberg 257-258) and most morally questionable sexual interactions between close relations are illegal not for being incestuous but for being assaultive (i.e., non-consensual).

According to Singer, the reason for the enduring “potency” of the taboo against sexual contacts with non-human animals, the vehemence with which this prohibition continues to be held, its persistence while other non-reproductive sexual acts have become acceptable, suggests that there is another powerful force at work: our desire to differentiate ourselves, erotically and in every other way, from [non-human] animals. (Singer, *Heavy*)

Societal restrictions against sexual contacts between human and non-human animals pre-date modern concerns for animal rights by thousands of years. These restrictions were not founded through a modern-day equivalent of concern for non-human animal welfare. Instead, the motivation behind a ban on zoophilia is derived from a desire to enforce a form of “natural law” ideology which zoophilia is seen to violate (Liliequist 393-394).

The most effective of Singer's critics, those who believe that bans against zoophilia ought to be maintained or, where necessary, put (back) into place, avoid reference to so quaint a notion as the "natural" order of things. Society has rightly evolved too far away from such a conception to allow for persuasive arguments to be made along such lines. Instead, they employ tools provided by modern-day attitudes towards non-human animals. These tactics were likely unimpressive to those who formulated and, presumably, enforced original taboos against zoophilia. At the time when the legal bans which led to today's equivalents were first put into place, zoophilia was wrongful in the same manner in which homosexuality was considered to be: it violated the "natural order" of things in which sex is procreative and limited to socially sanctioned, heterosexual couplings. Singer points out that, "not so long ago, any form of sexuality not leading to the conception of children was seen as, at best, wanton lust, or worse, a perversion" (Singer, *Heavy*; Lilliequist 393).

Incest, zoophilia, and pedophilia have yet to gain social acceptance in Canada. For sound reasons, it is doubtful whether pedophilia ever should or ever will win even a small measure of social acceptance. For different reasons, just as sound, certain instances of zoophilia may yet manage it. Though outside the scope of this examination, the Canadian statute barring genuinely consensual instances of incest between adults is most open to challenge. Such a prohibition seems to rest not on any relevant moral grounds but on most persons' distaste for sexual contacts with one's own close relations.

Singer has come in for severe criticism because of his opinion that certain instances of zoophilia are morally unproblematic and ought not to be legally proscribed. He cites Otto Soyka who wrote how, of all non-reproductive sexual acts, "only bestiality . . . should be illegal, and even then, only in so far as it shows cruelty towards an animal" (Singer, *Heavy*). It is unclear whether Singer intended to allow sex with children to slip into the category of morally unproblematic non-reproductive sexual behaviours by his apparent endorsement of Soyka's position, but it seems likely that this was not his intention. Singer has said nothing in defence of pedophiles.

Instances of zoophilia that show cruelty towards a non-human animal "are

clearly wrong, and should remain crimes” (Singer, *Heavy*). On the other hand, by this admission, Singer seems to support legalizing instances of zoophilia from which cruelty is absent and “sex with animals does not always involve cruelty” (*Heavy*). In fact, “in private not everyone objects to being used [sexually] by her or his dog . . . and occasionally mutually satisfying activities may develop” (Singer, *Heavy*). Though Singer never overtly states that any form of zoophilia ought to be legally condoned, this conclusion is certainly supported by the statements cited above. Given what statements Singer has made regarding zoophilia:

1. Some sexual contacts between human and non-human animals don't involve cruelty.
2. Only sexual contacts between human and non-human animals that involve cruelty ought to be illegal.
3. Therefore, some sexual contacts between human and non-human animals ought to be legal.

Despite the argument which Singer makes in support of legalizing “cruelty-free” zoophilia, his critics object that non-human animals are incapable of adequately consenting to such activities and so even cruelty-free zoophilia remains morally problematic. If non-human animals are incapable of giving consent to sexual contacts with human animals, then even cruelty-free zoophilia remains a form of sexual assault entirely similar to what occurs when adults engage in “cruelty-free” sexual activity with children.

Singer makes reference to an incident involving a male orangutan which many of his critics are quick to include in their rebuttals against his views on zoophilia. The incident also serves as a good starting point for an examination of Singer's own views of the relative importance of consent. Singer briefly relates an incident in which a captive male orangutan sporting an erection seized a woman (Singer, *Heavy*). The details of the incident were related to Singer at a social gathering by the woman who had been assaulted. The incident, similarly to the case of the amorous dog, features sexual behaviour initiated by a non-human animal. All that this could be used to demonstrate is that non-human animals sometimes undertake sexual contacts with human animals of their own volition: they don't always need to be coaxed or coerced into such behaviour by human

animals. The matter of captivity or domestication will be addressed below.

Apparent sexual attraction on the part of a non-human animal for a human animal isn't enough to allow Singer to escape being labeled a supporter of sexual activities uncomfortably similar to sexual contacts with adults initiated by children. There are certainly instances in which a child either inadvertently or deliberately initiates or invites sexual activities with an adult. It is the responsibility of the adult to discourage and resist such opportunities for morally suspect behaviour. Singer makes no mention of this, though it seems that this omission cannot be due to a lack of awareness. Singer seems more interested in making a broader observation: why insist on prohibiting apparently harmless instances of zoophilia when non-human animals are routinely slaughtered, confined, and exploited by human animals with either trivial or no legal consequences at all? While a greater injustice can never serve to excuse a lesser one even in a utilitarian world view, Singer further wants to know whether "mutually satisfying" instances of zoophilia are injustices at all.

A difficulty with Singer's recounting of the orangutan incident which is missed by his critics is the fact that he speculates in a manner seemingly unjustifiable given the context of his access to the facts of the situation. Singer writes:

As it happened, the orangutan lost interest before penetration took place, but the aspect of the story that struck [Singer] most forcefully was that in the eyes of someone who has lived much of her life with orangutans [i.e., Birute Galdikas, "the Jane Goodall of orangutans"], to be seen by one of them as an object of sexual interest is not a cause for shock or horror. The potential violence of the orangutan's come-on may have been disturbing, but the fact that it was an orangutan making the advances was not. That may be because Galdikas understands very well that we are animals, indeed more specifically, we are great apes. This does not make sex across the species barrier normal, or natural, whatever those much-misused words may mean, but it does imply that it ceases to be an offence to our status and dignity as human beings. (Heavy)

It would be interesting to know how the assaulted woman considered the situation: whether she was either shocked or horrified – or both. It is unclear whether Galdikas herself felt anything like these emotions either during or after the incident. The account may only reflect Singer's opinion of what Galdikas felt. Singer's reading of Galdikas's opinions of human-orangutan sex may be entirely speculative, and may even be coloured by what Singer would like to hold true.

Singer, in the circumstances he describes here (i.e., hearing of something second-hand, and then making a judgment about the attitudes of someone who isn't even present to that conversation), is never in a position to be able to render a judgment regarding whether or not Galdikas finds an orangutan's making sexual advances towards a woman "disturbing."

Singer relates Galdikas's reaction to the circumstances: "Fighting off so powerful an animal was not an option, but Galdikas called to her companion not to be concerned, because the orangutan would not harm her, and adding, as further reassurance, that 'they have a very small penis'"(Heavy). Does this reaction reveal the attitudes which Singer ascribes to Galdikas, or is there an equally plausible alternative explanation of her reaction? Calling to someone who has been suddenly assaulted by an extremely powerful animal, telling her not to be concerned and even making light of the situation, may simply have been a welter effort designed to help the woman remain calm and avoid escalating an already precarious situation. Galdikas need not have had anything in mind remotely similar to what Singer implies was there. She supplies no opinions on zoophilia in her work on orangutan sexual behaviour (*Galdikas, Adaptation; Behavior; Tactics*). Perhaps Singer, after hearing of the assault, contacted Galdikas and obtained her version of events. Perhaps his interpretation of what Galdikas was thinking comes from Galdikas herself.

Unfortunately, nothing in Singer's article suggests that this is in fact the case and so his interpretation of things is questionable. Though Galdikas certainly understands that humans are indeed animals -- one of the apes -- this does not imply that she holds that "sex across the species barrier ceases to be an offence to our status and dignity as human beings." Even given her understanding of things, biologically- and evolutionarily speaking, Galdikas does not commit herself to an illogical position by rejecting Singer's ultimate conclusion here. Finally, it does not further Singer's position that some sexual contacts with dogs are morally unproblematic when he takes pains to point out the fact that humans are apes. Singer does not seem at all interested in the thesis that the moral standing of zoophilia rests on degrees of similitude between various species, after all.

No matter what ultimately grounds historical prohibitions against zoophilia, it

is certainly true that the practice continues despite at least two thousand years of prohibitions. Miletski collects the findings of many contemporary studies into the prevalence of zoophilia in various human populations in the latter half of the twentieth century (Miletski 55-65). One weakness of the Miletski collection is its inclusion of “pseudo-scientific” (the term is Miletski’s) studies of dubious integrity. From the empirically valid studies collected by Miletski, a pattern emerges:

1. zoophilia is associated with youth: its frequency decreases sharply with age
2. zoophilia is rural: its frequency is controlled by exposure to non-human animals
3. men are more likely than women to admit to having engaged in zoophilia
4. non-heterosexuals are more likely than heterosexuals to admit to having engaged in it

A difficulty in any study of perverse sexuality is ascertaining the actual rates of incidence of what are regarded as deviant behaviours. The studies cited by Miletski ultimately measure self-reported behaviours and so their veracity is entirely dependent on the candour of their respective cohorts.

A 1948 study of male sexual behaviour conducted by Kinsey, Pomeroy, and Martin noted that “40 to 50 percent of all farm boys” engage in zoophilic activities and that, in some Western areas of the United States, this incidence rises as high as 65% (Miletski 55). This is a remarkably high crime rate (note, however, that zoophilic activities are not illegal in all 50 American states). It is telling how little attention the activities undertaken by these individuals warrants from the general public. A contributing reason for this is certainly the idea that mutually satisfying zoophilic contacts are either harmless or close to it. Another is surely that sexually mature non-human animals are not analogous to children, an attribution made by many of Singer’s critics – including the most cogent ones.

The association of zoophilic activities with youth largely derives from experimental sexual curiosity during adolescence. This may also play a role in the higher rates of incidence for non-heterosexuals (i.e., bisexuals and homosexuals). Being of a minority sexual orientation and living in a culture which frowns on non-traditional sex, non-human animals may prove a pragmatic alternative to sexual contact with a human of the same sex. If so, then some instances of zoophilia likely carry a taint of desperate opportunism, since such sexual contact would not

have been undertaken had the preferable alternative (i.e., sexual contacts with a fellow human animal) been more readily available. No study has examined this hypothesis, but it would be interesting to discover whether in fact higher rates of zoophilic activity among non-heterosexuals can be accounted by the seeking of same-sex (as opposed to inter-species) contacts. The association with agrarian environments is self-explanatory. The latter does suggest, however, that the incidence of zoophilia would increase within urban populations given greater exposure to non-human animals, accompanied by more frequent opportunities for direct contact.

### The Tactics of this Examination

Peter Singer's most effective critics cite as their principal reason for maintaining or putting into place prohibitions against all forms of zoophilic activity the fact that non-human animals are incapable of consenting to it. Therefore, it follows that all such contacts are constitutive of assault and are subsequently morally objectionable. Unpacking the concept of consent is an extremely complicated affair. At the start, it will be demonstrated that verbalized consent is not required under Canadian law. This at least opens the door to the possibility that non-human animals (and non-linguistic human animals) can sufficiently indicate a willingness or unwillingness to engage in zoophilic activities through non-verbal (or non-linguistic) conduct.

Over the course of clarifying the legal notion of consent in contemporary Canadian law, it will turn out that non-human animals can in fact -- through their conduct -- sufficiently indicate whether or not they consent to zoophilic contacts under certain very proscribed circumstances. But there is more. None of Singer's critics seems to have taken notice of what is implied by taking non-human consent "seriously." If non-human consent was taken seriously, as Singer's critics would have it, then every human intervention into the lives of non-human animals which cannot reliably be demonstrated to be genuinely consensual is problematic. If non-human consent is taken as seriously as seems warranted by the very harsh penalties that Singer's critics would assign those who'd engaged in zoophilic

activities, then similar non-consensual interventions into the lives of non-human animals ought likewise to be accompanied by stiff legal consequences.

The degree to which a non-human's consent is violated by any human-centred activity ought to be the determining factor in assigning such penalties, if the rationale behind the prohibition of zoophilic activities is respecting non-human consent. Harsh penalties associated with violating non-human consent arise only in the context of zoophilic activities, however. This is an indefensible inconsistency. Only in the realm of the sexual is non-human animal consent taken seriously. It can be conveniently dismissed where -- almost exclusively -- profits are concerned. While Singer's critics are quick to equate sexually mature non-human animals with children, and then decry zoophilic activities along with pedophilia, they sit utterly silent to the implications of their claims.

This examination makes an argument contrary to popular "wisdom." It is ordinarily taken to be a platitude that non-human animals are constitutionally incapable of consenting to sexual contacts with humans, and that they are, in this regard, child-like. This is an odd idea to hold, given that most persons -- and Singer's critics make no argument to the contrary -- accept that non-human sexuality is itself morally acceptable. That non-human species engage in sexual behaviour doesn't strike us as a source of concern (nor should it). Some instances of non-human sexuality seem empirically to be assaultive. Aside from these instances of "non-human rape," however, non-human sexual activity is not seen as any cause for moral outrage. Human animals may sometimes feel embarrassed in the presence of non-human sexuality, but non-human sexuality is ordinarily in itself a morally neutral (at worst) feature of the landscape. It is permissible, both morally- and legally speaking. The question then becomes: "What does the introduction of a human animal to the situation bring with it, morally-speaking?"

A mere change of species is morally irrelevant. Exchange of physical form to one or more participants in some sexual activity does not, in and of itself, bring anything morally relevant to a situation, unless such necessitates the infliction of physical harm. This is not to say that being human is simply the possession of a given physical form. What is morally relevant is that being human typically entails possession of a vastly greater intellect than any non-human, and the potential to

wield immense power that lies in the singularly human ability to manipulate sophisticated technology. What makes consent between human and non-human animals problematic is not some supposed inability to consent to sexual contact on the part of non-humans (which is conveniently ignored in non-zoophilic contexts where it is assumed not even to exist), but rather the imbalance of power inherent in any zoophilic encounter (which renders the situation akin to parent-child interactions). The relevant differences noted here must be kept in mind, or distorted and unsound views of non-human sexuality emerge which lead to unwarranted conclusions.

The Canadian context provides such a typically “unbalanced” morality, when examined from a perspective of non-human consent’s being of real concern. Horrific interventions into the lives of non-human animals in the name of industry go wholly unpunished, are even subsidized, while activities which are far less overtly (if at all) harmful, and to which a non-human animal may show no aversion, are liable to lengthy jail terms. There is, however, a novel approach to the issue and that is to regard zoophilic activities in the context of fiduciary relationships. Fiduciary relationships are similar to, but not identical with, “power relationships” wherein one member of the relationship inherently holds a far greater degree of control over the direction of the relationship than the other. There is a considerable power imbalance.

Many examples of such relationships are provided in the course of this examination, and it is clear that all the requisite elements are in place to the utmost degree possible in relationships between human animals and any non-human animals in their care. Being the stronger party, the human animal is morally obligated to restrict interventions in the life of the non-human animal only when doing so is in the non-human animal’s best interests. The selfish interests of the human participant in such a fiduciary relationship are irrelevant. The analogy between one’s children and one’s non-human companions arises once more, although it must be kept in mind that sexually mature non-human animals are not children (so not every conclusion drawn in one case is automatically transferable to the other).

Again, however, taking the relationships between human and non-human

animals in their care as exemplary of fiduciary relationships (which I believe to be the case, since I do believe that non-human consent must be taken seriously) implies that all such interventions, not just zoophilic ones, are to be held to a much higher standard of conduct. Industrial uses of non-human animals would virtually cease to exist, or be radically transformed so as to make most current agricultural practices prohibitively more expensive than at present. It would also all but deem zoophilic activities to be morally objectionable. There may be exceptional circumstances which prove the prohibition to be less than absolute, but this is a difficult argument to make (that a given zoophilic activity in fact did fully respect the best interests of the weaker party). It may even be that such instances are so unlikely as to allow a complete prohibition of zoophilic activity to be consistent with basic Canadian rights and freedoms. Such a ban may not be an unconstitutional infringement on a Canadian citizen's autonomy.

A total ban would not eliminate the fact that, philosophically speaking, some few instances of morally unproblematic behaviour are rendered illegal. This creates a situation similar to what happens when most age of consent restrictions are enforced: there are exceptions to either side of a more-or-less arbitrary line. Some persons deemed capable are not, just as some persons deemed incapable are not. Ironically, such lines are typically based on features which are not of any inherent moral relevance: age, consanguinity, or species. None of these factors is cited as capable of vitiating sexual consent, unlike a host of relevant concerns (see below). Doing away with the idea that there is any fiduciary duty between human animals and non-human animals in their care, or failing to acknowledge it, again removes a possible foundation for a ban on nearly, if not all, zoophilic activity. The failure to take non-human consent seriously, in the face of widespread legal, though morally unobjectionable, industrial abuses of non-human animals, effectively removes the grounds for any such prohibition in contemporary Canadian society. It establishes an unwarranted double standard, a baseless inconsistency that is therefore legally, morally, and philosophically untenable.

If non-human animals cannot consent to any zoophilic activities, and this is the rationale for a legal ban of zoophilic activities, then a similar ban must be enforced against all similarly non-consensual interventions in the lives of non-

human animals by humans. If non-human animals can consent to any zoophilic activities, then a legal ban of such activities ought to be lifted. It may be objected that there are surely other grounds for establishing a ban on zoophilic activities. Some moral codes clearly call for such a ban, the Bible being one example. This examination, however, takes a stance on zoophilia's applicability within the context of contemporary Canadian law. While derived largely from a Biblical tradition, the Canadian Criminal Code is not bound by it as once it was. Some persons may lament this fact, but that does not change it.

Speaking generally, the main barrier to declaring a sexual activity conducted in privacy morally acceptable in contemporary Canadian society is whether or not it is properly consensual. It remains illegal to engage in sado-masochistic activities, since such entail the deliberate infliction of pain and-or humiliation on a fellow human being. This is taken to be anti-social, and an encouragement of further such behaviour. It undermines the instilling of the virtue of benevolence in Canadians. Most zoophilic activities are not sado-masochistic, and so cannot be banned on such grounds. No empirical evidence exists to show that zoophiles are any greater danger to themselves or to others than ordinary folk. Contemporary psychological attitudes towards the behaviour do not brand it as indicative of mental disfunction worthy of intervention unless it becomes chronic. The sorts of activities that are indicative of an elevated danger to oneself and to others, the sadistic mutilation or killing of non-human animals, are, ironically, not punished with anything near the severity of zoophilic contacts. The double standard by which non-traditional sexual activities are judged is stark. If prohibitions against zoophilic activities aim to prevent harm from coming to humans, then the penalties associated with violating such a ban ought to be reflective of those that apply when non-human animals are subjected to sadistic cruelty or neglect. This is currently not at all true in the Canadian legal context (see below).

The grounds on which the rightness or wrongness of any given instance of zoophilic activity rests is properly the recognition of a fiduciary duty on the part of humans towards non-human animals in their care, or so this examination will argue. Until this recognition is endorsed in law, until it applies in every instance of human intervention in the lives of non-human animals in their care, zoophilic activities are

unconstitutionally singled out by for punishment. This is not tenable under the virtues espoused by Canadian society, the idea that laws must be just, or by the philosophical requirement of simple internal consistency.

## Chapter 2

### Consent's Centrality

... philosophy as practiced in the universities today does not challenge anyone's preconceptions about our relations with other species. By their writings, those philosophers who tackle problems that touch upon the issue reveal that they make the same unquestioned assumptions as most other humans, and what they say tends to confirm the reader in his or her comfortable speciesist habits. (Singer, All 81)

#### A Closer Examination of Singer's Position

Peter Singer fails to consider what most of his opponents see as the primary obstacle to permitting sexual contacts between human animals and non-human animals: the inability of unproblematically securing a non-human animal's consent to sexual contact. Singer (Heavy) points out that:

sex with animals does not always involve cruelty. Who has not been at a social occasion disrupted by the household dog gripping the legs of a visitor and vigorously rubbing its penis against them? The host usually discourages such activities, but in private not everyone objects to being used by her or his dog in this way, and occasionally mutually satisfying activities may develop . . .

If "cruelty" implies the infliction of suffering, then what Singer asserts is obviously true. The dog that "makes use of" a human animal's leg in this manner cannot be said -- necessarily -- to suffer as a result, especially in the case of an otherwise normal-seeming dog that seeks to repeat the experience. It is contrary to fact to assert that every such dog is masochistic. The rest of Singer's assertion mires him in more debatable territory. Although "not everyone objects to being used by his or her dog in this way" and "occasionally mutually satisfying activities may develop," it is far from clear that such activities as Singer intends are morally permissible and ought to be tolerated, if not encouraged.

The assertion that "not everyone objects" to such "use" rightly implies that objecting is a relevant concern. That is, if a human animal objects to this activity, it is non-consensual sexual contact. In such instances, a person has been sexually assaulted by a dog. The contact is unproblematically consensual, at least for the

adult human animal, if no such objection is present. The phrase, “occasionally mutually satisfying activities may develop,” is liable to misinterpretation. Singer is not condoning the development of “occasionally” mutually satisfying activities, that is: activities which are sometimes mutually satisfying for the parties concerned, but which sometimes are not (i.e., which sometimes are sexually assaultive). He must be asserting, instead, that out of some larger class of events: dog-humps-leg, a smaller subset of events, mutually-satisfying-leg-humping, arises. Only those that are not sexually assaultive are morally sanctionable.

This still leaves Singer open to criticism on the grounds that non-human animals are incapable of consenting to sexual activity with human animals tout court. That renders instances of zoophilia akin to pedophilic sexual contacts. It is sometimes the case that inter-generational sexual activity proves a “mutually satisfying activity” that the adult implicated does not object to. Despite such exceptions, few people seriously question or oppose laws that restrict outright all sexual contacts between adult humans and children. Recently, however, there has emerged just such a serious treatment of the possibility that not all such sexual contact is deleterious and which defends the abolition of age-of-consent restrictions to sexual contact (Levine; Collard). The idea of an age of consent restriction to sexual contact is again taken up, and at greater length, below.

Singer might be able to avoid this analogous comparison that conflates sexually mature non-human animals with children by pointing out any relevant differences between these two classes of beings. For one, the non-human animals in question (both dog and ape) are sexually mature. They possess the sexual drives of adult animals and are fully physically developed. They are physiologically suited for sexual intercourse. They may very well be sexually experienced. Under ordinary circumstances, human animals don't oppose such non-human animals from engaging in sexual intercourse amongst themselves -- except perhaps when their offspring would prove an inconvenience -- and certainly not on either moral or legal grounds. None of these characteristics is ordinarily true of children, and it isn't immediately clear that simply changing the physical form (i.e., species) of the sexual partner -- from a non-human to a human animal -- introduces moral issues not otherwise relevant.

Several of Singer's critics point out that non-human animals are incapable of consenting to sexual contact the way (i.e., in the same manner or degree) in which adult human animals can:

Singer essentially concedes his vulnerability on the consent issue by ducking it. He defends one scenario in which a dog tries to mount a human visitor's leg, and another in which an orangutan grabs a female attendant. Each scenario presumes the animal's initiative. (Saletan)

Singer doesn't necessarily "duck" the matter of consent's importance. Consent isn't relevant to his observation that all but the most sadistically wanton acts of zoophilia are a far lesser evil done towards non-human animals than some of the types of treatment inflicted on them which are currently condoned by human society, and even strongly encouraged through its use of advertising.

Many human animals tolerate or even encourage an omnivorous human diet. They accept that profit can be made from the confinement and slaughter of non-human animals. It is nonsensical for such persons to condemn zoophilia on the basis of animal welfare concerns since they sanction practices far more obviously and directly harmful to non-human animals.

A philosopher's duty is to clarify his principles and defend their consistent application. Those who embrace the principle of consent, and who agree that an animal "is no more capable than a child of giving meaningful consent," have done both. They have stated their principle and applied it to sex with children. What about Singer? He has often compared the mental ability of higher animals to that of children. Does he think this level of comprehension is sufficient to give consent to sex? If the answer is no, isn't zoophilia wrong? If the answer is yes, isn't pedophilia OK? (Saletan)

When Singer, the preference utilitarian (Specter 48), compares the mental abilities of higher animals to that of children, he does so with the aim of pointing out how higher animals, like children, are capable of knowing fear and despondency, pain and suffering. He does not state that some non-human animals, like some children, are able to conceive of and calculate the solutions to mathematical expressions. He does not suggest that adult non-human animals are sexually identical with children.

There are similarities between the mental capacities of non-human animals and children. That does not imply that the two are similar in every way, or in more than this one instance. To the degree that the similarities which do hold are morally relevant, these similarities justify treating certain non-human animals and children as

morally identical. If what makes an act wrong is its infliction of pain or discomfort, then it is morally irrelevant whether that pain or discomfort obtains in a child or a non-human animal since both children and non-human animals can suffer equally from the experience.

Saletan's last two rhetorical questions only affect the moral validity of Singer's position if Singer is committed to seeing children and certain non-human animals as relevantly similar in matters of sexuality. Nothing in his *Nerve* article commits Singer to holding that view. Norah Vincent asserts that, because a sexually mature non-human animal:

has the mental and emotional capacity of a child . . . it is no more capable than a child of giving meaningful consent. So when Singer argues that there is such a thing as cruelty-free bestiality -- when, for example, the animal either initiates sexual contact, or is not killed or physically injured receiving it -- he does so by ignoring the obvious truth that if you have had sex with someone who is constitutionally incapable of giving anything that might constitute meaningful consent, you have committed rape. At the very least you have taken advantage of a creature over which you exercise considerable power. (Vincent)

It must be stated: it is an unsupported assumption that sexually mature non-human animals are "no more capable than a child of giving meaningful consent" to sexual contacts with human animals. Sexually mature non-human animals are not children, and so are not necessarily "constitutionally incapable" of consenting to sexual contacts with humans as children are.

Though it isn't overtly stated, Singer very likely agrees with Norah Vincent that "if you have had sex with someone who is constitutionally incapable of giving anything that might constitute meaningful consent, you have committed rape." This holds true if only by virtue of fitting a certain linguistic model of application: violating the requirement of consent is (at least in part) just what it is to commit an act of rape. The question becomes whether or not any non-human animal is ever capable of giving "anything that might constitute meaningful consent." If certain non-human animals are capable of doing so, then engaging in cruelty-free zoophilia need not equate with committing an act of rape. Depending on how Vincent defines "having sex," the scope of the term rape as it is used here against Singer may already be far beyond its ordinary application. It certainly cannot be taken to refer to any of the possible instances of "cruelty-free bestiality," since such may not fit any established or defensible description of acts that "rape" can

properly be used to classify. This is, in part, why rape laws in Canada and elsewhere were reformed.

Singer seems to hold that children and non-human animals do differ in relevant ways, thereby preventing zoophilic activity from being simplistically conflated with pedophilic activity. The last consideration, asserting that those who commit acts of zoophilia “have [at the very least] taken advantage of a creature over which [they] exercise considerable power” is likewise too simplistic (though it may provide the key to dealing with the morality of zoophilia). As shall be argued, certain non-human animals are able to exercise enormous physical power against human animals who would attempt to “take advantage” of them. Also, the capacity to “take advantage” does not imply that the power which can potentially be wielded was in fact resorted to in order to obtain some end. That is, just because a human animal can resort to threats and punishments against a non-human animal, it does not follow that anything like that proved necessary. Just because a man can beat his dog into obedience if benevolent means fail to achieve that end, it does not follow that any particular man must have made use of such cruelty to obtain the desired end. Vincent’s mere assertion that the power imbalance between human and non-human animals is significant will lead to an approach to the question of zoophilia’s moral standing that seems more promising than an examination based entirely on any non-human animal’s presumed inability to give genuine consent to sexual contacts with a human animal.

Singer fails to overtly state that non-human animals can consent to sex with human animals. Singer also fails to condemn outright all sexual contact between human and non-human animals. Given the context of the remarks which Singer does make, however, it seems reasonable to suppose that some sexual contacts between human and non-human animals are morally acceptable and that others are not. The distinguishing feature separating these categories of behaviour is the presence or absence of discomfort: morally acceptable sexual contacts between human and non-human animals are “mutually satisfying” (morally unacceptable ones are not). With pedophilia, the fact that some instances of sexual contact between adults and children prove to be mutually satisfying, even to the point of their failing to interfere with the well-being of any participant at any

time later in life, has not been sufficient cause to lift Canadian legal restrictions against such sexual contacts.

The fact that sexual contacts between human and non-human animals can be mutually satisfying doesn't lead to the conclusion that zoophilia in even the most trivial form ought to be legal. If a non-human animal was found able to consent to such activities, however, the case against legalizing zoophilia would be seriously weakened. According to Timothy Noah:

Singer does denounce sexual practices that involve outright cruelty, [but] he doesn't really explain how an animal can go about giving consent because, well, you know, animals can't talk. Sure, a dog humping your leg may be conveying a certain message, but without the kind of verbal confirmation required these days by every college freshman manual ("no means no"), how can you be certain?

Noah concedes that the dog masturbating against a human animal's leg "may be conveying a certain message." That message is, presumably, that this is an activity which the dog derives some satisfaction from. Noah then makes reference to contemporary standards for sexual consent between human animals, which are set quite unattainably high for non-human animals. That they are set unrealistically high for most actual human sexual behaviour is not an entirely separate matter.

Though Noah seems to be flirting with ridiculing the consent policies which have sprung up on campuses across the United States and Canada, he nonetheless states a position shared in all seriousness by Piers Beirne:

Bestiality involves sexual coercion because animals are incapable of genuinely saying 'yes' or 'no' to humans in forms that we can readily understand. A different way of putting this is to suggest that if it is true that we can never know what it is like to be a nonhuman animal, as the philosopher Thomas Nagel has implied, then presumably we will never know if animals are able to assent -- in their terms -- to human suggestions for sexual intimacy. (Beirne, *Rethinking*)

It is true that human animals cannot "know" what it is like to be non-human. Human animals do know what it is like to be sexual, however. Although no human animal will ever "know" whether or not non-human animals "assent . . . to human suggestions for sexual intimacy," it is hard to imagine what it is that the dog could be seeking when he latches onto a human animal's trousers and thrusts his hips, apart from hedonistic sexual gratification. A non-human animal quite likely masturbates for much the same reasons as a human animal. Even if "their terms" of assent in some ways differ from ours, it seems clear that non-human animals

don't masturbate in the hopes of bringing suffering or pain on themselves.

Non-human animals engage in recreational (i.e., masturbatory) sexual behaviour in order to experience pleasure, alleviate boredom or stress or any of those same reasons which drive human animals to masturbate. Perhaps the pleasure derived is, for non-human animals, not identical to that experienced by human animals, but that seems completely irrelevant when judging the morality of the act. While non-human animals may lack the cultural conceptions (i.e., legal and moral notions) variously shared by groups of humans, there is no reason to think that the primary sexual impulses of adult human and non-human animals is qualitatively different. In this sense, sexually mature non-human animals are most definitely not akin to children. Overt demonstrations of sexual desire from children are disturbing for reasons which have no application to sexually mature non-human animals.

### Piers Beirne: Singer's Most Cogent Critic

According to Piers Beirne:

if we cannot know whether animals consent to our sexual overtures, then we are as much at fault when we tolerate interspecies sexual relations as when we fail to condemn adults who have sexual relations with infants or with children or with other 'moral patients' -- to use Tom Regan's term -- who, for whatever reason, are unable to refuse participation. If it is right to regard unwanted sexual advances to women, to infants and to children as sexual assault, then I suggest sexual advances to animals should be viewed likewise. (Beirne, *Rethinking*)

If, on the other hand, we could know whether non-human animals consent to our sexual overtures, then "interspecies sexual relations" would not be akin to sexual relations with "moral patients." For Beirne, this possibility seems unattainably remote: humans will simply never have sufficient access to the minds of animals to determine whether genuine consent obtains in any given instance of zoophilism. It is significant that the law does not place the same epistemological barriers against instances of inter-human sexual contacts. It could not: to do so would make every instance of sexual contact dubious. There can never be enough evidence to wholly remove the possibility of genuine consent's having either obtained or failed to obtain.

Beirne's epistemological standard cannot be adopted for use in any court system in the world. It would render findings of guilt or innocence unattainable by any human agency. Despite this, laws prevail and properly functioning legislatures must strive to dispense as good an approximation of justice as they are able to. This occurs in Canada as it does elsewhere. Thus, it will not be to Beirne's standard of "knowing" that any reasonable consideration of the legality of zoophilic activities can turn. Rather, the same standard of "knowing" that is currently applied against human sexual activities must serve (if it can be made to) in instances of zoophilia. It will be found that the prevailing Canadian judicial standard of "knowing" whether consent obtains in a given sexual encounter can be applied to instances of sexual contacts between human and non-human animals.

Beirne is guilty of begging the question: not knowing whether non-human animals consent to sexual contacts with human animals, in exactly the same manner in which such knowledge may apply to sexual relations between human animals, does not imply that such cases are equivalent to cases in which non-consent obtains. Apart from the fact that a sexually mature non-human animal is in no way relevantly (i.e., sexually) similar to a human infant, Beirne begs the question by equating sexual advances towards non-human animals with "unwanted sexual advances" -- towards anyone. Beirne suggests "viewing likewise" the following very disparate behaviours:

1. unwanted sexual advances to women
2. unwanted sexual advances to infants
3. unwanted sexual advances to children
4. sexual advances to [non-human] animals

Clearly, unwanted sexual advances are not what Singer would call mutually satisfying -- not if the opposition is genuine, though "token resistance" to sex is sometimes manifested (see below). By removing the question-begging aspect of Beirne's list, the following results:

1. sexual advances to women
2. sexual advances to infants
3. sexual advances to children
4. sexual advances to non-human animals

Now the problem is whether Beirne's is an extremely paternalistic attitude towards women. It cannot be the case that Beirne considers women on a par with infants in matters of sexuality. Removing the unwanted association results in classifying non-human animals with other "moral patients," which is no more than Beirne ought to have suggested even if it remains disanalogous.

Beirne asserts that moral patients, "for whatever reason, are unable to refuse participation." This cannot be what makes all zoophilia wrong, since some non-human animals can and do very effectively refuse participation in unwanted sexual activity, as is to be expected from animals which can be far more physically powerful than their human handlers and are unconstrained by social and cultural attitudes towards violence (i.e., such non-human animals are probably less reticent than humans are to inflicting injury when so inclined). In such instances, it must be the fact that we cannot "know whether animals consent to our sexual overtures" that makes zoophilia just as wrong as failing "to condemn adults who have sexual relations with . . . 'moral patients'."

Beirne explicitly emphasizes the epistemological problem with zoophilia in the following:

Ultimately, sexual coercion occurs whenever one party does not genuinely consent to sexual relations or does not have the ability to communicate consent to the other. Sometimes, one participant in a sexual encounter may appear to be consenting because she does not overtly resist, but that does not of course mean that genuine consent is present. For genuine consent to sexual relations to be present . . . both participants must be conscious, fully informed and positive in their desires. (Rethinking)

For Beirne, sexual coercion can occur even when all parties "genuinely" consent to sexual relations! This is possible because Beirne allows that the inability to "communicate" consent is sufficient to turn a sexual encounter into a case of sexual coercion. Thus, even if it is a fact that there was no coercion at all, if in fact genuine consent obtained for all involved in a given sexual encounter, that encounter can nonetheless constitute sexual assault. This takes the epistemological requirement far too compellingly, since it criminalizes behaviour that is in fact completely morally unproblematic. It likewise fails to establish one of the necessary elements in the crime of sexual assault: mens rea. Though all the conditions of genuine consent hold, yet, due to the inability to communicate in a manner sufficient to satisfy

Beirne (among others), all that can result is an instance of sexual assault.

Of the three conditions for “genuine” consent cited by Beirne, both (i.e., all) participants must be:

1. conscious
2. fully informed
3. positive in their desires

Only the first condition presents Beirne with no difficulties at all, in most instances of cruelty-free or mutually satisfying zoophilia. That still leaves the other conditions, both of which must be satisfied if sexual contacts between human and non-human animals are to be morally unproblematic. It is likely that non-human animals are incapable of being “fully informed” in a manner satisfactory to Beirne. This derives from how Beirne structured his position. It does not imply that sexually mature non-human animals cannot in fact give adequately informed consent to sexual contacts with human animals so as to render such contacts morally unproblematic from the standpoint of consent.

The epistemological problem intrudes upon securing the second condition, since human animals may never have sufficiently privileged access to the mental states of non-human animals to a degree which might satisfy Beirne that genuine consent in fact obtained and was communicated in a manner “readily understood.” A defence of Peter Singer’s opinion that some zoophilic contacts ought to be legal must address this. Positive responses to each of the following questions must be forthcoming if Singer’s suggestions have any merit:

1. Can any non-human animal be sufficiently “fully informed” of the nature of any sexual contact with a human animal?
2. Can any non-human animal be “positive” in its desire for sexual contact with a human animal?
3. Can any non-human animal communicate the fact that it is “positive” in its desire for sexual contact with a human animal?

## Chapter 3

### The Importance of Speech

Assuming that each person enters the encounter in order to seek sexual satisfaction, each person engaging in the encounter has an obligation to help the other seek his or her ends. To do otherwise is to risk acting in opposition to what the other desires, and hence to risk acting without the other's consent. (Pineau, Date 234)

#### Taking Non-Human Consent Seriously

For some of Singer's critics, non-human animals are relevantly comparable to children or incompetent human adults and so ought to be regarded identically with them in matters of sexuality. It is problematic that consideration for non-human animals' capacity for consent gets limited to the realm of sexuality by most people opposed to zoophilia. Surely, if gaining non-human animals' consent matters at all, then it matters in every instance in which it might factor into any given human imposition. Thus, human animals ought to secure the consent of non-human animals before they make use of them in any research, confine them, farm them, slaughter them, breed them, or involve non-human animals in any other form of human activity whatsoever. If human animals are to take non-human animal rights seriously, then human animals cannot conveniently limit their moral concern to matters of sexuality -- where such 'concern' becomes an inconvenience only to a small minority of 'perverts' easily dismissed by the vast majority of society. Morally-conscientious human animals ought instead to ensure that non-human animals do not "object" to any of the "uses" to which they would be put by human animals.

Limiting concern for non-human animals, regarding their inability to render consent in a manner identical to sober, adult human animals, to matters of sexuality is a contrived convenience. Interest in zoophilia is limited to a very small minority of human animals. Only this relatively tiny minority stands to lose out by its society's adopting or maintaining a strict moral code of consent in matters of sexual contacts with non-human animals, since only this small minority stands to see its

preferred range of activities curtailed by legislation, the threat of legal or other punishment, and public censure. There are two philosophically defensible (i.e., internally consistent) options for handling the idea of non-human animal consent:

1. expand serious concern for non-human animals' consent to all relevant matters;
2. reject serious concern for non-human animals' consent in any relevant matter.

Of these two options, a non-human animal rights and non-human animal welfare activist like Peter Singer must certainly favour the first. The second option would make zoophilia in many forms morally and legally permissible, since zoophilia would become just a part of the full range of uses to which human animals could make legitimate use of non-human animals, without their consent. The only limits which might be placed on zoophilia might then derive from moral considerations independent of consent. Straightforward utilitarians could then place restrictions on zoophilia based solely on the principle of maximizing utility; Kantians could place restrictions on zoophilia based on ends-versus-means reasoning, and so on. The first option does not, by itself, rule out zoophilia. Singer sees the possibility that even serious concern for non-human animals' consent produces, nonetheless, the result that certain instances of zoophilia remain morally acceptable. For Singer, as a preference utilitarian, certain instances of zoophilia may not simply turn out to be morally acceptable, but morally obligatory.

### Introducing Verbal Sexual Consent: the Antioch Example

Current standards of consent between human animals turn sex into highly politicized behaviour. The possibility that consent was not fully obtained or adequately maintained during some act(-s), or was acquired through fraud, threat, or misunderstanding, or was misconstrued, allows for sanctions on cognitive, moral, and legal grounds. An appropriate awareness of the sometimes subtle mechanics of sexual assault will inevitably produce strict guidelines regarding permissible sexual activity between human animals if the aim of those restrictions is to minimize doubt about the authenticity of proffered sexual consent. Although the true aim of such a set of guidelines might be to eliminate doubt, no policy can achieve that goal. If there exists an attempt to effectively minimize doubt in

matters of sexual consent or, perhaps more cynically, to minimize vulnerability to subsequent litigation, it is that proposed by Antioch University. The standards established by that policy go far beyond what most human animals consider to be adequate grounds for accepting that sexual consent has in fact (i.e., genuinely) been obtained and that any sexual contacts following it are morally, cognitively, and legally unproblematic.

Recall that, according to Piers Beirne, “if genuine consent . . . is a necessary condition of sex between one human and another, then there is no good reason to suppose that it may be dispensed with in the case of sex between humans and other sentient animals.” Even if genuine consent can be obtained, there remains the fact that communicating that fact is a necessary element for securing morally unproblematic sexual consent. For this reason, contemporary models of morally unproblematic sexual consent make use of dialogue. The model policy for ‘communicative sexuality’ was drawn up at Antioch College (now part of Antioch University). The policy’s proper goal is to minimize the incidence of misinterpreted sexual consent. It aims to achieve this end by taking Beirne’s communicative requirement seriously. Antioch’s policy (inadvertently) supports Beirne’s statement that “animals are incapable of genuinely saying ‘yes’ or ‘no’ to humans in forms that we can readily understand.” Antioch’s policy also supports the view that educated, economically privileged, sexually mature human animals, except under very strict conditions, are likewise incapable of adequately communicating sexual consent.

Antioch’s sexual offence policy has several, mutually requisite tenets (Francis 137):

1. All sexual contact and conduct between any two people must be consensual;
2. Consent must be obtained verbally before there is any sexual contact or conduct;
3. If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed -- which is one level -- to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before moving on to that new level);
4. If one person wants to *initiate* moving to a higher level of sexual intimacy in an interaction, *that person is responsible for getting the verbal consent of the other person(s) involved before moving to that level;* [italics in original]

5. If you have had a particular level of sexual intimacy before with someone, you must still ask each and every time;
6. If you have a sexually transmitted disease, you must disclose it to a potential partner.

Clearly, no non-human animal could hope to fulfill the requirements of Antioch's sexual offence policy. Non-human animals are not "persons." While some non-human animals may yet achieve such status, most will not. While the requirement of personhood may turn out to be "speciesist" in matters of sexuality, non-human animals cannot communicate verbally the way that Antioch students can. Perhaps the "verbalize it" requirement is meant to be read as a requirement to "express yourself linguistically" (i.e., not verbally, but symbolically through some form of "sign language"). Even so, the sexual offence policy prohibits what seem to be morally unproblematic instances of sexual activity.

Two persons who cannot speak in the normal sense, who are not verbally communicative, literally cannot fulfill the requirements of this policy. Presumably, two persons able to use a language of non-verbal signs would fulfill it, at least "in spirit," though a shake of the head is clearly taken to be less persuasive than a voiced "no." Two adult human animals with no shared language could only have risky, morally questionable sexual "interactions" at Antioch. Finally, according to the policy, sex with a child is not prohibited (recall that Singer seemed to make this slip, too). No age restriction appears in any of its tenets. Antioch seems to depend on other existing laws to punish that when it happens. A proper sexual offence policy should not, however, have to make reference to external legislation. If Antioch's policy-makers had simply thought to consider what seem to be model candidates for protection against sexual improprieties (i.e., children) in its model sexual offence policy, then this omission would not have arisen. No matter what the interpretation, even the most charitable reading of Antioch's sexual offence policy renders virtually every sexual encounter that anyone has ever had into an insufficiently consensual, and thus morally problematic, "interaction." This alone should serve as sufficient warning that the policy is far too restrictive of sexual behaviour.

The idea that verbal consent is a requirement at Antioch becomes muddled soon after "consent" is actually defined. According to the sexual offence

policy, consent is “the act of willingly and verbally agreeing to engage in specific sexual contact or conduct” (Francis 140). This seems to make verbal communication a feature of sexual interactions which cannot be done away with -- but then the following instructions appear:

If sexual contact [or] conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact [or] conduct is responsible for getting the verbal consent of the other individual(s) involved. (Francis 140)

This seems to imply that if sexual contact or conduct is mutually and simultaneously initiated, then the persons who initiate sexual contact or conduct are not responsible for getting the verbal consent of the other individuals involved.

Whenever escalating sexual contact, however, “verbal consent should be obtained [and] the request for consent must be specific to each act” (Francis 140). It isn't clear why verbal consent can be done away with in mutual initiations of sexual contact or conduct, yet be required for every escalation of same even if that occurs mutually and simultaneously. This allowance also blatantly contradicts the policy's stated requirement that “consent must be obtained verbally before there is any sexual contact or conduct.” To be consistent, Antioch ought to insist that verbal assent be required even for the mutual and simultaneous initiation of sexual contact or conduct.

In a section of the policy that Alan Soble “discounts” because it is anomalous, matters become even more complicated:

The person with whom sexual contact [or] conduct is initiated is responsible to express verbally [or] physically her [or] his willingness or lack of willingness when reasonably appropriate. If someone has initially consented but then stops consenting during a sexual interaction, she [or] he should communicate withdrawal verbally [or] through physical resistance. The other individual(s) must stop immediately. (Francis 140)

Physical responsiveness is an adequate indicator of sexual consent or refusal. Verbal communication is optional when physical indications are present. In this citation, as in those which preceded it, the disjunctive “or” is supplied in the place of a clumsier “and-or” clause in the original policy for the purpose of clarity. These substitutions do not subvert the aims of the Antioch sexual offence policy. Use of the “and-or” does not turn the statements into conjunctions, since it allows the disjunctive case to apply. Use of the disjunctive alone strengthens these tenets.

Certain sexually mature non-human animals are capable of physically expressing a willingness or lack of willingness for sexual contact. These same non-human animals are likewise capable of exerting physical resistance to unwanted sexual contact. For some non-human animals, growling is an easily understood, even vocalized communication of unwillingness, especially when accompanied by bared teeth (although such behaviour and even more strenuous resistance to sexual contact is inherent to some non-human species' mating methods). In any case, it is unsound to assert that no non-human animal is able to discourage sexual contact with a human animal.

Securing the verbal consent of even a sexually mature and fully informed human animal may itself be inadequate. According to the sexual offence policy at Antioch (Francis 141), consent cannot be obtained if:

1. the person submitting [i.e. verbally agreeing] is under the influence of alcohol or other substances supplied . . . by the person initiating [sexual contact or conduct];
2. the person submitting [i.e. verbally agreeing] is incapacitated by alcohol, drugs, [or] prescribed medications;
3. the person submitting [i.e. incapable of verbally consenting] is asleep or unconscious;
4. the person initiating [sexual contact or conduct] has forced, threatened, coerced, or intimidated the other individual(s) into engaging in sexual contact [or] conduct.

The first two restrictions respect the admonition that “for truly consensual sex, you and your partner(-s) should be sober to be sexual” (Francis 138). The degree of sobriety required, however, wrongfully depends on the source of inebriating substances. According to the policy, buying a person a drink is sufficient to bar sexual contact so long as the alcohol contained in the drink remains in the drinker's system. The person for whom the drink was purchased will be “under the influence” of alcohol till that time. On the other hand, drinking oneself into a state of “incapacity” is required for verbal consent to become invalid. The bar has been raised, and for no sensible reason. Either this sexual offence policy must prohibit sexual “interactions” so long as any participant's decision-making processes is under the influence of any substance tending to corrupt their efficacy, or risk hopelessly complicating the system of determining whether every participant truly consented to sexual contact or conduct.

The final restriction can be very broadly interpreted, rendering verbal consent questionable in too many circumstances. Offering to end or otherwise change a relationship unless sexual contact occurs may be enough to qualify as “coercion” or “intimidation.” Being close to or more than two metres tall and weighing ninety or more kilos may be enough to “intimidate.” An undeserved reputation as a “bad guy” may be enough to render consent impossible. These are not facetious exaggerations: “nonviolent sexual coercion” has been defined so as to include “unwanted sexual activity because of a man’s verbal arguments, not including verbal threats of physical force” [e.g., “he said he’d break up with me if I didn’t,” “he said I was frigid,” “he said everyone’s doing it”], “assumptions about the nature of marriage,” and “discrimination against lesbians, which forces them to choose between sex they do not want (i.e., heterosexual sex) and no sex at all” (Muehlenhard, Schrag 122). Thus, simply having no sexual alternative save celibacy is sufficient ground for claiming that one was coerced.

This opinion is not universally held. Alan Bryant doubts whether consent is vitiated by relatively minor forms of coercion. According to Bryant:

[If] a woman, the dominant person in a relationship, threatens her common law spouse with separation unless he engages in sexual activity and . . . the male person reluctantly consents by reason of this pressure . . . this kind of exercise of authority should not be a vitiating circumstance . . . (109; note also 152)

It seems immediately apparent that there can be circumstances inherent in such a situation such that the scenario described by Bryant may be only trivially coercive or severely so. How coercive the situation is rests on how dependent the weaker member of the relationship is on the stronger, how much the weaker member of the relationship stands to suffer by resisting the unwanted sexual contact, and how at-odds the request is with the best interests of the weaker member of the relationship. No matter what “sexual contact” or “sexual conduct” are (their definitions are not contained in Antioch’s sexual offence policy), the school adopts an extremely paternalistic attitude towards mature, highly educated, and economically privileged women (and men).

Alan Soble has reservations about Antioch’s sexual offence policy, as well. He cites a statement made by an Antioch student:

[Suzy Martin] defends the Policy by saying that "It made me aware I have a voice. I didn't know that before." Coming in the mid-90s from a college-age woman, the kind of person we expect to know better, this remark is astonishing. In effect, she admits that what Antioch is doing for her, at such an advanced age, is what her parents and earlier schooling should have done long ago, to teach her that she has a voice. Thus Antioch is employing an anti-autonomy principle in its treatment of young adults -- *in loco parentis* -- that my college generation had fought to eliminate.

Antioch's sexual offence policy does not pay due respect to autonomy. It denies that even college-educated, adult human animals are able -- without the aid of on-going verbal intercourse -- to consent to even the 'slightest' (physical) sexual contact: a kiss on the cheek, a quick hug, or a pat on the bum. Soble's point, however, is more a criticism of this person's "parents and earlier schooling" than it is of Antioch. The criticism still concedes that literally "having a voice" may remain central to exercising autonomous consent in sexual relations. Soble questions the importance of speech to exercising consent with statements such as this:

The body should not be dismissed. . . . Other cases of successful communication -- in and out of sexual contexts -- are explicit and specific without being verbal. . . . the body sometimes does speak a clear language . . . Certain voluntary actions, even some impulsive, reflex-like, bodily movements, do mean "no," and about these there should be no mistake . . . if such motions can be assumed or demanded to be understood in a pluralistic community -- pulling away when touched means "no" -- then some voluntary behaviors and involuntary bodily movements must reliably signal "yes."

Unfortunately, Soble is unaccountably hesitant to list examples of "other cases of successful communication," those ambiguously referred to "times" when the body communicates as effectively as language.

### Casting Doubt on the Primacy of Language

It seems clear that, practically-speaking, Soble's statement about "the body [sometimes speaking] a clear language" is absolutely true. Tests which purport to indicate truth-telling are relatively unreliable given modern legal standards of proof. No "lie detector" test can overturn DNA evidence in a courtroom. Attempts to determine the candour of a speech-act uniformly depend on physical cues, not their actual content. Attempts to determine the sincerity of a speaker's assertions are not drawn from stark, black-and-white transcripts of text in

situations far-removed from the speaker. The reader of this paper cannot determine whether its author believes anything written here, or whether he was simply playing Devil's Advocate.

So-called lie detectors depend upon physical cues: fleeting expressions, eye movements, the presence or absence of muscle tension and nervous activity, capillary dilation and perspiration. They focus not on what is said but how it's said: tone of voice, timing of response, and physical cues. The body talks and the signals it sends are often clear. Beirne's, Noah's, and Antioch's emphasis on verbal communication "privileges the voice over the face, when the voice and the face are equally significant channels in the same system" (Gladwell 49). The particularly privileged access to truth as it is 'written' on another human's face is not something which can be applied to interactions with non-human animals.

Access to non-verbal information, however, is not thereby limited to human facial expressions. Silvan Tomkins observes that "we are such creatures of language that what we hear takes precedence over what is supposed to be our primary channel of communication, the visual channel" (Gladwell 49). Tomkins is here referring only to human facial cues, but (again) this is not to say that non-verbal indicators cannot serve in place of verbalizations in any circumstance. Language is necessary when the information to be transmitted is complex. Body language isn't going to serve very well (if at all) for conveying the mathematical foundations of Einstein's theory of relativity. Certainly, though, most conscientious observers can reliably detect signals for "yes" and "no," "stop" and "go." While "language increases the range and depth of possible communication, [it] can take place through gestures, expressions, or caresses or other physical movements" (Francis, Norman 519).

Soble throws doubt on the possibility of effective non-verbal communication when he observes that "bodily phenomena -- reacting with sexual arousal to a touch; not moving away when intimately touched -- [do not] necessarily mean that the touched person welcomes the touch or wants it to continue" (Soble). To assert that the opposite is true, that a lack of evident sexual arousal or physical removal from a particular situation may imply sexual consent, gives grounds for encouraging sexual assault. Yet such phenomena do not

necessarily indicate any lack of desire. Perhaps sex has been made too philosophical when every empirical indicator can nonetheless lead in the wrong direction.

In the circumstances cited by Soble, more information must be provided to clarify this confusing state of affairs. Properly contextualized, the contradictory behaviour hinted at by Soble will likely become entirely comprehensible without necessitating verbal communication. Many considerations can interfere with the clear communication of intent, in every imaginable circumstance. The Antioch sexual offence policy attempts to minimize doubt in sexually charged contexts, but doubt itself can never be eliminated. Language in some instances (i.e., token resistance to sex) proves a less reliable indicator of intent than physical (including contextual, if not verbal) cues. Beirne's concern that there exists a barrier between human and non-human animals which renders the reliable communication of consent impossible does not disappear even when only sexually mature, highly educated and economically privileged human animals are involved. This suggests that it would indeed be "speciesist" to assert that the difficulty in obtaining sufficient knowledge of another being's intentional states is qualitatively wholly different for human and non-human animals.

The reliability of using language as a guide to the contents of intentional states is questioned by Soble and others. He cites a 1988 study which found that 39.3% of a sample of 610 undergraduate women had engaged in "token resistance" to sex. That is, 240 of the women in this cohort gave a positive response to the scenario (Muehlenhard, Hollabaugh 874):

You were with a guy who wanted to engage in sexual intercourse and you wanted to also, but for some reason you indicated that you didn't want to, although *you had every intention to and were willing to engage in sexual intercourse*. In other words, you indicated "no" and you meant "yes."

Though Soble neglects to do so, it ought to be mentioned that -- of the women who reported ever offering token resistance to sex (and 60.7% reported never having done so) -- "over three fourths . . . reported doing so 5 or fewer times" (Muehlenhard, Hollabaugh 878). Of the women in this study who have offered token resistance (874):

- 32.5% reported having done so only once
- 45.6% reported having done so 2 to 5 times
- 11.2% reported having done so 6 to 10 times
- 7.8% reported having done so 11 to 20 times
- 2.9% reported having done so more than 20 times
- 85.2% reported having done so in the past year

Thus, only 7 women out of 610 reported having offered token resistance to sex more than 20 times, or roughly 1% of a sample of women with a mean age of 19. This seems to support a conclusion that the actual incidence of token resistance to sex is very low. In fact, Muehlenhard and Hollabaugh state that their study “found that a substantial number of women engaged in token resistance to sex. . . . when a woman says no, chances are she means it. . . . regardless of the incidence of token resistance, if the woman means no and the man persists, it is rape” (878).

This is a remarkable indictment of the reliability of verbal communication and may be based at least partly on the finding that 68.5% of the entire cohort reported “saying no when they meant maybe” at least once prior to the study (Muehlenhard, Hollabaugh 874). Muehlenhard and Hollabaugh don’t mention that the actual incidence of token resistance to sex is impossible to determine from the information contained in their study. This is because the only truly useful data about the reliability of verbal assertions of non-consent would have been a rate of incidence of “token resistance” in comparison to the total number of sexual encounters.

If the data cited is derived from a sample of a thousand sexual “interactions,” then the incidence of token resistance is considerable. If this data is derived from a sample of ten thousand sexual experiences, it is far less so. It may be the case that even the “worst offenders,” those seven women who reported having offered token resistance more than twenty times prior to the study, did so in only a relatively small percentage of their sexual encounters. Women who have actually offered token resistance fewer times, but more often in comparison to the total number of their sexual experiences, may in truth be more prone to sending confused signals to their sex partners.

According to Muehlenhard and Hollabaugh, 60.8% of “sexually

experienced” women and 11.9% of “sexually inexperienced” women reported having engaged in token resistance (874). Nowhere in the study, however, are the boundaries of these two classifications made explicit. Their study does, however, divide the cohort into three mutually exclusive categories (873):

1. “Women who had engaged in token resistance.”
2. “Women who had never engaged in token resistance and who had willingly engaged in sexual intercourse.”
3. “Women who had never engaged in token resistance and who had never willingly engaged in sexual intercourse.”

At two further points in this article (874, 876) similar (identical?) divisions are characterized as being equivalent to:

1. women who had engaged in token resistance at least once
2. sexually experienced women who had never engaged in token resistance
3. sexually inexperienced women who had never engaged in token resistance

The cohort seems to have been divided along the same lines in all three instances, though the descriptions of the categories is altered slightly each time.

Within the first category must be both sexually “experienced” and “inexperienced” women, or else the finding that 11.9% of sexually inexperienced women reported engaging in token resistance makes no sense. The third category, likewise, could contain “sexually experienced” women: those who had been raped and, therefore, whose resistance was definitely not “token.” “Sexually inexperienced” women who had engaged in token resistance clearly did so to their detriment, if indeed they sincerely “had every intention to and were willing to engage in sexual intercourse,” since token resistance seems to have been enough to thwart that end. In any case, these findings question the usefulness of depending on verbal testimony as an indicator of consent.

Muehlenhard and Hollabaugh’s assertion that “when a woman says no, chances are she means it,” supports the idea that verbal consent cannot carry the weight which Antioch’s sexual offence policy places upon its shoulders. The concluding remark of Muehlenhard and Hollabaugh’s study is shocking: “if the woman means no and the man persists, it is rape.” Thus, if the woman says no

but her resistance is token, and the man persists, it is not rape in any literal sense. While obviously true, this completely overturns the aims of Antioch's sexual offence policy.

Whether or not Muehlenhard and Hollabaugh's conclusion is sound, it does follow from the empirical evidence and demonstrates that verbal testimony is not so reliable as either Antioch University or Beirne need it to be. In fact:

token resistance . . . discourages honest communication . . . makes women appear manipulative and probably causes women to regard themselves as manipulative . . . could cause women to miss out on sexual relationships with men who believe their refusals . . . perpetuates restrictive gender roles for women and places the burden of being the aggressor on men [and] probably also encourages men to ignore women's refusals. (Muehlenhard, Hollabaugh 878)

Without exaggeration, these conclusions are likely made more valid and accurate with the removal of the softening qualifiers "probably" and "could." Token resistance damages the hope that all resistance to sexual contact can rightfully be taken seriously. The fact that it occurs at all is unfortunate, as it discredits the notion that it is a "myth" that "when a woman says 'no' she is really saying 'yes,' 'try again,' or 'persuade me'" (*R. v. Ewanchuk* 372, 375). Clearly, verbal communication cannot be taken as the sole determinant of consent unless it is, in and of itself, the best determinant. This in many situations is clearly a false claim. Verbal communication is not the best of a host of determinants, almost all of which are entirely non-verbal. This is made clear by the fact that even the most strenuous verbal assertion that a partner consents can be overturned by contrary non-verbal evidence and subsequently result in a rightful conviction for sexual assault.

### Lois Pineau: "Communicative" Sexuality

Lois Pineau, whose quote heads this chapter, puts her faith in verbal communication. The quote itself seems speciesist, and perhaps Peter Singer himself might agree with that assessment. Replacing the term "person" with "being," "creature," or "animal" does not alter the intent of the message in any relevant sense. There isn't even an implied age restriction on "person," so that

can't serve as grounds for limiting the quote to human animals. The idea behind Pineau's message is basically what Singer said about "mutually satisfying" sexual encounters. In fact, Pineau also concedes that "consensual sex . . . is presumed to aim at mutual enjoyment" (Pineau, *Date* 234). Pineau joins both Singer and Antioch University in failing to overtly proscribe sex with children. Joined to this citation is evidence that Pineau goes farther than Singer does, along lines suggested by Beirne (though this evidence fails to show that sexually-savvy children cannot fulfill the requirements of 'communicative' sexuality):

the obligation to promote the sexual ends of one's partner implies the obligation to know what those ends are, and also the obligation to know how those ends are attained. Thus, the problem comes down to a problem of epistemic responsibility, the responsibility to know. The solution, in my view, lies in the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire. (234-235)

Pineau is not suggesting that any participant has an "obligation to promote the sexual ends of one's partner" beyond the point where one can willingly go. That would interfere with the requirement for mutual enjoyment. On the other hand (Pineau, *Date* 236):

persons engaged in communicative sexuality will be concerned with more than achieving coitus. They will be sensitive to the responses of their partners. They will, like good conversationalists, be intuitive, sympathetic, and charitable. Intuition will help them to interpret their partner's responses; sympathy will enable them to share what their partner is feeling; charity will enable them to care. . . . They will treat negative, bored, or angry responses, as a sign that the erotic ground needs to be either cleared or abandoned. Their concern with fostering the desire of the other must involve an ongoing state of alertness in interpreting her responses.

Nothing that Pineau asserts here implies that linguistic communication is necessary for communicative sexuality.

Using "intuition . . . to interpret their partner's responses" and relying on sympathy and charity as described by Pineau places the emphasis on emotional rather than linguistic modes of perception. Communicative sexuality is described as being merely analogous to "good" verbal exchanges. There is also nothing here that morally undermines mutually satisfying instances of zoophilia, since it would seem that attention to physical signals can suffice to secure awareness of a partner's consent. Unfortunately, Pineau seems idealistic about the transformative effects which communicative sexuality is purported to have on human sexual

behaviour. While persons engaged in communicative sexuality will be concerned with “more than” achieving coitus, this may be only trivially true. They may be concerned with achieving coitus and with minimizing the possibility of a rape charge while they’re at it.

Communicative sexuality will not make human animals any more “sensitive,” “interpretive,” “sharing”, or “caring.” Communicative sexuality cannot achieve these ends by itself. It cannot make human beings “treat negative, bored, or angry responses” in just the way Pineau intends, nor can it make “concern with fostering the desire of the other” the central feature of sex if that isn’t already the foundation of a relationship. Pineau herself concedes that she “tend[s] to be independent and self-absorbed” (Pineau, Response 105). Sexually adept human animals become adept at sexual game-playing. The assertion that the “rejection of active consent [i.e., communicative sexuality] . . . increases the possibility of game-playing, deception, and confusion in relationships” (Orton 149) disregards the playful, deceptive, and confusing uses to which verbalized language may be put by properly motivated human animals.

Even in circumstances in which communicative sexuality is for the most part ignored (i.e., reality), the reliability of statements such as “I love you” and “I’ll respect you” are ripe fodder for satirical humour in popular culture for good reasons. Learning the lingo of communicative sexuality, if that makes getting sexual gratification easier or just possible, will frequently be undertaken for pragmatic reasons, not those virtuous ends which Pineau envisions. People will still try to “score.”

Pineau cannot support legalizing mutually satisfying sexual contacts between human and non-human animals, since the shared use of a language is a central requirement for both legally and morally permissible sex:

Let us . . . consider a date rape trial in which a man is cross-examined. . . . the cross-examiner . . . could use a communicative model of sexuality to discover how much respect there had been for the dialectics of desire. Did he ask her what she liked? If she was using contraceptives? If he should? What tone of voice did he use? How did she answer? Did she make any demands? Did she ask for penetration? How was that desire conveyed? Did he ever let up the pressure long enough to see if she was really that interested? Did he ask her which position she preferred? (Pineau, Date 241)

Even Pineau cannot avoid referring to non-verbal cues: “tone of voice,” and “the pressure” are non-linguistic indicators (one is emotional, the other is highly contextual). Additionally, Pineau’s account of cross-examination begs the question. Failing to ask any or all of these questions does not imply non-consent on the part of the woman, or disregard on the part of the man. Communicative sexuality, by itself, cannot guarantee that there had been any actual “respect . . . for the dialectics of desire,” even if all the ‘right’ questions were asked, followed by all the ‘right’ answers. Pineau’s chosen example is, also, sexist: clearly, “she” is just as capable as “he” to lack respect for the “dialectics of desire.”

Pineau sees it as advantageous that “in making noncommunicative sex the primary indicator of coercive sex” the cross-examiner “would not have to rely on the old criteria for non-consent . . . would not have to show either that she had resisted him, or that she was in a fearful or intimidated state of mind” (Pineau, *Date* 241). Yet, a woman in such circumstances is unlikely to indicate through communicative sexuality her inclination not to engage in sex. There must be consequences of resistance, verbal or otherwise, which a person is seeking to avoid by engaging in unwanted sex. A person who submits to unwanted sex has likely got reasons for doing so, even if those reasons aren’t sensible ones. Telling a lie in such circumstances does not seem unreasonable, since the overriding concern is still going to be avoiding the perceptibly worse consequences of resisting. It ought to be noted in passing that the Canadian legal system does not in fact “rely on the old criteria for non-consent” and yet it has not adopted Pineau’s model of proper sexual conduct (i.e., “communicative” sexuality), either.

A woman who fails to resist and seems neither fearful nor intimidated can still be unwilling, since “submission to an insensitive and overbearing lout is no way to go about attaining sexual enjoyment” (Pineau, *Date* 223). It would be simpler to live in a culture where this was exceptionlessly true, yet just such acts of submission were rated most arousing by a cohort of college women exposed to pornography (Cowan, Dunn 18). Submission, or the “rape myth,” was rated as arousing as explicit sex between equals, and each of these “themes” was rated far more arousing than seven others examined in that study. This difficult finding, combined with information on token resistance to sex, reveals human sexuality to

be an extremely complicated collection of behaviours.

The most commonly-cited (22.9% of the cohort considered them to be “moderately to very important”) category of rationales for token resistance to sex was “manipulative . . . game-playing reasons [wanting to get their partner more aroused by making him wait, wanting him to beg or talk her into it, and wanting him to be more physically aggressive], anger with a partner, and the desire to be in control” (Meuhlenhard, Hollabaugh 877). Manipulative reasons were more significant in contributing to token resistance to sex than either inhibition-related or practical reasons (Meuhlenhard, Hollabaugh 877, 878). “Women who rated manipulative reasons as important did not seem to accept male dominance in general . . . instead, their acceptance of male dominance seemed to be specific to physical force in sexual situations” (Meuhlenhard, Hollabaugh 878). Despite this, straightforward sexual enjoyment is taken by Pineau as the only morally unproblematic motive for engaging in sex.

To disregard this fact is, for Pineau, to do away with the requirement that there be ‘proper’ mutual satisfaction. For human animals at least, sex (like life) is rarely so simple. Even Pineau (Date 224) admits that:

it would be *prima facie* unreasonable for [a woman] to agree to have sex [without any hope of sexual gratification], unreasonable, that is, unless she were offered some pay-off for her stoic endurance, money perhaps, or tickets to the opera.

Obtaining some “reasonable” pay-off makes sex with an insensitive and overbearing lout reasonable, as well as consensual. Pineau suggests here (for example) that a prostitute’s “stoic endurance” is reasonable so long as it is compensated for by sufficient material exchange. In all cases relevantly similar to this, sexual gratification is not the aim of the encounter. Rather, it is a monetary or otherwise material gain instead of a physical or emotional (i.e., hedonistic) one. The same may hold true for her partner. It likewise seems reasonable for a woman to answer positively when in fact she does not hold the accompanying beliefs in order to secure similar gains.

Communicative sexuality is too easily perverted to serve as the sole grounds for securing consent. It is clearly false that verbal communication is to serve as the only grounds for assessing consent, even for Pineau: the competent

cross-examiner will not stop at verbal responses, but will proceed to non-linguistic evidence that consent was not actually obtained or risk an appeal. In other words, all the right answers to Pineau's questions constitute insufficient grounds for a verdict of innocence.

Pineau insists that "communicative sexuality . . . is the only feasible means to mutual sexual enjoyment" (Pineau, Date 239). This seems sound, but it does not imply that the only choice is between Pineau's model of communicative sexuality (or Antioch's) and an uncommunicative sexuality. Unfortunately for Pineau, acceptable alternatives to her model of sexuality exist -- models which are incidentally more accommodating to zoophilia. Pineau asserts that:

where communicative sexuality does not occur, we lack the main ground for believing that the sex involved was consensual. Moreover, when a man does not engage in communicative sexuality, he acts either out of reckless disregard, or out of wilful ignorance. For he cannot know, except through the practice of communicative sexuality, whether his partner has any reason for continuing the encounter. (Pineau, Date 239)

This is sexist, if not speciesist. Although calling communicative sexuality the "main ground" seems overly optimistic, admitting that it is such leaves room for other acceptable bases for beliefs that any given sexual activity was consensual.

These other bases would be non-verbal. Pineau only sees two options apart from communicative sexuality, at least where men are concerned:

1. reckless disregard (disrespect of the virtue of benevolence)
2. wilful ignorance (disrespect of the virtue of integrity)

This is sound if the only alternative to what Pineau calls communicative sexuality was sex devoid of communication. It also implies that, for Pineau, men have almost exclusively throughout history acted out of "reckless" disregard or "wilful" ignorance and do so currently. An indictment of virtually all (hetero-) sexuality is sufficient for calling Pineau's premises into question. To assert that "he cannot know, except through the practice of communicative sexuality, whether his partner has any reason for continuing the encounter" flies in the face of reality.

A reckless individual is one "who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk . . . one who sees the risk and who takes the chance" (Sansregret 582). On a literal reading, this suggests that an activity with the merest possibility

of breaking a law qualifies as reckless. In any instance of sexual contact, because one is never in a place to know with absolute certainty whether what one intends to do will violate the consent of another individual, every act is fraught with risk. Piers Beirne suggests that the epistemological barrier between humans and non-humans likewise endangers any zoophilic activity. On a philosophical level, the risk is surely there. But legal standards acknowledge that the mere presence of subjective uncertainty cannot qualify as sufficient to undermine every instance of physical intercourse. In *Sansregret*, it was found that “a man who intimidates and threatens a woman and thereafter obtains her consent to intercourse would know that the consent was obtained as a result of the threats” (582). Such overt circumstances have identical implications in zoophilic scenarios involving “knowledge of a danger or risk [i.e., of committing sexual assault] and persistence in a course of conduct which creates a risk that the prohibited result will occur” (*Sansregret* 584).

Wilful ignorance, in *Sansregret* termed “wilful blindness,” “arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth” (584). Furthermore, “where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge” (*Sansregret* 587). The requirement to “make inquiry” suggests that verbal communication is called for, but it should be noted that the circumstances that give rise to perceptions of this need are typically not verbal. The impossibility of verbal inquiry in zoophilic activities does not vitiate consent beforehand. A person “aware of the need for some inquiry” in these circumstances must cease sexual contact, since the necessary inquiry is impossible to conduct. Only by “deliberately failing to inquire when he knows there is reason for inquiry” (*Sansregret* 584) and proceeding regardless (i.e., recklessly) is an offence committed.

A partner’s responsiveness to sexual contact typically suffices to indicate consent, making verbal confirmation redundant. In cases where this isn’t so, merely soliciting a verbal opinion ought not to overturn a judgment of non-consent which is physically apparent. Whatever the reasons for putting up a pretense that the

contact is desired, communicative sexuality won't prevent the telling of falsehoods whenever that's perceived as being situationally convenient. Physical behaviour combined with contextual factors is enough to render communicative sexuality unnecessary in almost every instance of sexual contact undertaken at any reasonable pace. The difference between communicative sexuality as envisioned by Pineau and communicative sexuality as practiced by most persons lies in allowing for communication as it's called for rather than requiring that it precede every aspect of every instance of sexual contact.

### Bringing Antioch, Pineau, and "Token" Resistance Together

The stated aim of policies like Pineau's and Antioch University's is to minimize the incidence of date rape. In doing so, they make "advances by males [and females?], in almost any form, that do not receive clear and explicit consent . . . coercive or assaultive" (Gilbert 61). According to Pineau, "where communicative sex does not occur, this establishes the presumption that there was no consent" (Pineau, Date 242). In the case of Antioch University, a policy that makes verbal consent at every step of a sexual encounter necessary also makes non-compliance with it a foundation for prosecution which hadn't existed before. In and of itself, this is not necessarily a mistake. Laws change to keep pace with cultural evolution. At one time, slavery was not illegal and, much more recently, neither was marital rape. In the latter instance, the law simply failed to acknowledge its existence.

Peter Singer has raised the issue of zoophilia's legality, with the potential result of bringing about another shift in legal awareness. Unlike proposed reforms of sexual consent rules, as suggested by Pineau or Antioch University, the reformation (i.e., abolishment) of prohibitions against slavery, marital rape, or the reform of restrictions against zoophilic activities proposed by this examination does not make morally unproblematic situations into grounds for legal prosecution. Making sexuality communicative contributes nothing to the presence or absence of consent. It is an epistemological concession which simply recognizes an

existing state of affairs. Consent or non-consent exists prior to the verbalization of it. Thus, Muehlenhard and Hollabaugh can make the startling statement: "if the woman means no and the man persists, it is rape." The verbalization, the token resistance, contrasts with the existing state of affairs. Consent can be legitimate, even if not a single word is spoken during a sexual encounter, especially since overt assertions of resistance can be hollow.

It is unsound to assert that only "communicative sex" as proposed by Antioch University or Lois Pineau is consensual. It is unsound to assert that only verbal cues are reliable guides to action. It is unsound to assert that most every instance of sexual behaviour among human animals has been and continues to be insufficiently consensual and therefore morally problematic. The following aim is laudable but unrealistically optimistic: "our goal is for people -- women and men -- to engage in sex only when they freely consent, not because sex is the least undesirable of several undesirable options" (Muehlenhard, Sympson et al, 146; compare Park 866). Unfortunately, it is frequently the case that the only truly desirable option is unavailable.

Human animals regularly engage in sexual contact with each other for reasons far more complex than merely hedonistic ends. Sadly or not, sometimes the goal is indeed a trip to the opera. Life-affecting choices can generally be described as selecting for the least-undesirable amongst perceived options: rational people aren't free to choose with no regard to consequences, aren't free to choose without restraint, aren't free to choose for the simple sake of choosing as one might were one completely free of constraints. Making sex communicative in the sense of requiring a stream of verbal consent isn't going to change that fact.

Under ordinary circumstances, a sex partner who takes the time to ask: "Are you okay with this?" is likely to do so out of sincere concern. Pineau seems to think that this sincerity, this "respect for the dialectic of desire," will still apply when asking is made necessary to avoiding subsequent censure. Sex partners who are "sensitive," "interpretive," "sharing", and "caring," are not likely those who'll commit date rape. Such partners are also likely to be attuned to their partner's responses, enough so that "negative," "bored," or "angry" attitudes will be perceptible without having to ask. Such partners are unlikely to act out of "reckless disregard" or "wilful

ignorance.” Such partners are likely to be those for whom even “token” resistance proves to be a sufficient deterrent to further sexual contact.

Contrary to Pineau’s hopes, communicative sexuality is no protection against “insensitive and overbearing louts,” who will engage in communicative sexuality, if forced to, with far less than optimum sincerity. Finally, the hopes of Muehlenhard and Simpson (et al) set a higher standard than that required in determinations of sexual assault in Canadian courts: “the question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed” (*R. v. Ewanchuk* 352). This recognizes that motivating factors for sex are complex, too complex to allow that consent to sex is not free when it is “the least undesirable of several undesirable options.”

Pineau and the Antioch sexual offence policy do not establish the conclusion that consent can only be or only has been given through the constant employment of mutually understood words or, at the very least, a shared language of non-verbal symbols. The conclusion that non-human animals cannot indicate consent to sexual contacts with human animals likewise remains unsupported. The arguments examined in this chapter only support the conclusion that non-human animals cannot indicate consent in all the ways available to human animals. The arguments only support the conclusion that, in determining whether non-human animals have consented to sexual contacts with human animals, non-verbal and (for the most part) non-symbolic indicators must be relied upon. The arguments likewise support the conclusion that verbalizations are not necessary to determining whether consent was genuinely obtained in any given sexual encounter.

## Chapter 4

# Verbal Consent in a Canadian Legal Context

Recent amendments to the Criminal Code of Canada have enabled the Canadian courts to move toward a standard of communicative sexuality which goes beyond what I even dreamed possible at the time I wrote my article "Date Rape" [i.e., 1989] . . . [providing] unprecedented protection against sexual assault . . . (Pineau, Response 64)

### Does Pineau's Model Apply in Canadian Society Today?

If Lois Pineau's interpretation of recent Canadian jurisprudence is correct, the chances that any instance of zoophilia might be legalized any time soon are extremely slim. The actual chance may be zero, since the evolution of Canadian law has been constantly been towards a recognition of the actual complexity of sexual consent and historical precedent makes it look highly unlikely that any steps "backwards" are forthcoming. It was noted in the Introduction that, for Peter Singer, instances of zoophilia that show cruelty towards a non-human animal "are clearly wrong, and should remain crimes." Given the context, it seems clear that the cruelty in question is physical rather than emotional. It is doubtful (at best) that emotional cruelty shown towards a non-human animal by a human animal during a sexual encounter could ever be adequately demonstrated to have served as grounds for coercing consent, or for prosecution at court. Fortunately, jurisprudence has evolved to the point that the same is no longer held to be the case for sex between human animals. If that were not the case, then sexual assault charges would be limited to circumstances where physical cruelty is evident.

Grounds for nullifying consent are not limited to evident physical assault. If the list of acceptable instances of sexual contact appearing in the Introduction are re-worded so as to refer to sex between human animals, not zoophilia, the result is that:

1. Some sexual contacts between human animals don't involve cruelty.
2. Only sexual contacts between human animals that involve cruelty ought to be illegal.

3. Therefore, some sexual contacts between human animals ought to be legal. Prima facie, this seems unproblematic. However, it needs to be maintained that the cruelty in question is of far narrower scope than is applicable in human relationships tout court.

The result of this is that:

1. Some sexual contacts between human animals don't involve evident physical cruelty. (i.e., no battered tissue results as a consequence of the sexual activity)
2. Only sexual contacts between human animals that involve evident physical cruelty ought to be illegal.

3. Therefore, some sexual contacts between human animals ought to be legal. This falls far short of the morally justifiable limits placed on acceptable sexual activity by contemporary jurisprudence in developed, pluralistic democracies such as Canada. As Piers Beirne has suggested that "if genuine consent . . . is a necessary condition of sex between one human and another, then there is no good reason to suppose that it may be dispensed with in the case of sex between humans and other sentient animals," so similarly the restrictions against sexual contacts with a non-human animal might more generally be held to be the same as those which apply to sexual contacts between human animals. To pursue such conditions clearly avoids any charge of speciesism and, apart from that, seems the only morally correct course to follow when the most basic consideration of sentience applies. To put a notorious assertion of Singer's regarding medical experimentation into a sexual context: it ought to be less morally problematic to sexually assault a human animal in a persistent vegetative state than it is to sexually assault an ordinary cow.

If Lois Pineau is correct, and the Canadian courts have adopted a stance akin to her communicative sexuality model, then there is no hope of circumventing the epistemological requirement of verbalized consent and legalizing sexual contacts with non-human animals becomes an impossibility. If Lois Pineau is correct, then not only zoophilia but much sexual activity between ordinary adult Canadians is liable to prosecution in their law courts. Pineau's stance derives from a legal judgment about the following circumstances (Response 65):

The [high school] boy had been engaged in kissing and caressing his date, an activity to which she had consented. The boy, without her consent, stuck his hand under the woman's shirt, and touched her breast. The woman pushed his hand away, and the encounter came to an end, but her parents reported the incident to the police, who charged the boy. . . . In assuming the right to touch the breast without permission, the court held, the boy assaulted her. The judge was very clear. Consent to the kisses was not to be taken as consent to the touching of the breast. The decision assumed that consent to one kind of sexual act cannot be taken as consent to another kind. . . . the boy was guilty because he failed to take reasonable steps to determine whether it was all right to touch [her] breast.

Pineau's reading of this judgment is that any instance of sexual contact which has not been previously validated by the taking of "reasonable steps" to determine whether it is welcomed is risky because this may demonstrate reckless disregard and-or wilful ignorance. In order to protect oneself from prosecution, and to ensure respect for the "dialectic of desire," it is now necessary to verbally ensure that any given sexual act is welcomed prior to the act's being undertaken, according to Pineau. All of Canada gets a close affinity with the campus of Antioch University.

There are far too many gaps in Pineau's account of the case to take the conclusions she draws from it at face value, however. Among them, the following are most relevant:

1. "The boy had been . . . caressing his date." What does this entail?
2. "She had consented [to the kissing and caressing]." Verbally or implicitly?
3. "The boy . . . stuck his hand under the woman's shirt." How old was the defendant?
4. "The woman pushed his hand away, and the encounter came to an end." Doesn't this indicate that the boy respected the "dialectic of desire" (perhaps insufficiently)?
5. "Her parents reported the incident [to police]." How old was the complainant?
6. "Consent to the kisses was not to be taken as consent to the touching of the breast." What was the nature of the caresses and why could they not lead to a reasonable belief in the boy that touching of the breast would be welcomed by the woman?
7. "Consent to one kind of sexual act cannot be taken as consent to another kind." Was it simply the judge's intention to deliver the message that consent to 'preliminary' sexual contacts did not amount to consent tout court? (e.g., that consent to kissing does not entail consent to intercourse)

8. "The boy was guilty because he failed to take reasonable steps to determine whether it was all right to touch the woman's breast." Is it really the case that, by "reasonable steps," the judge implied that a verbal exchange was required?
9. "The judge was very clear." Wouldn't a direct citation of the judgment have carried more weight than Pineau's assurances?
10. "In assuming the right to touch the breast without permission, the court held, the boy assaulted her." Does "permission" require a verbal exchange?

Pineau's reading of the facts of this case makes it clear that she believes the Canadian courts have made it a reasonable requirement that persons obtain verbal permission before proceeding with any sexual activity. If this is correct, then zoophilia cannot currently be legalized in Canada in accordance with the standards of consent required of human animals. An examination of recent verdicts reveals that Pineau's interpretation of Canadian jurisprudence is naive, at best.

Under current Canadian law, a defence of "honest but mistaken belief" is available under only some circumstances:

the defence of honest but mistaken belief should not be put to the jury in the absence of evidence disclosing an air of reality to the belief. In particular, the defence was held to be unavailable if the accused's and the complainant's versions of events were diametrically opposed . . . (*R. v. Livermore (C.)* 342)

It seems clear that the version of events cited by Pineau must have diverged only on whether there was consent to the touching of the breast. According to the few facts supplied by Pineau, it certainly does not seem to be the case that the accused's and the complainant's versions of events were "diametrically opposed." The requirement that diametric opposition nullify the defence is itself debated (*Osolin* 652, 654-655, 683-686). In any case, Pineau is defending the interpretation that total agreement could have obtained in the testimony of both the accused and the complainant but for the one point of disagreement regarding consent to (direct) touching of the breast.

In order for versions of events to be diametrically opposed, it must be the case that "different interpretations [arise] from different evidence" (*R. v. Livermore, (C.)* 343). In that case:

The complainant testified that she said "no" repeatedly, resisted as forcefully as she could, and was frightened. The accused's evidence was that she never said "no," that any struggling was just part of the logistics of attempting intercourse in the front seat of a car, and that she participated willingly. (342-343)

Obviously, unless there are facts which Pineau has not provided, there could not have been such an extreme disconnection between the versions of events related by complainant and defendant in a case that purports to demonstrate the applicability of communicative sexuality in the context of Canadian jurisprudence. Disagreement on a scale like that found in *Livermore* does not even permit the defence of mistaken belief. In order for communicative sexuality to have the sort of relevance which Pineau envisions, the gap between perception and reality has got to remain legally relevant even on a much-reduced scale.

This leaves an examination of the requirement that there be an “an air of reality” to the honest but mistaken belief in a partner’s consent. Unless Pineau has neglected to include relevant facts in her characterization of the legal judgment she cites, it seems that the defendant should have had access to this defence. While it is true that consent to one form of sexual contact is not consent to another, the defence of honest but mistaken belief does allow for reasonable extrapolations from consented-to activities. It is surely sometimes the case that it is “entirely inappropriate . . . to suggest that [behaviour which preceded the sexual assault] can lead a man honestly but erroneously to believe that there is consent to sexual intercourse” (*R. v. Livermore, (C.)* 343). In that case:

Not screaming, drinking beer while under age, being out at 1:00 a.m., parking, cavalierly trusting a stranger, switching places in a car after a casual physical encounter, and staying too long in a car someone else has control over, are neither individually nor collectively any basis at all, let alone realistic ones, for assuming that someone is agreeing to sexual intercourse. (343)

In the case cited by Pineau, kissing and caressing (which may even have included caressing of the breast through clothing, even under-clothing) cannot give rise to an honest but mistaken belief that the woman would welcome direct caressing of the breast.

There is clearly, in *R. v. Livermore, (C.)*, a “quantum leap” (343) between the events cited as providing grounds for an honest but mistaken belief in consent to sexual intercourse. It is certainly unclear whether this state obtained in the case cited by Pineau, and even the scanty facts which she provides seem to support the idea that an “air of reality” did in fact apply to the defendant’s honest but mistaken belief in consent to the sexual contact undertaken without expressed,

verbal permission. This is particularly reasonable if, as Pineau's presentation suggests, the individuals implicated were young and relatively inexperienced sexually. The facts of the matter in the case cited by Pineau seem open to the interpretation that the offence could rightly be deemed accidental. It certainly seems that it was never the defendant's intent to ignore the complainant's will. The verdict in *Osolin* supports the idea that the offence in the case as cited by Lois Pineau is not properly a case of sexual assault since "sexual assault . . . is simply not a crime that lends itself to commission by mistake or by accident" (685-686; *R. v. Darrach* 506).

It ought to be noted that the original verdict in *Livermore* was an acquittal of the defendant on a charge of sexual assault. This verdict resulted despite medical evidence which would likely have easily qualified as sufficiently abusive according to Peter Singer's interpretation of that term to render the act criminal (*R. v. Livermore*, (C.) 342; *R. v. Carson Livermore* 85). Appeal to the Supreme Court was required to get a new trial (*R. v. Carson Livermore* 96). Multiple appeals were required to arrive at an acceptable judgment in a case where:

1. the defendant is held to have clearly and verbally indicated her lack of consent repeatedly;
2. no grounds obtained for holding an honest but mistaken belief in consent with any "air of reality";
3. alcohol had been consumed by both parties implicated;
4. the defendant was 28 years old and the complainant only 15;
5. medical evidence of painful and injurious penetration (and hospitalization) was entered into the court record.

Despite this preponderance of evidence, the Ontario appellate judge who supported the original acquittal stated with assurance that "it is highly probable that for good reason the jurors were left in a state of reasonable doubt about the credibility of those witnesses (i.e., Valerie E., the defendant, and her 14-year-old friend Tasha C.) and were not prepared to register a conviction based upon their testimony" even though the same judge conceded that "this case was one of consent or no consent" (*R. v. Livermore*, 232): consent was the only issue under

examination.

None of this indicates that the law in Canada has gone farther than Pineau could have “dreamed possible” in 1989 unless, of course, her imaginary abilities are severely limited. An indicator of the persistence of traditional thinking, even on the Supreme Court of Canada, is evident in *R. v. Livermore (C.)*:

The alleged sexual assault took place in the bucket seat of a sports car. The cramped quarters were such that on the facts of this case some co-operation, if not the consent, of the complainant was necessary for the alleged offence to have occurred. . . . The jury was aware of the circumstances of the alleged offence and concluded that the accused proceeded with consent, or at least they had a reasonable doubt about his guilt. This finding of fact represents the collective wisdom of the community as expressed by the jury and should not be interfered with. (112)

The current Criminal Code of Canada makes no provisions for either a defence on the basis of “cramped quarters” or when “some co-operation” seems required. What this reasoning does indicate, when combined with other recent Canadian legal judgments, is that some relevant facts of the case Pineau has cited as evidence that support for a model of communicative sexuality as she conceives of it has gained the support of Canadian courts must have gone missing.

### Pineau’s Inconsistencies and Carson Livermore

On the face of things, a conviction for sexual assault in the circumstances described by Pineau seems to be an impossibly severe punishment given prevailing Canadian jurisprudence. It is unclear whether Pineau herself would characterize the case she cites as being properly constitutive of sexual assault. Pineau confesses to having been “sexually assaulted at least twelve times (fifteen, if you count the threats of four [moving-] men)” (Pineau, Response 103) and, in each of the twelve more definitive instances she refers to, Pineau was: was physically attacked, thrown on the floor or dragged into a bedroom, pinned down, kisses and caresses attempted, and ample body contact made. . . . My assailant always informed me in a clear, quiet voice that I was going to be raped. The violations involved in these incidents goes far beyond the offence implied in the case of the defendant who touched the breast of a woman and stopped after she pushed his hand away. Pineau confesses that “it never occurred to [her] . . .

that these [twelve] attempts at rape constituted sexual assaults” (Pineau, Response 103). Clearly, the situations described do legitimately fit the description of sexual assault as the offence is defined in Canadian law, but Pineau goes too far when suggesting that a threatened or perceived potential for sexual assault might likewise constitute sexual assault.

According to Pineau, “in one case, I was not physically attacked but was told by four moving-men who had just delivered my furniture that they were going to rape me” (Pineau, Response 103). This is not sexual assault under Canadian law. Similarly, Pineau does “not count among these [twelve or fifteen] assaults the times I ran like the wind from some stranger who accosted me” (Pineau, Response 103). According to the law, Pineau could not have done so even had she wanted to and this is by no means morally unproblematic. A person cannot and ought not to be charged with sexual assault just because Pineau felt afraid in his presence.

There is also the admission by Pineau that (Response 66-67):

Professions of love and loyalty which have been accepted, and which there is no reason to think have been put on hold, would seem to stand proxy as having taken reasonable steps to determine the acceptability of kisses and hugs, and even of more intimate caresses, ahead of time. . . . lovers who have previously acknowledged themselves as lovers, who have made a mutual promise to be lovers, [can] be excluded from the step-by-step approach. They should not, of course, be excluded from the requirement of respecting negative responses.

Perhaps these considerations were properly applicable in the breast-touching incident, despite Pineau’s reluctance to suggest that this might have been the case. In fact, Canadian law does make concessions similar to those suggested by Pineau (*R. v. Darrach*). Finally, Pineau herself concedes that there is value to non-verbal communication in sexual contexts (Response 97):

There is, first, verbal communication . . . the second kind of communication consists of [non-verbal] responses which may be read as negative or positive . . . communication also takes place at the level of sexual responses related to levels of arousal, and people who are good at reading the signs make good lovers.

The examples which Pineau provides to illustrate the “second kind” of communication are not necessarily ambiguous, as might be concluded from the statement cited above. Pineau simply points out that there are non-verbal ways to reliably indicate positive responses, and other non-verbal indicators which

reliably convey negative responses.

By giving credence to non-verbal signals, Pineau lends legitimacy to sexual contacts which do not involve verbal exchanges at all. Sex need not be non-communicative, despite the absence of a shared vocabulary or verbal exchange. Pineau's arguments support an agenda which aims to shift the burden of proof in sexual assault cases in a manner which is not in fact amenable to the directions currently being taken by the Canadian courts. This agenda becomes overt in assertions such as that: "in Canada, the courts hold that a man must take positive steps in order to determine that consent has been given" (Pineau, Response 99). Apparently, according to Pineau, the Canadian courts make no similar requirement of women.

Pineau may have found support for her notion of communicative sexuality in Supreme Court's observation that "there was evidence that Valerie [the defendant] had said no; there was no evidence that she had said yes" (R. v. Carson Livermore 89). The accompanying judgment, however, nowhere asserts that literally saying "yes" -- or saying anything at all -- was required in order for the honest but mistaken belief in consent defence to have been unavailable to Livermore. Making consent explicitly verbal helps to concretize the fact that consent obtained but it neither guarantees that consent obtained nor does its absence indicate that consent was lacking. As Pineau herself concedes, the law in Canada requires only that "lack of agreement to engage in the activity" or "lack of agreement to continue to engage in the activity" be expressed "by words or conduct" (Pineau, Response 64). This supports the legitimacy of non-verbal signals of consent and non-consent, and that allows for the possibility of legalizing certain instances of zoophilia.

The air of reality threshold, or the threshold of sufficient evidence, entails that: "there must be some evidence which, if believed, would support the existence of a mistaken but honest belief that the complainant was in fact consenting to the acts of intercourse which admittedly occurred" (R. v. Carson Livermore 91). The difficulty lies in attributing "honesty" to the belief of a defendant in circumstances where the defendant is purportedly mistaken. There

are two courses of action which may not be pursued without the possibility of legal repercussions (R. v. Carson Livermore 92, 93):

1. "In order for the belief to be honestly held, the accused cannot have been wilfully blind about whether consent was given."
2. "The accused cannot have been reckless in his belief that there was consent."

These restrictions are extremely similar to those which Pineau set out when describing sexual relations which were not communicative.

For Pineau, the only alternatives to her model of communicative sexuality are:

1. reckless disregard (of the dialectic of desire [i.e., a partner's consent])
2. wilful ignorance (of the dialectic of desire [i.e., a partner's consent])

Finally:

If there is no evidence permitting an inference that the accused honestly believed in consent, then the accused in assuming consent must be taken to have closed his eyes to whether there was real consent, i.e., he must have been wilfully blind or reckless as to whether there was consent. (R. v. Carson Livermore 94)

This is why it can be asserted that sexual assault does not lend itself to accidental occurrence, and it seems entirely doubtful whether such circumstances -- or anything remotely close to them -- actually obtained in the case cited by Pineau in support of her model of communicative sexuality.

If literally no evidence exists to give grounds to a honestly mistaken belief in consent, a defendant cannot have paid any mind to his partner's will. Indeed:

belief need not be reasonable [though] there must be something [aside from the mere assertion by the defendant that the complainant consented; R.v. Darrach 504] in the evidence of the circumstances surrounding the alleged assault which lends an air of reality to an honest belief in consent. (R. v. Carson Livermore 93)

In the case as cited by Pineau, the defendant does not seem to have acted either blindly or recklessly, nor does he seem to have lacked respect for his partner's will. The defendant in that particular case seems to have assumed consent "on the basis of the circumstances, [not] as a result of recklessness or wilful blindness" (R. v. Carson Livermore 94) as Pineau would have it. In none of the cases cited above, with the exception of the 'facts' presented by Pineau, do the Canadian courts require anything approaching communicative sexuality as described by either Lois Pineau or Antioch University.

Blatant disregard for a partner's expressed non-consent is unacceptable,

as is recklessness in presumptions of consent. Both of these faults can be avoided by adequate observation of non-verbal cues by virtually anyone with at least some awareness of sexual responsiveness. These circumstances are sufficiently exhaustive so as to render the Canadian courts' allowance that verbal assertions of consent are not necessary morally unproblematic. They may also allow that certain instances of zoophilia properly fall under consideration for legalization.

Furthermore, "consent can be express [i.e., verbal] or implied [i.e., non-verbal]. A suggestion by the women's coalition, that consent should be limited to unequivocal communications, was rejected and would have produced unfairness to the accused" (Stuart 250; *R. v. Darrach* 502). So much for any supposed affinity between Antioch University and the Canadian court system in matters of obtaining sexual consent. "Facial expressions, voice inflections, body gestures, and reactions to suggestions made by others" are all legitimate and often sufficient non-verbal indicators of attitudes (*R. v. Livermore*, 230). With regards to the burden of proof to be placed on a defendant (Stuart 254; Bryant 138-139):

At the First Reading stage, the accused was to be required to take "all" reasonable steps. "All" was dropped at Third Reading, presumably accepting arguments that the standard was too severe and risked a Charter challenge that it restricted the minimum Charter standard of due diligence.

All of this goes against Pineau's interpretation of Canadian jurisprudence regarding standards of consent. Had the provision to take "all" reasonable steps gotten into the final version of the law, verbalized consent would have become a requirement in every instance of sexual contact between human animals in which such was at all possible. Even had that been the case, however, certain instances of zoophilia might still have found legal sanction insofar as "all" reasonable steps in such cases simply would not have included speech-acts. The "charter" referred to is the Canadian Charter of Rights and Freedoms (*R. v. Darrach* 483), and the clear indication is that the requirement of explicit, verbal consent in all sexual matters is excessive given the workable standard currently assigned to "due diligence."

This is in complete agreement with the observation that "Pineau's proposal that the defendant show ongoing intimate communication goes much too far in [not requiring women to show active resistance in order to show non-consent]" (Wells

42). As unpalatable as some may find it, it nonetheless seems true that Pineau (and Antioch University) “should be faulted for giving virtually no consideration to issues of fairness as they apply to the alleged rapist” (Wells 43). Adequate attention to and respect for the dialectic of desire can be satisfied by a standard much less restrictive than Pineau’s, a standard that might also permit certain instances of zoophilia to be legalized.

This is especially true given that the Canadian courts and even Pineau herself observe rightly that “the sexual signaling system [involves] nonverbal as well as verbal behavior” (Goodchilds, Zellman 235). Though there has historically been a steady shifting of the burden of proof in favour of complainants in sexual assault cases, a shift which may well continue into the future, it seems that the Canadian Charter of Rights and Freedoms -- so long as it exists in anything resembling its current form -- constitutes a barrier which will prevent a shift as far as Pineau would have it, and that this prevention has the laudable aim of preserving fairness in the judicial process.

### Lois Pineau’s Gross Misrepresentation

As a matter of fact, Lois Pineau grossly malforms the true facts of the case she cites in support of a purported revolutionary stance by the Canadian courts. The case is properly cited as *R. v. Whitley*, and not “*R. v. W.(p.)*” which suggests the involvement of a minor, and the judge’s name is Locke, not “Lock” (Pineau, *Response* 65). Percival Whitley was an adult when he committed the assault, and the complainant was an eighteen-year-old student at Ryerson Polytechnical Institute in Toronto (*R. v. Whitley*). Neither was a “high school” student at the time of the offence. The principal offender was Timothy Mowers, a 22-year-old Ryerson student (*R. v. Whitley*). The complainant had in truth agreed “to allow [Mr. Mowers] to kiss her, to remove her sweater, and to unhook her bra, among other [sic] things . . . nothing more than heavy petting” (*R. v. Whitley*).

The sexual contact did not stop there. It is not the case, as Pineau reported it, that the offender put his hand on the complainant’s breast, removing it and

stopping sexual contact when the complainant protested. Instead:

The jury obviously found she did not agree to suddenly without her consent to have the hands of Mr. Mowers, Mr. Whitley and Mr. Rickard [a third adult present] probing the inside of her vagina, her anal canal as well as the other sexually related portions of her anatomy. She obviously did not consent to being put on the floor on some type of mattress where she then became the subject of gang rape first by Mowers and then with intercourse attempted by Whitley, along with the placing of the respective penises in the area of her mouth. Obviously with the demand, spoken or unspoken, that she perform fellatio upon each. (*R. v. Whitley*)

Except for matching case-numbers, dates on which verdicts were delivered, and courts in which this case was heard, there is virtually no way to identify the facts as they applied in reality with the facts as cited by Lois Pineau.

Even very brief mentions of the relevant facts in the Weekly Criminal Bulletin reveals a tremendous disparity (Rosenberg, Buhr (1992) 375; (1993) 595-596) with Pineau's reporting of them. Given Pineau's presentation, it can reasonably be inferred that the appeals registered to the convictions in this case stemmed from a possible defence of mistaken belief in consent. It seems the appeals stemmed more from clumsy and reckless wording in the original judgment which is at several points too strenuously critical and unjustifiably interpretive of the respondents' intentional states.

The disparity between the facts and Pineau's citation of them is so extreme as to suggest either complete unfamiliarity with the case or deliberate misrepresentation. Either way, Pineau's use of the case is shown to be utterly without merit. Recall that, according to Pineau:

In assuming the right to touch the breast without permission, the court held, the boy assaulted her. The judge was very clear. Consent to the kisses was not to be taken as consent to the touching of the breast. The decision assumed that consent to one kind of sexual act cannot be taken as consent to another kind. And the boy was guilty because he failed to take reasonable steps to determine whether it was all right to touch the woman's breast. (Response 65)

The judge was not "very clear" that "in assuming the right to touch the breast without permission . . . the boy assaulted her." No mention of this reasoning appears anywhere in Whitley. In fact, consent "to kisses" was ruled not to be consent to "gang rape." Such a ruling does not break new ground in Canadian jurisprudence. Whitley does not assume "that consent to one kind of sexual act cannot be taken as consent to another kind" in any way resembling what Pineau

has in mind. According to Whitley, consent to kissing and “heavy petting” with one individual does not presume consent to sexual intercourse with him and with two other men that the “virginal” complainant had just met. The “boy” was not guilty “because he failed to take reasonable steps to determine whether it was all right to touch the woman’s breast.” Such a minor infraction is not even relevant to the case under examination, which involved conduct in which “the complainant had been degraded and humiliated and her sexual integrity very much violated by these accused” (Rosenberg, Buhr (1992) 375). Pineau, in her misuse of Whitley, fails to meet even minimal standards of professional integrity as a philosopher.

### Robin D. Wiener on Verbal Assertions of Consent

Robin D. Wiener proposed that a “standard that requires overt behavior demonstrating consent will ask the fact-finder [i.e., the judge or jury] to make one judgment -- whether the woman overtly consented” (158). Wiener’s idea is that this provides a “more predictable legal standard” than the resistance standard currently being applied in many jurisdictions since “it examines only one behavior -- the woman’s overt consent -- rather than multiple behaviors and interpretations of behaviors” (158). Wiener cites numerous cases in which the requisite “overt” behavior was displayed:

1. Commonwealth v. Sherry: “the victim had verbally protested” (152)
2. People v. Guthreau: “the victim had verbally protested” (152-153)

According to Wiener, the “courts concluded that, in [both of] these situations, verbal protests constituted a reasonable showing of resistance” (153).

Proponents of ‘token’ resistance should take note. Furthermore, in the cases of:

3. State v. Rusk: “crying and verbal protests should reasonably have conveyed her lack of consent to the defendant” (154)
4. State v. Lederer: “the victim verbally protested” (156)
5. State v. Clark: “the adolescent victim [i.e., the complainant] told her aunt’s ex-husband [i.e., the defendant] she did not want to have sex” (156)

Wiener points to the Wisconsin penal code, which “criminalizes failure to ensure consent” (157), as the model which the rest of the United States ought to

emulate (155-160).

Wiener's citations suggest that verbal protests are sufficient indicators of nonconsent. The conclusion that verbal assent is likewise required as a sufficient indicator of consent does not follow from that observation, however. In the case of Lederer, it was protested that the Wisconsin statute makes criminal "consensual sexual relations which 'two parties may enter into . . . without manifesting freely given consent through words or acts'" (Wiener 159). Therefore, the statute is unconstitutional: it renders illegal what are utterly unproblematic instances of sexual activity. In reply, Wiener points out that this objection to the Wisconsin statute "ignores the fact that overt behavior indicating consent need not be verbal" (159). The standards of communicative sexuality proposed by both Antioch University and Lois Pineau are once again undermined by reason. Wiener's perception of ideal sexual assault legislation still allows for the possibility that certain instances of zoophilia could be legalized. According to Wiener:

Ensuring consent . . . simply requires that there be some demonstration on the woman's part that she is freely consenting to a voluntary chosen act, rather than passively submitting in the face of fear, duress, or social pressure. (159)

If it can be argued that certain non-human animals have a capacity to consent to sexual contacts with human animals that is not undermined as purportedly 'consensual' sexual contacts with children are, then the fact that non-human animals do not share a literal language with human animals should not constitute a barrier to their engaging in mutually satisfying sexual relations. If "ensuring consent . . . simply requires that there be some demonstration" that the consent is not rather passive submission to fear or duress, then that is a standard which even zoophilia is capable of meeting.

### Wiener's Fatal Error

There is one great weakness in Wiener's approach to prosecuting rape (or sexual assault), and it may well bear heavily upon the legalization of zoophilia. Wiener states that:

If rape laws were meant to punish those who are morally blameworthy, a minimum of recklessness regarding consent might be necessary for liability. The aim of [rape] laws, however, is to deter and alter unwanted behavior and protect social and public interests. (160)

Rape laws, like any other, must punish those who are morally blameworthy, and only those who qualify as such. This is a foundational tenet of Canadian law. The conviction of an innocent must be regarded as a breach of justice. Wiener suggests that punishing the blameworthy is not the aim of rape laws. Rather, their aims are “to deter and alter unwanted behavior” and “to protect social and public interests.” This opens the door to unconstitutional legislation and prosecution. Wiener’s suggestion that “a minimum of recklessness regarding consent” is not necessary for liability legitimizes the objection raised in Lederer. To remove that aspect of criminal law which aims at punishment only of the guilty perverts the intent of morally defensible legislation (at least in the Canadian context, which is not a manifestation of straightforward utilitarianism).

If similar attitudes were adopted in the matter of zoophilia, then those who are not “morally blameworthy” could nonetheless find themselves being prosecuted for having engaged in zoophilia if such activities were considered “unwanted behavior” or perceived as being a threat to “social and public interests.” This is an untenable and indefensible state of affairs in any contemporary pluralistic democracy.

It seems a reasonable assumption that the best way to protect social and public interests is precisely to punish only those who are morally blameworthy, and that the proper punishment of those rightly found guilty as such is the best manner in which to deter and alter unwanted behaviour. Don Stuart more suitably characterizes the role of contemporary sexual assault laws in Canada as being “to reflect the violence rather than the sexual nature of the offence and to increase both reporting and conviction rates” (242). Nowhere does Stuart suggest that these increased conviction rates ought to include cases where guilt is not featured. Furthermore, Stuart rightly asserts that “however heinous the crime, the criminal justice system must be scrupulous in its attempt to punish the morally blameworthy and to ascertain the truth lest we convict the innocent” (244).

History demonstrates the ease with which persons have been unfairly

prosecuted for holding unpopular beliefs or engaging in unusual activities. If Wiener's example is followed, it is surely likely that many (if not most) people would classify zoophilia as "unwanted" behaviour and that perhaps it will also be deemed contrary to the "public interest." Mob rule would determine right and wrong on no independent basis. That is no proper foundation for a morally upright society. Zoophilia, even if considered a social ill, nonetheless must not be deterred through a practice akin to witch-hunting.

Alan W. Bryant declares that "it is an open question whether the judiciary will rule, on grounds of public policy, that certain physically dangerous, degrading, or psychologically abusive sexual conduct is beyond the scope of consent" (99). This statement was not aimed specifically at zoophilic sexual activities, but zoophilic activity can be physically dangerous and may be considered degrading. Nonetheless, it is doubtful that the law will adopt the stance that all such activities are thereby "beyond the scope of consent."

Where Canadian law has prohibited the giving of consent, such that no person can consent to being killed, nor can any person consent to "aid and abet suicide" or "the infliction of grievous bodily harm" (Bryant 98), it does not seem to be the case that a person cannot literally give consent in such circumstances, but rather that the law itself vitiates such consent. In every instance cited by Bryant, the law aims to prevent actual physical harm. More telling: every cited instance prohibits a person from deliberately inflicting suffering, injury, or death upon another.

It can cogently be argued that such prohibitions are wholly appropriate in any ethical legal system, if for no other reason than to discourage predilections for hurting one's fellows. Mutually satisfying zoophilic sexual activities cannot properly be described as akin to such injurious behaviours. Some instances of zoophilic contact may well be in the best interests of all those engaged in it. These are not obviously violations of the virtues that the prohibitions listed here are meant to respect. This cannot be said of either "grievous" physical injury, or (with the exception of euthanasia) deliberately bringing about the death of another being.

## Chapter 5

# Taking Non-Human Consent Seriously

You begin to see what's in it for PETA: if Phillip [a man] and Lady Buble [a dog] are a recognized couple, going to the Elks Lodge together, dancing cheek to cheek as the band plays Puppy Love, it becomes all but impossible to hunt and eat animals. The law can't recognize Daisy the cow as Peter Singer's significant other but her sister Gertie as merely next week's Double Whoppa with Cheese. (Steyn)

### Genuine Consent

Consent to sexual activity can be non-verbal. Non-human animals, therefore, are able to express consent (or non-consent) to a degree sufficient for the standards set by Canadian courts of law. Recall that, for Piers Beirne, "genuine" consent to sex has three features. Participants must be:

1. conscious
2. fully informed
3. positive in their desires

The requirement for consciousness is a given, and it does not complicate most instances of zoophilia (and none that, as Peter Singer would have it, are mutually satisfying). The requirement that participants be positive in their desires can be met with non-verbal indications to that effect. Presumably, such non-verbal indications must be very similar in human and non-human animals, in most cases, in order to enable a reliable leap to the conclusion that they serve adequately similar functions in each sort of case. Non-verbal cues that signal sexual receptiveness in humans are the only gauge by which humans might infer when such cues are present or absent in non-human animal behaviour, unless it is reliably demonstrable that a given non-human animal species expresses sexual receptiveness in a manner significantly unlike humans.

It is unnecessary to attempt an exhaustive list of such indicators here, but it ought to suffice to mention that the 'positivity' of such desires need not exceed the standards set for human animals in contemporary Canadian law. A more detailed examination of that standard is contained in the next chapter. A brief consideration

of “genuine” consent is appropriate first. According to Piers Beirne, “if genuine consent . . . is a necessary condition of sex between one human and another, then there is no good reason to suppose that it may be dispensed with in the case of sex between humans and other sentient animals” (see above). The following assertions are defended by Beirne:

1. Genuine consent is a necessary condition of [morally unproblematic] sex between human animals.
2. Genuine consent is a necessary condition of [morally unproblematic] sex between humans and non-humans.

Beirne does not consider a third case: sex that occurs exclusively between non-human animals. Yet, for the sake of consistency, Beirne must likewise hold that:

3. Genuine consent is a necessary condition of [morally unproblematic] sex between non-human animals.

If genuine consent is not a necessary condition of sex between non-human animals, then why require it in instances of zoophilia? Its absence from non-human sexuality should obviate its inclusion in mutually satisfying sexual contacts with humans. If non-human sexuality is not morally problematic for lacking genuine consent, then isn't that a “good reason” for thinking that genuine consent is not necessary to render morally defensible certain instances of bestiality? If genuine consent is a necessary condition of sex between non-human animals, then can every instance of sex between non-humans rightly be described as sexual assault?

Non-human animals engaging in sexual behaviour can seem ridiculously positive in their desires (especially males), but perhaps they are truly incapable of giving ‘informed’ consent to what they’re doing. What is being witnessed whenever ‘nature takes its course’ is a sexual assault. Perhaps it is speciesist to think of non-human animal sex in any other manner, since only human animals are capable of genuine consent, and thus capable of having morally unproblematic sex. Doesn't this give human animals a “good reason” to work towards the prevention of non-human sexuality? Is this absurd, or merely speciesist? Given that mammalian non-human sexual partners represent the end result of hundreds of million of years of sexual reproduction across uncounted thousands of

generations, and given that sexual reproduction itself is at least a billion years old, the idea that sexually mature -- if not sexually experienced -- mammals today remain nonetheless incapable of genuinely consenting to sexual contacts of any kind seems quite absurd.

Canadian law sets out a list of conditions under which consent cannot be obtained. This list is not intended to be exhaustive (Stuart 249). Consent to sexual contact, if it is to be genuine, cannot be obtained if one or more of the following conditions apply (Stuart 249-250):

The agreement is expressed by words or conduct of a person other than the complainant. . . . The complainant is incapable of consenting to the activity. . . . The accused induces the complainant to engage in the activity by abusing a position of trust, power or authority. . . . The complainant expresses, by words or conduct, a lack of agreement to engage in the activity. . . . The complainant having consented [sic] to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

These same restrictions ought likewise to apply in instances of zoophilia, if such behaviour is to be properly considered for legalization in Canada. To follow Piers Beirne's lead, there is every reason to suspect that standards of conduct which apply to sexual contacts between human animals should likewise apply to sexual contacts between human and non-human animals -- unless, perhaps, holding non-human animals to this human standard of behaviour renders sex between non-human animals as a whole morally problematic. Any philosophical stance that renders all sexual contacts between ordinary, mature non-human animals problematic seems to have adopted misguided principles somewhere along the way.

Consider each of the listed circumstances under which true consent is impossible in the context of zoophilia. The first condition entails that no human animal can consent on behalf of that non-human animal to sexual contacts with another human (or non-human!) animal. Consent is not transferable or liable to being exercised by proxy. There is no reason to suppose that matters are otherwise when non-human animals are concerned. Likewise, consent cannot be obtained through an abuse of power over either a human or a non-human animal. It cannot be legitimately obtained through coercion: either resort to force, the threat of force, or other punishment. It cannot be obtained through fear. In the case of

zoophilia, if the non-human animal indicates through its conduct any lack of agreement either to engage in an activity or to continue to do so, then the sexual contact must come to an end immediately. The same holds true for human animals in any sexual circumstance.

Both Alan Soble and Lois Pineau (Pineau, *Response* 100-101) would like to make exceptions in the case of sado-masochistic sexual practices, but even recent Canadian jurisprudence still frowns on the idea of deliberately inflicting pain for the purpose of sexual gratification (*R. v. Welch*; Bryant 97-99). The most effective critics of Singer's opinions contend that the difficulty with zoophilia lies in the second condition: the requirement that non-human animals be capable of consenting to sexual contacts with human animals.

### The Notion of Force and Carol J. Adams

Carol J. Adams adopts a position that seems, with the exception of her opposition to zoophilia, entirely suited to Singer's attitudes towards non-human animals: "In addition to exploiting animals for food, clothing, entertainment, product testing, and biomedical research, some people put animals to a use so heinous that its name is seldom mentioned. That name is bestiality." At first glance, this seems to be a more consistent position than Singer's, in that it treats exploitation as exploitation. But Singer could object that non-human animals do not consent to each of these activities in the same manner, and that in particular there is no "air of reality" to the idea that any non-human animal would freely consent to being:

1. Used to further either product testing or biomedical research, both of which are likely to be painful, involve great discomfort and risk of personal harm with no reward, and are designed to improve the lives of other (human) animals than itself.
2. Trapped (usually) or poisoned or shot or raised in confined quarters, then skinned to provide its fur or hide to satisfy human animals' vanity (for the most part).

3. Raised in confined quarters (typically) or shot, trapped, or hooked, eviscerated and chopped or ground into bloody pieces to feed other animals (both human & non-human).

The idea of making captive wild animals, then employing them as amusing diversions in circuses and zoos seems exploitative tout court. There are, however, experts whose intentions are not simply to use captive non-human animals as entertainment.

Research into preserving endangered species and improving the chances of survival of non-human animal species whose habitats are in danger of destruction, raising public awareness for the needs of non-human animals and the threats they face (mostly from human animals), and other laudable goals lie behind human motivations for keeping ordinarily wild species in artificial habitats -- not just entertainment. Whether such intrusions nonetheless constitute unacceptable breaches of non-human consent is another matter: they likely do. Other animals seem to derive meaning for their lives among humans from the work that they do with them. It doesn't seem immediately evident that domesticated animals employed for use on ranches and even in entertainment would bolt at the first opportunity to escape from their assigned tasks. People who work closely with dogs and horses, in particular, claim that these animals enjoy work and derive satisfaction from its accomplishment (and, no doubt, the praise that follows). These, coincidentally or not, are among the species most likely to find themselves the objects of zoophilic attention.

The work that dogs and horses do seems to serve as a diversion for the non-human animals themselves, and not just for the humans who either witness or participate in its achievement. Adams does not provide an exhaustive list of exploitive uses to which human animals put non-human animals, but even her short list of such uses contains wildly contrasting elements. Some of Adams's entries are clearly abusive, in the sense that they cannot be in keeping with the desires of the non-human animals involved. Product testing, biomedical research, being killed to be turned into clothing or food are uses which strike one as being unpalatable to any sentient being -- including humans. The Kantian's objection that non-human animals are used as means instead of ends rings truest in these

instances. Entertainment and work are grey areas, liable to harbouring both abusive and non-abusive situations. Singer could argue that this makes the use of non-human animals in human entertainments or as tools is akin to their use in sex, and similarly leaves open the question of whether zoophilia is always wrong because it violates the consent of non-human animals.

Adams holds no such ambiguous view of zoophilia. For Adams, all zoophilia is properly referred to as “forced sex with animals,” and zoophilia “is always animal abuse.” By characterizing zoophilia as forced sex, she leaves no option but to criminalize it in even the slightest instance. By characterizing zoophilia as forced sex, Adams adopts the view that non-human animals are to be considered identical to children in matters of sexual contacts with human animals. According to Canadian law, no one under the age of fourteen is deemed capable of consenting to sexual contact. This entails that the presence or the absence of force is, like consent, legally irrelevant. The importance of this fact is missed even in some courts.

In an Ontario case, *R. v. A.Z.*, a 13-year-old accused was initially acquitted of both sexual assault and invitation to touch for a sexual purpose (386-387). The accused in that case originally escaped conviction because he:

1. was deemed not to have been in “a position of trust or authority to the complainant”;
2. was not “a person with whom the complainant is in a relationship of dependency”;
3. did not use “force or threat of same” against the complainant to coerce sexual contact. (386)

The fact of the matter is that “the respondent took the complainant to a secluded area and induced her to perform fellatio by promising her some gum” (*R. v. A.Z.* 386). The appellate court of Ontario quashed the acquittal and ordered a new trial based on the fact that the third finding was faulty: the incident did amount to forced sex because force was an element of the criminal act. According to Canadian law:

The “force” required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. . . . A friendly but unwanted kiss may be an assault. (*R. v. A.Z.* 387)

None of the evidence in *R. v. A.Z.* suggests that the respondent in this case did not welcome the act which constituted the offence. In other words, in this instance the act of fellatio (though not “friendly”) was not “unwanted.” The Crown conceded at trial that it could not establish that any of the three conditions listed above applied to the incident in question, including the element of coercive force.

It might be argued by some future court that a thirteen-year-old is in an inherent position of trust in the eyes of a seven-year-old, but this is not the approach taken by the Ontario appeals court in this instance. That court observes that any instance of touching can constitute an assault (whether wanted or not), because touching is in itself an interference with another’s bodily integrity (*R. v. A.Z.* 387). By extension, the court claims that any instance of sexual touching can constitute sexual assault, which strengthens the statement that is actually made by Doherty and Laskin. Not only is it the case that a friendly but unwanted kiss “may” be assault -- it is one (though perhaps only in the most trivial, literal sense). Canadian jurisprudence requires more than this (i.e., the *actus reus*) to establish that an act of sexual assault has been committed when the contact is welcomed.

In its treatment of *R. v. A.Z.*, the Ontario appeals court adopts a position which was erroneously introduced at trial in *R. v. Pitt*:

Force simply means physical contact. There can be force without physical violence. In other words, this ingredient is proved if you are satisfied, beyond a reasonable doubt, that . . . the accused [touched] the victim. (330-331)

Thus, the appellate court argues, the seven-year-old was indeed “forced” to perform fellatio (*R. v. A.Z.* 387; contrast Bryant 109). But the citation from *R. v. Pitt* cannot be interpreted in a manner which allows that the element of force, vitiating consent, is satisfied by any instance of physical contact. While the majority opinion of the appeals court decided that “it is difficult to see how the jury would be deceived into thinking that any touching could vitiate consent” (*R. v. Pitt* 331), a dissenting opinion arose based on the possibility, given that the trial judge had defined “force” as simple physical contact (*R. v. Pitt* 331).

If it is deceptive to define force as simple physical contact (and it is), then both the trial judge in *R. v. Pitt* and the appellate judges in *R. v. A.Z.* committed errors by introducing the idea into their respective trials. In instances of sexual

contact involving children, outside a few specific exceptions provided for under Sections 151 and 152 of the Canadian Criminal Code, consent is irrelevant. Thus, the element of force need not be proved by prosecutors in order to secure a guilty verdict. It is misleading and erroneous, a legal defect, to attempt to include an element of force in such a manner that distorts it beyond all practical application. Adams' characterization of zoophilia as "forced sex with animals" makes the same mistake: if non-human animals are to be considered incapable of consenting to sexual contacts with human animals, then even a total absence of force is insufficient to render an act of zoophilia either legally or morally unproblematic. It is a mistake, in such instances, to consider whether or not force was applied since that finding has no legal bearing on the verdict.

Assault simpliciter can ordinarily be quite easily distinguished from assault with sexual connotations:

Sexual assault is an assault . . . committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test to be applied . . . is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.' (R. v. K.B.V. 199)

Singer's two references to instances of sexual contact sought out by non-human animals qualify as incidents which did not involve force being applied against them. If Adams is correct, then consent in such instances is merely apparent. It carries no moral or legal weight, since it is literally absent.

The appeals court decision in R. v. A.Z. made the following argument before ordering a new trial:

. . . the respondent took the seven year old complainant to a secluded area and induced her to perform fellatio. That act involved a touching of the complainant by the respondent and an interference with her bodily integrity. Given the complainant's age, consent was irrelevant. There was, therefore, evidence that the respondent applied "force" to the complainant and thereby assaulted her. (387)

The judges use extreme care in their wording: the complainant's "bodily integrity" was interfered with, thus bringing a charge of "assault." They do not state that the complainant's sexual integrity was violated (though the nature of the contact was obviously sexual), justifying a charge of sexual assault. The appellate judgment is not absolutely clear whether a charge of sexual assault is to be brought against the accused in R. v. A.Z., though that seems to be the intention of granting a new

trial. It is obvious in this case that the girl's sexual integrity and not simply her bodily integrity was interfered with by the accused, and the appellate judges had access to the cited observations when they composed their ruling.

The appellate judges ought not to have included any mention of the element of force (with or without scare-quotes) since, even despite its total absence, a crime would nonetheless have been committed. Carol J. Adams considers non-human animals to be in the same situation as this seven-year-old girl: non-human animals are constitutionally incapable of consenting to sexual contacts with human animals and so, even when consent seems evidenced through their conduct, all instances of zoophilia are likewise instances of sexual assault (though this does not result from the presence of force sufficient to vitiate consent). In the case of sex with children, it is not force that vitiates consent: it is age. In the case of zoophilia, it is not force that vitiates consent: it is species. In both cases, the capacity to give genuine consent is irrelevant: it is in every instance presumed to be nonexistent.

### The Stance Taken by Carol J. Adams

If Adams's position truly equated non-human animals and children in matters of sexual consent, then she ought to end her argument there. To do so, however, would necessitate a defence of the position that the implied identity exists. Adams seems diligent enough to recognize that fact, though the required defence is not forthcoming. Instead, Adams resorts to a condemnation of zoophilia which for the most part does not rest upon the assumption that non-human animals are incapable of consenting to sexual contacts with human animals in the same manner as children are held to be. It should be noted that Canadian law likewise does not ban zoophilia on the grounds that non-human animals and children are sexual equals, or that non-human animals cannot provide genuine consent to sexual contacts with humans (see below). Instead, the ban is a hold-over from times when all non-procreative (i.e., so-called "non-natural") sex was prohibited. Of course, this does not imply that a ban against zoophilia can have no foundation in Canada today, since there may be other compelling reasons for

maintaining it. This examination of zoophilia will argue that there are good reasons for prohibiting the practice in many (if not most) instances, and that the basis for such a ban should not be focused on dubious assumptions of non-human animals' capacity to genuinely consent to sex. Carol J. Adams lists seven mutually damning aspects of zoophilia (i.e., forced sex with animals).

1. "Many forms of sexual contact between humans and animals are physically destructive to the animals."

Even Peter Singer regards such cases as illegal. Acts which are physically destructive to the non-human animals involved cannot be considered to be mutually satisfying. There is no empirical evidence that non-human animals masochistically enjoy the pain and suffering associated with injury. Adams makes reference to a horrific instance of zoophilia with the aim of condemning zoophilia outright. She observes how "chickens are frequently decapitated because this intensifies the convulsions of the sphincter, thereby increasing the sexual pleasure of the man." How "frequently" this occurs is entirely speculative. There is no evidence that this is epidemic behaviour anywhere. The fact that some alleged practices are destructive cannot affect the moral standing of other, harmless behaviours. While the practice cited by Adams is clearly indefensible in most moral schemata, it is harder to see that criticisms which might be leveled against it apply at all to the bored housewife who dallies with the family dog or the curious adolescent fondling her pony's penis.

2. "Silence is a major problem. . . . Since bestiality is most often something that occurs in private, no one need ever learn about it."

The implication here is that silence and privacy are flaws in themselves. It is true that incidents of zoophilia are not going to be reported in the same manner as sexual assaults against humans, since non-human animals aren't able to talk about their experiences or to consider calling in authorities. However, activities which are not morally problematic but which are done in private and not ever made public do not through that become wrongful. The inability of non-human animals to share their experiences with others becomes problematic only when harm is involved. Consensual sex between human animals "is most often something that occurs in private" and "no one need ever learn about it." That does not make it morally

problematic.

Unless Adams presents a cogent argument for treating non-human animals like children, their inability to speak should not count against zoophilia's moral status. Interestingly enough, when attention is paid to instances in which the inability to communicate instances of abuse is similarly featured in human sexuality (e.g., sexual contacts with infants), it is not the fact of silence which associates such behaviour with immorality. Instead, it is the fact that infants are constitutionally incapable of consenting to sexual activity. Piers Beirne shares Adams's concern that non-human animals cannot communicate their distress to others who might intervene to put a stop to it (*Rethinking, What*). It is certainly a concern that no one interested in non-human animal welfare can ignore, but it cannot serve to condemn every instance of zoophilia. Adult humans who, for whatever reason, have very limited communicative abilities in no way lose their capacity to genuinely consent to sexual contact thereby. The fact that non-human animals are more susceptible to abuse because of their relative inability to communicate wrongs done to them does contribute to seeing zoophilic contacts are liable to greater protection than that afforded to ordinary, adult human animals. This fact is captured by addressing zoophilic contacts as part of a fiduciary relationship (see below).

3. "The notion of bestiality as a safety valve that operates until the (usually young) men are ready for women leads one to ask whether the women to whom these young men graduate are not safety valves, too. . . . Animals are harmed in safety-valve bestiality, and humans learn that it is okay to treat others as safety valves."

This point is reminiscent of Immanuel Kant in that it associates the treatment of non-human animals as an indicator of attitudes towards human animals. The assertion that "animals are harmed in safety valve bestiality" is question-begging. Adams provides no empirical support for the claim that, through 'safety-valve' zoophilia, "humans learn that it is okay to treat other [humans] as safety valves" (i.e., as means rather than ends). The whole notion of describing adolescent experimentation with zoophilia as a 'safety-valve' taints the issue. The assumption is that there is a danger associated with denying this urge for sexual release. All recreational sex can similarly be described as having the function of a 'safety-valve.' The release which is sought through recreational sex is not thereby evil.

Sex, these days, is held to have more than a pro-creative function. That it contributes to psychological well-being is not a flaw. If it can be demonstrated or even persuasively adduced that harm to animals caused by 'safety-valve' zoophilia leads to harm to humans, then such behaviour ought to be deterred and prevented.

Of course, if Adam's third point is sound, then it seems likely that 'safety-valve' sex between human animals ought to be deterred and prevented as 'safety-valve' zoophilia would be -- if not more so. To refuse to take this further step is conveniently speciesist. So long as recreational sex between human animals is permitted, even morally endorsed, Adams has not provided an argument against 'safety-valve' zoophilia. It is only when 'safety-valve' zoophilia truly is an indicator of psychological dysfunction (as it can be) that one ought to be concerned for the future sexual misbehaviour of the individual implicated in the activity. In such situations, the behaviours exhibited typically involve harm to the non-human animal as a clear warning sign that the offender may 'graduate' to harming human animals. Adams provides no empirical evidence that those engaged in zoophilic activities which do no physical harm to the non-human animals implicated are more likely thereby to engage in behaviours harmful to fellow human animals. None of Singer's critics provides any empirical evidence of a causal link between engaging in zoophilic behaviour and subsequently developing a taste for abusing one's fellows.

Being inclined towards and even partaking in zoophilic contacts is insufficient grounds for a diagnosis of mental pathology, according to the DSM-IV (see above). Zoophilia can sometimes become manifested as a chronic disorder, but this is a feature of chronic behaviour in general and does not necessarily indicate any specific danger towards anyone other than the zoophiliac. Hani Miletski (37-41) presents a number of evaluations of the practice of zoophilia. Some are negative, others neutral. There is a correlation with time: the earlier the studies, the more negative the evaluation. The fact that even the least critical evaluations of zoophilia only regard it neutrally is not necessarily a condemnation of sex with non-human animals. Over the same period of time, attitudes towards homosexuality have similarly evolved from generally-held negative attitudes

towards neutrality.

Though homosexuality has not in most quarters come to serve as the ideal of human sexual behaviour, tolerance and acceptance (i.e., neutrality and equality) of it has been enough to change the practice's legal and cultural standing. Similarly, neutrality towards certain instances of zoophilia stemming from the observations that they are neither evil nor dangerous ought to be sufficient to produce tolerance of them in Canadian society, given enough time, and freedom from legal persecution (all else being equal -- see below for why this is not the case).

4. "In the second kind of bestiality, fixated sex, an animal becomes the exclusive focus of a human's sexual desires. . . . those who engage in this kind of sex prefer to be known as 'zoophiles' . . . The zoophile's worldview is similar to the rapist's and child sexual abuser's. They all view the sex they have with their victims as consensual, and they believe it benefits their sexual 'partners' as well as themselves."

Here, at least, non-human animals aren't considered mere means. To state that zoophilia is rape and akin to child sexual abuse requires that sexually mature non-human animals be equated somehow with children in a manner relevant to sexuality. Adams has not provided such an argument and, as William Saletan may say, she has ducked the issue. To say that zoophilia is rape or akin to sex with children is to presume that non-human animals are constitutionally incapable of consenting to sexual contacts with human animals. One difficulty in asserting such a view is that it seems to make all sex among non-human animals abusive.

As Singer would have it, there is no relevant difference whose penis goes into whose vagina, mouth, or anus -- or whose tongue or hand stimulates what -- so long as the experience is mutually satisfying. If it is not abusive to a sexually mature canine to thrust his penis into the vagina of another sexually mature canine, then what difference can the simple substitution of that canine vagina for a consenting adult human's make? The idea that species differences have no moral relevance is not unheard-of:

Are bare biological differences morally [sic] relevant? We don't see how. . . . Why should our primary classification (whatever that means) be our species rather than biological class (animals), biological order (primates), sub-species distinctions (race), or cross-species distinctions (gender)? (Lafollette, Shanks 43)

Membership in the species *homo sapiens* in itself has no moral significance, but rather the fact that all men are human serves as a *reminder* that being human involves the possession of characteristics that are morally relevant. (Steinbock 248)

One may treat two creatures differently because one is less sensitive than the other to some kind of suffering, but two equally sensitive creatures may not be treated differently merely because they belong to different species. (Benson 530)

5. "One cannot talk very long about sex with animals without noticing the gender issues: Men are more likely to do it. Women are more likely to be depicted -- or to be forced into -- doing it. This type of bestiality, domineering sex, has long been used by batterers to degrade their partners."

Not all zoophilic activities can be condemned because some of the variants are worthy of moral and legal condemnation. Arguments along such lines do away with morally unproblematic activities, along with those which are demonstrably offensive. One ought not, for example, do away completely with automobiles or alcohol because some people choose to drive drunk. That some abusive individuals employ zoophilia to further humiliate and control their human fellows does not infringe on instances of zoophilia that are freely engaged in and mutually satisfying. The difference is identical to that between acts of sexual assault and acts of consensual sex. Megan Metzellar states that "women are often sexually abused and exploited in conjunction with acts of bestiality" (Carnell). It is a simple matter to draft legislation which punishes such excesses (existent Canadian prohibitions against sexual assault suffice) while leaving mutually satisfying zoophilic practices unhindered. Morally unproblematic activities cannot be condemned for being irrelevantly similar to morally problematic ones.

6. "Relationships of unequal power cannot be consensual. In human-animal relationships, the human being has control of many -- if not all -- of the aspects of an animals' well-being. Sexual relationships should occur between peers where consent should be possible."

Unless such control is perceived by the non-human animal to constitute a threat to its continued well-being, the mere fact that a human animal has power over it cannot infringe on the legitimacy of a non-human animal's consent. Adams's second statement is inadequately formulated, given her ideological commitments. It ought to read: "sexual relationships must occur between peers where consent is possible." Even Piers Beirne admits to being:

not convinced that bestiality must entail sexual coercion simply because human-animal sexual relations always occur in a context of unequal power . . . If unequal power is the definitive criterion, then sexual coercion would be an essential characteristic . . . of most adult heterosexual and even homosexual intercourse as well. (What)

Sexual relationships of unequal power can be unproblematically consensual, if they are mutually satisfying and genuinely consensual. Unequal standing in 'power' is usually not a problem in any sort of relationship unless that greater influence is used as a means of coercion. Its mere presence does not satisfy that requirement. A far more promising solution to the question of zoophilia's morality can be derived from the dynamics of power relationships. None of Singer's critics is either able to see this or willing to acknowledge it. This results from a shared insistence on making the presumed constitutional incapacity of non-human animals to give genuine consent central to their respective efforts to criminalize zoophilia.

7. "Consent is when one can say no, and that no is accepted. Clearly animals cannot do that. Bestiality is the model case of circumventing consent on the one hand, while confusing affection for consent on the other."

Adams here supposes, on even the most generous reading, two things:

1. Non-human animals are unable to effectively indicate an unwillingness to participate in sexual contacts with human animals.
2. Any indication of unwillingness is recklessly ignored.

That a willingness for sexual contact can be indicated through non-verbal means is a given fact of both Canadian jurisprudence and common sense. That non-human animals can ordinarily indicate unwillingness, either through efforts to distance themselves from unwanted contact or aggressive reactions to it, seems obvious. Non-human animals ought perhaps to be held to the same (non-verbal) standards which indicate willingness in human animals -- in Canadian courts -- if one hopes to remain on reliably unproblematic moral ground. This will curtail the sorts of instances in which zoophilia is morally unproblematic, though such curtailment alone will stop short of making zoophilic contact an absolute liability offence.

## Taking Non-Human Consent Seriously (Again)

Carol J. Adams fails to provide any argument to the effect that non-human animals ought to be considered identical to children in matters of sexuality. The platitude that non-human animals are sexually equivalent to children is frequently cited by Peter Singer's critics (Feral; Metzellar; Carnell; et al). The seven unrelated points which Adams does make in reference to the immorality of zoophilia cannot, either separately or together, constitute a damning condemnation of every instance of sexual contact between human and non-human animals. In fact, were Adams to put forward a similar set of criteria aimed at discrediting sex with children, it is entirely unclear whether such an attempt would succeed universally. The Canadian courts, by designating all persons below a certain age incapable of consenting to sexual activity with adults, avoids the problems inherent in any similarly piece-meal approach.

The problem with a similar, blanket prohibition in the case of zoophilia is that it seeks to condemn sexual activity not between children (i.e., the incapable) and adults (i.e., the capable), but between species. Outside of a "natural law" approach to morality, it isn't obvious whether any grounds exist to make inter-species sex either immoral or illegal. By prohibiting mutually satisfying sex between sexually mature non-human and human animals on the grounds that non-human animals are constitutionally incapable of consenting to it, one ends up either prohibiting sex between mature non-human animals tout court or committing the mistake of speciesism (i.e., banning an activity which is only problematic for involving humans): dogs copulating is okay, but copulating with dogs is not. Likewise, invading the sexual integrity of non-human animals for the sake of profit is okay, but doing the same for sexual gratification is not.

Stimulating the penis of a non-human animal for the purpose of collecting semen is legal in Canada, even to the point of constructing artificial mares for stallions to masturbate on. Stimulating the penis of a non-human animal for the purpose of mutual sexual gratification is illegal. As the motives of the human animal in either situation equally imperceptible to the non-human animal, either both practices are morally unproblematic (from the standpoint of non-human

animal welfare) or neither is. To ban either of the activities alone is indefensible from a standpoint that takes non-human consent seriously.

Piers Beirne aims to take non-human animal consent seriously. He sees that a “difficulty” with Singer is his “refusal to consider that one of the ‘participants’ in acts of bestiality might not have consented or, if consent seems to have been given, that it might be a form of consent that has been variously manufactured through coercion” (What). It seems that Singer does incidentally pay respect to a non-human animal’s consent, since he only countenances mutually satisfying instances of zoophilia. If consent to the sexual contact has not in fact been obtained, then it is unlikely that the encounter will prove to be mutually satisfying. Negative indicators are not to be read as “token resistance.” It isn’t clear whether Singer would support any form of coerced submission to sexual contact, although preference utilitarianism certainly wouldn’t rule out bribery. Singer might allow a dog to be trained to expect a juicy steak as a means of promoting its participation in bedroom activities.

Regardless of what Singer may or may not permit regarding positive reinforcement of behaviour in a non-human animal, Beirne seems to have negative forms of coercion in mind (What):

In the same way that the sexual assault of women differs from acceptable sex because the former is sex obtained by physical, economic, psychological or emotional coercion -- any of which implies the impossibility of consent -- so, too, [Carol J.] Adams' assertion that bestiality is always sexual coercion ("forced sex") is surely a correct description of most, if not all, human-animal sexual relations.

It is unclear whether economic, psychological, or emotional coercion can be applied against non-human animals with anywhere near the effectiveness (if any at all!) with which it can be wielded against human animals. It is not possible for a non-human animal to conceive of the idea that, were it to refuse the sexual advances of a human animal, it might find itself “out on the street,” or denied opera tickets. It is not possible for a non-human animal to give in to sexual advances because of cruel mind-games, or being told that no one else loves it (or any of the other, innumerable nasty ploys that some human animals use quite effectively against their fellows).

Physical coercion is the most pertinent form of coercion in instances of

zoophilia. Beating or restraining a non-human animal so that it cannot but submit to sexual contacts with a human animal is clearly wrong. In the same class as these wrongs might be denying the basic necessities of life: withholding food or water, or denying shelter as a means of breaking an animal's will. It is quite clear that Singer does not so much as suggest that any of these practices is acceptable. He could hardly do so, as a preference utilitarian. Coercion as it can be effectively employed against non-human animals has a far narrower range than it does in dealings between mature human animals weakens the hypothesis that zoophilia "is always sexual coercion."

Oddly enough, since it is Beirne's stated aim to discredit zoophilia in any form, he grants that some instances of zoophilia may not be sexually coercive: "most, if not all." This may simply be a slip on Beirne's part, or it may give rightful credit to the possibility that zoophilia need not feature either "physical, economic, psychological or emotional coercion." It ought to be noted that no one will do time in a Canadian jail for using the sorts of coercive measures listed above as means to training an animal, even if they are employed with extreme recklessness. Training a dog may well be achieved by denying him food, water, and shelter, or by beating him, without worry of criminal prosecution. Such forms of coercion may be deemed primitive, perhaps morally wrong, but only in the context of sexuality are they considered worthy of criminal charges. Sex is again singled out over every other form of human interference into the lives of non-human animals, for no good reason.

The very idea that coercion is basically directly transferable from non-zoophilic to zoophilic circumstances is misleading. Coercion is less applicable to non-human animals: it must be much more readily or directly perceived to be at all effective, when compared to forms of coercion which might be applied effectively against human animals capable of higher forms of reasoning. Coercion or extortion can be far more subtle and indirect with most human animals (even children) than with non-human animals, due to a human's ability to formulate far more complex perceptions threatened consequences. This is particularly true of social consequences, which are not even liable to application against non-human animals. A non-human animal need never worry that an offer of sexual contact

could precede losing a job or promotion, failing a course of study or receiving an undeservedly poor grade on a research paper, having a reputation maliciously tarnished, or any other particularly human fear. Extortion, levied against a non-human animal, can never be subtle because such subtlety depends on the human capacity for perceptions of far-reaching and complex consequences due to non-compliance with an extortionist.

None of this is to suggest that non-human animals are invulnerable to coercion, but it points out that the class of effective forms of coercion is much narrower for ordinary non-human animals than it is for ordinary human animals. Since coercive attempts to secure sexual contacts with non-human animals must be relatively blatant, likely aimed at either physical deprivation or physical abuse, it may be easier to demonstrate its presence or absence in a court of law. This narrowing of the possible forms of coercion in zoophilic contexts ought incidentally to provide somewhat greater protections against abuse by reducing the likelihood that coercion might go undetected as such by a judge or jury. Despite this, it remains generally true that non-human animals are much more vulnerable to exploitation by human animals than human animals, and thus the idea that a fiduciary relationship obtains between non-human and human animals continues to hold, as well (see below). This fact supports a novel approach to the morality of zoophilia which incidentally supports the intuition that so many people have that zoophilic contacts are morally problematic, as shall become apparent.

Beirne makes only one addition to the requirements on morally acceptable sex in his second essay on zoophilia: “[sometimes] one participant in a sexual encounter may appear to be consenting because [she or he] does not overtly resist, but that does not of course mean that consent really is present” (What). This is entirely correct, and reflects current Canadian court rulings in the matter of determining whether consent was indeed present in a given instance of sexual intercourse. Submission is not consent, just as tolerance is not approval. Positive evidence of consent is required. This is in keeping with Canadian jurisprudence but, according to Beirne (What):

If we cannot be sure if animals consent to our sexual overtures when we make them, then we are as much at fault when we fail to condemn sexual relations between humans and animals as when we fail to condemn adults who have sexual relations with infants or with children or with other moral patients . . .

Beirne has a higher degree of certainty in mind than that required by the Canadian courts. The courts call for taking reasonable steps, and avoiding both reckless disregard and wilful ignorance. The courts acknowledge that non-verbal indicators are sufficient for determining consent. Thus, it would seem that one can be “sure,” to the degree required by Canadian law (if not Piers Beirne), whether consent to sexual contacts with non-human animals has been obtained (or not).

This is what matters when considering whether any instance of zoophilia is liable to legalization in Canada. Also, as Adams missed the mark when she raised the issue of non-human animals’ inability to communicate their distress, sexual relations with “infants or with children or with other moral patients” are not wrong for the reason(-s) that Beirne proposes here (i.e., because we cannot “know” whether they are consenting). Children, especially, can give all the overt indications of their consent to sexual contacts as an adult human can. Some older children can even consent genuinely. Nonetheless, all such indications are considered illegitimate since children are by Canadian law defined as being constitutionally incapable of consenting to sexual contacts with adults. We don’t legally condemn sexual relations with children because we can’t be sure that they’re consenting, though the law does make that tacit assumption in most cases.

Legal scholars and judges must nonetheless concede that, with regards to the capacity for consent to sex, there is nothing inherently relevant about turning fourteen. In some instances, children genuinely consent to sex with adults. Difficulties derived from this fact are circumvented by defining relationships between children and non-children in such a manner so as to render sexual relations between them outrightly illegal. The fact that children cannot consent to sex with adults in Canada is statutory (and sound in most actual instances, as well).

## Not Equating Sexually Mature Non-Human Animals and Children

A similar approach exists in current Canadian jurisprudence with regards to zoophilia. There is no foundational reasoning, other than some version of “natural law,” that supports the current ban on zoophilia. It is simply wrong. Philosophical justifications in support of the prohibition underlie the ban, but only indirectly. It is one thing to say that most children are incapable of consenting to sexual contacts with adults, and another to say that all instances of sexual contact between children and adults are illegal. Both are true in Canada today. Legally-speaking, the first statement is irrelevant. Philosophically-speaking, however, it is the exceptions to the second statement that rightly cause consternation and make wholesale prohibitions difficult to justify. Blanket prohibitions allow for the punishment or condemnation of innocents, even if only rarely. Canadian law provides a more subtle mechanism for determining whether an instance of sexual contact is appropriate -- and therefore legal -- in limited cases (see below). This nuanced approach is both more judicious to exceptionless bans and responds to the phenomenon of zoophilia in a way that neither Peter Singer nor his critics have considered. It thus points towards a more satisfactory solution to the questions posed by human sexual contacts with non-human animals.

Beirne makes one last relevant (though clumsy) observation:

Some animals are not equipped to resist human sexual advances in any meaningful way, owing to their docile and often human-bred natures (is this perhaps the case with the orangutans at Camp Leakey cited by Singer?). . . . in most situations animals are incapable of enforcing their will to resist sexual assault, especially when a human is determined to effect his purpose. (*What*)

Presumably, the animals referred to by Beirne are quite easily overpowered by humans. It is true that most non-human animals are both much smaller and far weaker than are human animals. This is a brute fact of Earth’s biosphere. It does not imply that all instances of zoophilia are wrong, even if sexual interactions between human-sized and chicken-sized animals are obviously problematic. Given that zoophilia in such situations is morally problematic, due to the unlikelihood of mutually satisfying sexual contacts and the very likely infliction of

non-trivial harm (i.e., the infliction of harm minimally consistent with Canadian assault charges), Beirne's criticism misses making reference to all non-human species. Some non-human animals are "equipped to resist human sexual advances" and are capable "of enforcing their will to resist sexual assault."

In fact, some non-human animal species are generally more capable of doing so than human animals are. The moral status of sexual contacts with such animals is not brought into question by Beirne's criticism. Incidentally: Beirne's apparent eagerness to make reference to the incident cited by Singer involving a captive orangutan is misguided, since that did not involve a "human sexual advance." It also disregards the fact that rape is a feature of both captive and wild orangutan populations (Galdikas, *Behavior* 95), so the incident at Camp Leaky was not as atypical as it might seem to be to the uninformed lay person.

Neither Carol J. Adams nor Piers Beirne has succeeded in making an argument that all zoophilia is immoral, or that it always ought to be illegal (though the fact that non-human animals cannot communicate their distress to others who may intervene on their behalf seems a relevant concern). These are Peter Singer's most cogent critics. Their arguments do not rely on out-dated moral attitudes, but nonetheless are inadequate to their purpose. It is not a simple matter to condemn zoophilia outright. The best hope of doing so is to follow the lead taken by the Canadian courts in regard to sex with children, and simply designate non-human animals as incapable of giving genuine consent.

This is generally an uncomplicated premiss when it comes to children, since restricting children's sexual activity is seen as a good thing for Canadian society in general, and the overall health of children in particular. No doubt it also lends some measure of comfort to those most able to influence this democracy: adults and, more particularly, parents. In some instances, however, Canadian law prohibits actions which do not violate the spirit of the law in any way. Non-human animals are not children. Unlike children, non-human animal expressions of sexuality are atypically worrisome. This makes it more difficult to simply designate sexual contacts with non-human animals as behaviour worthy of legal sanction. It also creates a scenario where well-intentioned paternalism towards non-human animals obligates the radical alteration of the ways that humans currently interact with non-

human animals in matters far beyond sexuality. This wholesale re-evaluation, so obviously necessitated by the arguments made by Singer's most cogent critics, is universally ignored by them.

While non-chronic masturbation and harmlessly exploratory sexual behaviour in children is accepted, sexuality among non-human animals can rightly be much more sophisticated without arousing the concerns of adult humans. No one argues that there is anything wrong (under ordinary circumstances) with sexually mature non-human animals copulating, or bearing and then raising their young. The same is not said of children or, for that matter, dysfunctional human adults. Is this evidence of indefensible speciesism? If so, there are two options:

1. State that sexually mature non-human animals are akin to adult human animals rather than to children in matters of sexuality.
2. State that sexually mature non-human animals are akin to children rather than to adult human animals in matters of sexuality.

To do the latter consigns all sexual behaviour among non-human animals, with the exceptions of non-chronic masturbation and (perhaps) exploratory or 'adolescent' sexual activity, to being assaultive. It also leads to the untenable conclusion that normal, healthy, adult sexual relations are an impossibility for non-human animals: only children actually mature.

Equivalently, non-human animals could unproblematically masturbate or act out sexually during adolescence. Their sexual lives must stop there or enter into the realm of the morally problematic since, in outright denial of biological facts. Not just zoophilia, but any human activity that "interferes with the sexual integrity" of non-human animals is therefore immoral. The sole exceptions to such a wholesale condemnation might be veterinary procedures analogous to those medical procedures which are permitted to assure childrens' continued good health, and which do not violate the fiduciary relationship between doctor and patient.

To do the former, to treat sexually mature non-humans and humans alike, removes the greatest barrier to accepting some instances of zoophilia as both morally and legally viable. The two options presented above are surely not the only ones conceivable, but people (rightly) consider the former to be true in all non-zoophilic situations, and Singer's critics (wrongly) hold the latter to be true in all

zoophilic ones. Due to the fact that non-human sexuality isn't ordinarily seen as morally problematic in the absence of humans, the proper concern is to determine what -- if anything -- a human presence brings to this typically uncontroversial situation, thereby rendering it morally questionable.

If our acceptance of the sexual behaviour of mature non-human animals is not flawed, and so our view that (generally) non-human sexuality is no cause for moral concern, then our acceptance that mature non-human animals are not identical to children again preserves the possibility that some instances of zoophilia are morally unproblematic. The tone of Mark Steyn's column on zoophilia reveals either that human animals continue to be overwhelmingly insensitive to non-human animals, or that his audience fundamentally accepts that sexually mature non-human animals are not akin to children when it comes to sexual consent. It would not be possible for Steyn to have adopted a light-hearted and satirical attitude towards child sexual abuse in the pages of the National Post.

Steyn's attitude reflects the fact that modern Canadian dispositions towards zoophilia have historical roots in Western culture. In 17th- and 18th-century Sweden, for example, zoophilia aroused "reactions of ridicule [and the] laughter, smiling, and pointing fingers of witnesses and others" (Liliequist, 419). Modern attitudes towards zoophilia continue to reflect similar attitudes: "the equation of the male bugger [i.e., practitioner of zoophilia] with an immature boy" (Liliequist, 419). Talk of zoophilia arouses laughter and teasing. Talk of pedophilia arouses anger and condemnation. Non-human animals either don't suffer from sexual contacts with adult humans as children seem all but guaranteed of doing, or Steyn's words betray an intolerable societal insensitivity towards "inter-species sexual abuse."

## Chapter 6

# Sexual Assault

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched. (R. v. Ewanchuk 331)

Recklessness is an intermediate step between negligence and intent . . . a person acts recklessly when he is aware there is a probability, a likelihood, or a possibility that the complainant may not consent. (Bryant 94)

### (Seriously) Comparing Zoophilia to Sexual Assault

Two recent cases in the Canadian courts might severely limit the incidence of morally acceptable sexual contacts between human and non-human animals, although a total ban on zoophilia would not result even if these judgments and the others already cited were applied in all seriousness to sexual contacts between human and non-human animals. Perhaps such a restricted limitation is the most that can be hoped for by opponents of zoophilia who do not act out of either reckless disregard or wilful ignorance of the facts of consent. In the citation from R. v. Ewanchuk, above, the terms “person” and “animal” (i.e., human or non-human) are liable to substitution with no insult to the principle of autonomy referred to. The crime of zoophilia, like that of buggery, stems from a time when ideas about the ‘natural’ order of things drove the legislation of sexuality, so perhaps it can be more properly dealt with in a contemporary context by reconsidering zoophilia in relation to the modern offence of sexual assault.

There should be no difference when considering whether an act is one of simple assault against a human or a non-human animal. It makes no relevant difference whether an injury is either inflicted or threatened against a human animal or not. Abuse of a sentient being is a descriptor equally applicable to typical humans and typical (higher) non-humans. Matters might be sufficiently analogous

in matters of sexual assault to allow a similar conclusion. What turns an assault into sexual assault are matters of context which seem applicable no matter what species is (or are) implicated. Under this conception of things, the crime of “bestiality” would disappear from the Canadian Criminal Code. Despite this, most instances of what had formerly been “bestiality” offences would still merit legal censure.

The legalization of zoophilia in some jurisdictions has not been wholly intentional: by abolishing the crime of “buggery” so as to legalize homosexual expressions of sexuality, laws banning zoophilic sex falling under the same title vanished. This unintended legalization of zoophilia has been noted. The Humane Society of the United States remains:

concerned that . . . the provisions outlawing sex with animals are located in the same statutory provisions that cover certain other sexual acts that take place between consenting adults and are accepted by many facets of society. Many of these laws are being challenged in court or have already been overturned. . . . sexual animal abuse should continue to be prohibited.

Though reference to homosexuality as “certain other sexual acts that take place between consenting adults and are accepted by many facets of society” is so coy as to seem quaint, The HSUS has no qualms about making explicit reference to sex with non-human animals. The strategy proposed in this examination of zoophilia seeks to avoid mistakenly legalizing immoral behaviour.

Zoophilia would still fit the description it received in the Introduction, but it would no longer describe a wholly illegal class of acts. Instead, sexual assault would be more soundly recognized as a crime that can be committed against either a human or a non-human animal. It is a speciesist attitude to consider that such a move somehow belittles humanity, and especially women since “90 percent of the victims [of sexual assault] are women,” any more than does the fact that “99 percent of the offenders in sexual assault cases are men” (Osolin 669; *R. v. Ewanchuk* 362). Men are no less human for having committed sexual assault, no matter what else it says about them, and accepting the fact that some non-human animals can become victims of sexual assault in no way makes women less than fully human, either.

Treating non-human animals as liable to being sexually assaulted simply

acknowledges reality. There will no doubt be great resistance to the idea that it ought ever to become a precept of Canadian law, however. The laws of Canada have been built around the rights of people (i.e., human animals), not (non-human) animals. More importantly, once one admits that unwanted sexual contact with a non-human animal constitutes sexual assault, one might also come to conceive of treating most human killings of non-human animals as acts of murder and many human efforts to confine non-human animals as unlawful. Such extrapolations potentially have a far greater effect on human behaviour towards non-human animals than does settling the issue of zoophilia by considering human actions against non-human animals as akin to their actions against human ones. This is not to say that, morally speaking, they are the wrong attitudes to adopt. True concern for non-human animal welfare has far-reaching consequences for the scientific, medical, and industrial (i.e., agricultural) uses to which non-human animals are routinely and legally subjected to in most human societies today.

## Non-Human Rape

The phenomenon of “rape” has been documented by biologists in many non-human species, ranging from insects to great apes, with a very high incidence among birds (Palmer 360-367). Rape or “forced copulation” takes several forms in non-human animal species, as it does in human animals (Palmer 357-358):

... passive nonconsent ... can be identified in nonhuman animals by focusing upon the likelihood of resistance leading to injury or death.

When ... a female resists in one circumstance, but not in another, the matings in which she resists are seen as rape.

If a female resists under all circumstances, such resistance is seen as “normal,” and hence, “presumably” a “willing resisted” mating (i.e. involving only female coyness).

[Rape or forced copulation is defined as] copulation involving either the individual’s resistance to the best of his/her ability, or the reasonable likelihood that such resistance would result in death or bodily harm to the victim or others whom he/she commonly protects. ... a certain amount of judgment is involved in determining [whether either of these two criteria are present, but] these judgments are usually clear enough to determine if the behavior of nonhuman animals is rape.

Passive non-consent occurs in humans, when either a desire to avoid increased

harm (i.e., fear) or a perception of helplessness outweighs a desire to end or avoid physical contact.

Presumably, the second sort of instance in which rape in non-human species is identifiable (resistance in only some circumstances) does not involve the likelihood of injury or death. The non-human animal is exercising choice. Otherwise, resistance might be present, though not overt: it might be another instance of passive non-consent. Oddly enough, orangutans blur these two distinctions since there is always a likelihood of either injury or death from resisted matings (orangutans are sexually dimorphous, with males being far larger than females) yet females resist matings almost exclusively with sub-adult males: they consistently distinguish between mating attempts by adolescent and mature adult partners (Galdikas *Adaptation, Behavior, Tactics*; MacKinnon). Resisted matings are characterized as rape-attempts by both Galdikas and MacKinnon.

Galdikas notes that “while subadults occasionally forcibly copulated with females, adult males were not observed to ‘rape’” (*Tactics*, 10). The concession that forcible matings happen “occasionally” fails to acknowledge that, when a sub-adult male was implicated, the incidence of ‘rapes’ observed is 86% (19 out of 22 incidents) (Galdikas, *Behavior* 93). Galdikas even offers the hypothesis that sub-adult orangutans have a sort of “mistaken belief in consent” defence available to them: “probably adult males rarely forcibly copulate because they can better discriminate a female’s reproductive state than can subadult males” (Galdikas, *Tactics* 20-21). To their lasting credit, female orangutans do not tend to exhibit “passive non-consent” to unwanted sexual advances, though faced with a significant likelihood of injury. The same cannot be said about the human attendant assaulted by a male orangutan in the incident cited by Peter Singer. This supports the earlier contention that humans are relatively unable to control the sexuality of certain non-human species.

The third case is most problematic. In the context of evolutionary theory, resisted matings seem to promote the development of powerful individuals and this may be advantageous to the continued existence of a species as a whole. Thus, there seems to be some evolutionary support for the idea that female resistance to copulation by default in certain species is an adaptation that

promotes genetic survival. To characterize the situation in evolutionary terms, however, necessitates (at minimum) the following assumptions:

1. It is advantageous for males to force themselves on females, since this way only the strongest will create offspring (and strengthening offspring is advantageous to the species on the whole).
2. It is advantageous for females to resist mating, since this way only the strongest will create offspring (and strengthening offspring is advantageous to the species as a whole).

There seems no reason to assume that “coyness” lies behind female resistance in such species, or to assume that females are only putting up a good fight for “show.” It makes as much explanatory sense to assume that such non-human females, at least sometimes, truly do not want to mate. Actual fear, a genetically ingrained erotophobia, serves as a far more reliable guarantee that matings will be resisted to the “best” of a female’s ability. There seems to be no support for the idea that, in such species, it is “token resistance” and not true unwillingness that motivates female resistance to mating.

Researchers here have concluded that, in species where mating is always resisted, actual rape is impossible. What ought to have been concluded is that rape in such circumstances is either impossible to discern or omnipresent. Female “coyness” is excluded from species where resistance is infrequent rather than constant: rape actually occurs -- when the female resists. The idea of “coyness” serves as a means to avoiding the characterization of all matings in a given species as assaultive. Perhaps, in some non-human animal species, all matings are instances of rape. This might be evolutionary Darwinism in its crudest form, but it may also lead to the proliferation of a species quite effectively. It is an amazing over-simplification to assert that “a certain amount of judgment is involved in determining . . . if the behavior of nonhuman animals is rape” since the same can be said even of sex between humans, at times.

Palmer’s definition seems closest to a sufficient definition of non-human rape. To paraphrase:

1. Copulation accompanied by “reasonable” fear of death or injury is non-consensual.

2. Copulation accompanied by “best” physical resistance is non-consensual. If non-human sexual assault is to be taken seriously, however, then even Palmer’s definition is not strict enough. In fact, the standards of proof which Palmer provides are identical to those which once governed rape trials. Enhanced sensitivity towards the dynamics of sexual assault has shifted the burden of proof away from such crude standards, and for very good reasons. It is no longer the case that fear of “death or injury” be “reasonable” or that resistance to unwanted sexual contact be “to the best of a woman’s ability” (contrast Bryant 108). There seems no good reason, as Beirne might say, for resisting the application of these current standards of proof to instances of zoophilia. Such a move is in keeping with “the proper development of the criminal law [and] the proper prosecution of . . . sexual assault” (Osolin 638). As our perceptions of sexual assault have evolved, so must our moral evaluations of sexuality.

### The Moral Relevance of Species Distinctions

Many features of the treatment of sexual assault in Canadian courts have already been included in this examination of zoophilia. While the aim of this part of the essay is to examine if current sexual assault standards in Canada prohibit zoophilia, two assumptions must be made explicit at the outset:

1. Sexually mature non-human animals are capable of consenting to intra-species sexual contacts.
2. It makes no inherent moral difference whether the sexual behaviour of an animal (human or otherwise) is confined to its own species or not.

To deny the first assumption is to accept that all sexual contacts between sexually mature non-human animals even of the same species are morally problematic.

There is no evidence for the view that ordinary non-human sexuality is immoral. It is not even a position to which any of Singer’s critics is committed. It is, however, a position to which their arguments commit them when they hold sexually mature non-human animals to be child-like.

To deny the second assumption is to accept that a biological distinction

(i.e., species) has moral relevance. If it's alright for a sexually mature non-human animal to engage in any particular form of sexual contact with a similar member of its own species, then the same sort of sexual contact, when engaged in with an adult of a different species, is likewise morally unproblematic -- *ceteris paribus*. To deny either of the statements appears to be unjustifiably speciesist (irrelevantly discriminatory). It is the case that all things are not equal when a human animal engages in sexual contacts with a non-human animal, but the relevant moral concerns arise not from a difference of physical form (i.e., species) but from differences in ability. It is demonstrable that sex between non-human animals is relevantly different from zoophilia, such that the latter can be shown to be morally problematic virtually every instance (see below).

### An "Honest" Belief in Consent

The burden of proof in sexual assault cases has shifted far away from crude formulations similar to the criteria for non-human rape as set out by Palmer. To start with, belief in consent must be "honest" (Osolin):

A belief which is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and has drawn an honest inference from them. Therefore, for a belief to be honest, there must be some support for it in the circumstances. The level of support need not be so great as would permit the belief to be characterized as a reasonable belief. But some support there must be [which would rule out] "wilful blindness" . . . which is belief not grounded on the circumstances . . . (649)

[Evidence for the belief] may come from the detailed testimony of the accused alone, on this issue or from the testimony of the accused coupled with evidence from other sources. For example, the complainant's testimony may supply the requisite evidence. (687)

The implication for zoophilia is that, as in cases of sexual assault confined to humans, sexual contacts with non-human animals can only proceed on an honestly-held belief in the non-human animal's consent. Since evidence of consent need not be verbal, non-verbal indications can suffice for creating an honestly-held (if not reasonable) belief in a non-human animal's consent to sexual contact. Evidence for the belief can come solely from the accused, though the defence has been misinterpreted as barring such a case (Osolin 687).

Clearly, in cases of zoophilia, the complainant's "word" is not available: non-human animals cannot supply testimony. Any honest belief in consent must be based on the non-verbal conduct of the non-human animal. The fact that, in most instances of zoophilia, the human participant alone will be able to report the facts of the matter to a court is not inherently damning. The mere assertion on the part of the human participant that consent was present is never sufficient proof of an honestly held belief in consent. Verbal assurance on the part of the accused that a non-human animal's consent was rightfully obtained can, however, be supported by medical and veterinary evidence that no harm resulted from the act to either participant, and whatever evidence witnesses (necessarily part of the prosecution in such cases: the accused is unlikely to level charges and the actual complainant cannot) provide that any of the conditions which nullify consent in human sexual assaults was met.

Reforming the crime of bestiality in the manner suggested under this examination will not alter how evidence of that crime is currently uncovered. It would remain the case that witnesses not implicated in the behaviour are required to bring charges against human animal(-s) involved in particular instances of wrongful zoophilic activity. Protections from harm currently available to non-human animals are not compromised by the proposed reforms. What would change is the fact that zoophilia is currently an absolute liability: simply engaging in it is sufficient grounds for penalization and "even a reasonable mistake will not excuse" (Bryant 144).

## The Problem of Domestication

It might be objected that any non-human animal likely to find itself the object of sexual contact with a human will be in a situation in which its range of movement is severely restricted. Either in a household or on a farm, non-human animals are kept confined to areas controlled by their human masters. Thus, the following objection to a verdict that a particular instance of sexual consent was legitimate may be considered wholly applicable to many instances of zoophilia:

... an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all. (Osolin 651, 662)

Applying the situation described above to non-human animals: domestication itself might sufficiently vitiate consent. By this reasoning, non-human animals in human "care" are akin to slaves and their capacity to give consent is tainted due to a severely constrained freedom of choice. Domestication constitutes forcible confinement.

Some persons hold that "a domestic animal can no more consent to sex than could a human slave" (Francione, Gary; Danten). Though Danten does not mention zoophilia, it is clear that he sees domestication as an unjustifiable violation of the lives of non-human animals. Danten considers pet-ownership to be much more cruel than other forms of exploitation, due to its hypocrisy:

*l'exploitation des animaux de compagnie se fait d'une façon subtilement perverse, sous le couvert des bonnes intentions et des bons sentiments. . . . L'amour se traduit souvent dans notre monde par affection, plaisir, satisfaction, possession, exploitation et domination gratuite.*

Danten holds that pets are sterilized to ease the lives of pet-owners, and to eliminate a sexuality "beaucoup trop manifeste" (i.e., too intrusive). He mentions, among other inconveniences, sexually intact male pets' tendencies to masturbate and to try and mount their owners. It ought to be stated that the motives of pet-owners are not always perverse, and that good intentions and affection are not always a "cover."

Danten's central point, that pets are commodified non-human animals mutilated to serve human ends, may be fundamentally correct. Despite this, and even if sterilization, with the blessing of the veterinary industry, makes the transformation from an unruly creature into a pet possible, Danten's view that non-human animals involved in this re-arrangement gain nothing is wrong. While fecundity is removed and the effects that sterilization has on behaviour are not inconsiderable, the pet most often stands to gain a relatively pampered existence with veterinary attention to ensure good health, a steady diet of nutritious food, human companionship (if not that of fellow pets), and regular play and exercise. When Francione and Danten label pets as slaves, they deliberately employ a

term that can only have negative connotations for their readers. For a human animal, slavery is a pure loss when compared to free existence (i.e., non-slavery) or, at least, the limited freedoms of human society.

For a non-human animal, the “slavery” of domestication is not so simply characterized. Some even deny its applicability tout court: “it is an affront to the dignity of a human being to be a slave . . . this cannot be true for a horse or a cow” (Steinbock 253). The choice of a non-human animal is either to be a “slave,” or to eke out a chancy existence in competition with other non-human animals, constantly exposed to countless fickle harms. For a non-human animal, the choice is not an easy one between wholly good and wholly bad. Danten’s claim that the lot of a household pet “n’est pas plus enviable” as that of tigers and rhinos hunted by poachers, monkeys sacrificed “inutilement pour la science” and animals used in the development of cosmetics, “des millions de reptiles” skinned alive by the clothing industry, and veal calves is unsound. If non-human animals were able to make their choice known, it seems very likely that the lot of the household pet would be overwhelmingly more popular than the listed alternatives.

With the possible exception of poached tigers and rhinos, which presumably get to live out their lives free and wild up until the fatal bullet strikes home, how realistic is it to claim that any properly cared household pet (given a choice) would trade its place for a research animal or one raised for its skin, fur, or meat? Even life in the wild, with its potential for ending as another animal’s meal, featuring chronic disease or slow starvation, might not be selected for if a pet could be given the opportunity to make an “informed” choice. Many mammals and, apparently, parrots express a wide range of emotions. When distressed or depressed, such pets show it. Unless these animals are so acclimatized to their “traditional” role in the great hypocrisy of pet-ownership that they act the part of happy slaves, Danten’s claims -- while dramatic -- are often unsound. Pet ownership cannot be wholly freed of controversy. It’s too complicated, as nearly every interaction between human and non-human animals is, but to propose that it be abolished is similar to prohibiting every instance of zoophilia. Danten’s approach, like an outright ban of zoophilia, is a denial of, rather than a confrontation with, moral complexity.

The idea that domestication is akin to slavery is not, however, the interpretation of the courts. Human animals, the most domesticated species on the planet, don't thereby lose their ability to consent to sex. Non-human species who exist within environments controlled by humans don't, either. Human animals share this much with some non-human animals: they exist within environments controlled by other human animals. Both human and non-human animals may be born and raised in captivity (i.e., non-natural environments). This does not limit a human animal's ability to give consent, though it does affect what choices are available. The same doubtlessly applies to non-human animals' adaptation to human environments. Francione's statement implies that a non-human animal's understanding of its domestication is equal to a human animal's understanding of its enslavement. This is dubious at best, and likely plain wrong.

The circumstances of *Osolin* are such that a man dragged a woman (described at one point as "a 17-year-old-girl" [656]) from her home "naked and protesting," and transported her to "a remote place," and there tied her to the bed and had sex with her (651). Clearly, the idea of forcible confinement as it is necessary to vitiate consent in Canadian law is stricter than a metaphorical association between non-human animals and human slaves. The gist of the examination in *Osolin* is that "passive acquiescence" is not sufficient evidence of consent under the circumstances prevailing in that case (652). It should likewise be insufficient evidence of consent in any relevantly similar instance of zoophilia. Non-human animals need not overtly protest to sexual contacts to demonstrate their non-consent: an honest evaluation of contextual circumstances suffices for determining whether consent was freely given. The same holds just as true in human sexual activities.

### Seriously Comparing Zoophilia to Sexual Assault (Again)

Each of the five conditions listed in the previous chapter, any of which vitiates consent to sexual contacts between humans, ought to do likewise in all instances of zoophilia. The second condition listed there, that of "capacity" to

consent, is to be applied to sexually mature non-human animals as it applies in Canadian law courts to human non-children. This class includes some dysfunctional human adults (see below). That is, sexually mature non-human animals are not to be considered constitutionally incapable of giving consent to sex (for reasons cited earlier), but rather that certain circumstances render that capacity to consent temporarily absent (e.g., intoxication, unconsciousness, etc.). Added to these restrictions, consent cannot be obtained through (*R. v. Ewanchuk* 351, 367):

1. the application of “force”
2. “threats” of force or the “fear” of its application
3. “fraud”
4. “the exercise of authority”

“Honestly held fear,” unlike honestly held belief, “need not be reasonable,” and it need not “be communicated to the accused in order for consent to be vitiated” (*R. v. Ewanchuk* 333). The presence of any of these factors carries a tremendous amount of influence in vitiating apparent consent: “if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority” (*R. v. Ewanchuk* 360). Even sexual contact that seems vigorously welcomed might turn out to have been in truth fraudulently presented as such in order to mask non-consent and avoid a perceived danger of harm.

The taking of reasonable steps to determining whether consent is given under the prevailing circumstances ought to reveal vitiating factors to the accused before contact is attempted. The taking of reasonable steps should prevent an accused from being surprised by subsequent assault charges capable of sustaining a conviction in court. Finally, an honest (but mistaken) belief in consent cannot arise from (*R. v. Ewanchuk* 356, 367):

1. “self-induced intoxication”
2. “recklessness”
3. “wilful blindness”
4. the omission of having taken “reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting”

All of these additional restrictions ought to apply with equal legal force in any instance of zoophilia.

Throughout this examination of zoophilia, the notion of “conduct” alone being capable of expressing sexual consent has been referred to. This remains a viable tenet of Canadian jurisprudence. It obviates verbal consent, thus making it possible for non-human animals to meet the requirement that consent be indicated and perceived as such by human animals. *R. v. Ewanchuk* does not call this into doubt:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question [in some manner, either verbally or through her conduct]. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire [in any way], is not a defence. (333)

This author’s interpretation has been inserted into the citation above, at two points. To read the passage without the additions may lead a reckless reader to suppose that verbal assent to sexual touching is now a requirement of the Canadian courts. Additional support for this reading is found in the claim that “an unequivocal ‘yes’ may be given by either the spoken word or by conduct” (*R. v. Ewanchuk* 357).

An unusually vague and misleading phrase, for the Supreme Court of Canada, also appears in the introductory material for this judgment:

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. (332; note also 351)

The meaning of this cannot be that the complainant actually ever consented! It ought certainly to be read as: “even if the complainant apparently consented.” There is no way to regard the complainant as having actually consented, even if everything indicates that she has, if any of the restricting conditions apply to the circumstances of her apparent consent. Consent in such conditions is irrelevant and cannot be spoken of as existing in any legally binding manner. For example, “as irrational as a complainant’s motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent” (*R. v. Ewanchuk* 335). Similarly, if fear or any of the other factors which vitiate consent applies to a given circumstance, consent literally is absent from it. Fear as a factor capable of vitiating

consent is clearly equally applicable to zoophilic activities.

It might seem from statements cited above that any determination of the presence or absence of fear is not liable to an “air of reality” or “honesty” threshold. In other words, mere assertion on the complainant’s part that she was fearful is sufficient evidence to vitiate her consent and expose the defendant to a charge of sexual assault. This may seem unfair to the accused. However, if the only support for any claim of fear is its mere assertion by the complainant, then surely that cannot constitute sufficient grounds for ruling out a defence of honest but mistaken belief. Thus, mere assertion that a complainant was fearful cannot suffice to bring an effective charge of sexual assault against an accused. Just as “the complainant’s statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct” (*R. v. Ewanchuk* 349), so, too, is the complainant’s statement that she was fearful. In any case, it is misleading to claim that a charge of sexual assault can arise “if the complainant consented.”

In any instance of zoophilia, a mere assertion on the part of a witness that the complainant (i.e., [oddly enough] the non-human animal) was fearful cannot constitute sufficient grounds for convicting the accused of committing sexual assault against a non-human animal. Testimony to that effect accompanied by supporting evidence, including the alleged behaviour of the non-human animal during the activity under prosecution, may constitute sufficient grounds (and particularly given a lack of ulterior motives on the part of the accuser). This is not to deny that establishing proof beyond a reasonable doubt is more difficult in instances of sexual assault against non-human animals than it is in cases involving human complainants, which is already at times difficult. Though the rightful establishment of proof may be more difficult, the elimination of a reasonable doubt may not be.

The testimony of witnesses may outweigh the actual facts of the case in a manner unlikely to be reproduced in non-zoophilic circumstances: the complainant is in no position to contradict the testimony of any witness. Also, the nature of the behaviour itself is prejudicial in ways unlike most forms of human sexuality, perhaps disposing a jury to be more prone to ruling against a defendant’s claim to innocence (and interfering with a legitimate ruling). These observations support the

idea that a way to eliminate many of the sticky complexities of evaluating the morality of zoophilic activities from the standpoint of consent is to acknowledge a fiduciary duty between human animals and non-human animals in their care.

In *R. v. Ewanchuk*, the complainant “actively projected a relaxed and unafraid visage [though] fearful throughout the encounter” (343) – she also said “no” repeatedly (a feature of the court record conceded by the defendant’s counsel), “did not move or reciprocate the contact” (341), and there was no evidence “from which [the accused] could honestly believe consent to have been re-established before he resumed his advances” (334). Suppressed fear, unaccompanied by additional signs of non-consent, does not constitute sufficient grounds for a conviction on a charge of sexual assault. It cannot in cases of zoophilia, either.

This removes part of the obstacle to permitting sexual contacts with non-human animals as Piers Beirne would have it since, presumably, suppressed fear could always be offered as a feature of zoophilia given the epistemological difficulties in “knowing” that genuine consent has been given. *R. v. Ewanchuk* demonstrates that if a non-human animal gives every indication of consenting to sexual contacts with a human animal, the activity cannot be legally invalidated by mere reference to a non-human animal’s allegedly suppressed fear. The assertion that suppressed fear is present in any instance of zoophilia has to be an “honest” (i.e., factually supported) belief if it is to be rightly described as an instance of sexual assault. The fact that a non-human animal cannot testify as to its state of mind likewise does not taint this reading of matters, since even reliable testimony from a human animal to the same effect cannot carry the charge without supporting factual evidence which gives the assertion an “air of reality.”

Doing away with the requirement that assertions of suppressed fear be supported by additional facts can very easily “result in the injustice of convicting individuals who are morally innocent” (*R. v. Ewanchuk* 353). In *Sansregret*, reference is made to “a very real and justifiable fear” (577) arising from circumstances which amounted to the victim’s being “terrorized” by the accused (578). Despite such circumstances, *Sansregret* was originally acquitted. Though *Sansregret* was finally convicted, it is clear that the presence of fear be supported

by empirical facts in addition to any claim of suppressed fear.

The fact, noted previously, that most non-human animals are both much smaller and far weaker than are human animals does not constitute sufficient grounds to allow that suppressed fear is to be assumed to obtain -- especially when the variety of sexual contact is considered. To argue otherwise is to hold that any considerable disparity in size between sexual partners automatically vitiates consent. A great difference in the relative sizes of sexual partners surely contributes to the hypothesis that suppressed fear vitiates consent, but it must be accompanied by other signs of distress: either psychological maladjustment, physical behaviour (i.e., trembling), or injury: empirical facts. Looking at the range of forms that zoophilic behaviour may adopt, as unappealing as that may be, inevitably encourages consideration of it as not properly characterizable as an absolute liability, either legally or morally. At least, not from the standpoint of consent alone (see below).

### “Communicative” Sexuality and R. v. Ewanchuk

Thus far, neither the sort of restricted movement entailed by domestication nor the additional consideration of overt or suppressed fear provides considerations which necessarily bar the legalization of certain instances of zoophilia (i.e., those which do not violate any of the consent-vitiating criteria applicable to sexual assault). There does arise, in R. v. Ewanchuk, considerations that have far-reaching implications for zoophilia and intra-human sexual activity:

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to “test the waters.” Continuing sexual contact after someone has said “No” is, at a minimum, reckless conduct which is not excusable. (357)

If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established *before* he resumed his advances. (361)

. . . the accused proceeded from massaging to sexual contact without making any inquiry as to whether the complainant consented . . . [this] is not reasonable step. The accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non-consent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent. (378)

For the purpose of argument, and to be consistent with other jurisprudence, the intention of these citations does not preclude that expressions of unwillingness can be non-verbal. Thus, "saying 'no'" does not imply that that word is literally voiced so that the accused has heard and understood it or any synonymous (verbal) equivalent to it. In fact, even a clearly stated and understood "no" must be unambiguous, as revealed in *R. v. M.O.* (204, 210), though it is possible that a proper handling of such circumstances entails that, in order to maintain an "honest" belief in consent, the potential defendant must remove any ambiguity before proceeding with further sexual activity. One problem with ambiguity is that the passages refer to "unwillingness to engage in sexual contact" and "a lack of agreement to engage in sexual activity" whereas in *R. v. M.O.* the "no" could have referred either to sexual contact or -activity or the use of a condom (203, 204, 216).

The second citation is best: "where a complainant expresses non-consent [i.e., in any form and towards whatever at all], the accused has a corresponding escalating obligation to take additional steps to ascertain consent." This formulation has the apparently justifiable advantage of holding a potential offender responsible for even ambiguous expressions of non-consent. It holds a potential accused responsible not only for ascertaining consent but also for ascertaining the nature of the objection before proceeding. "No" can imply different, even contradictory, actions. When it comes to consent, however, "no" always in some manner implies "stop" ('token' resistance aside). Thus, it does seem that, contrary to the decision in *R. v. M.O.*, an appeal of the acquittal ought to have been permitted. In any case, non-human animals can make the required expressions of non-consent, unwillingness, or lack of agreement referred to in the passages above non-verbally. Reading these passages specifically in this manner is in keeping with the development of Canadian jurisprudence as cited in this examination of zoophilia. Despite this, these passages effectively limit morally

and legally acceptable instances of zoophilia, and human sexual activity in general.

The prohibited methods of “testing the waters” once “an unwillingness to engage in sexual contact” has been expressed are notable:

1. allowing time to elapse
2. the complainant’s silence
3. the complainant’s equivocal conduct
4. further sexual touching

The only legitimate route for re-establishing sexual contact is unequivocally sexually aggressive conduct (verbal or non-verbal) on the part of the complainant (R. v. Carson Livermore 94; R. v. M.O. 215). In the case of zoophilia, the complainant will most likely be the non-human animal. Though it is not logically precluded that the offender be non-human, as evidenced by the two instances of non-human sexual aggressivity cited by Peter Singer, such an offender cannot be brought before the bench for prosecution of his actions (at least, not unless mediaeval attitudes towards the non-human animals implicated in zoophilia make a comeback). When it is the non-human animal that has given evidence of non-consent (through its conduct), the only legitimate prelude to further sexual contact, if one exists at all, might be sexually aggressive conduct on the non-human animal’s part.

The analysis of R. v. Ewanchuk makes no mention whether any amount of time between attempts to initiate sexual contact suffices to turn an attempt to re-establish sexual contact into a wholly separate, initial attempt at the establishment of sexual contact. That is, with no indication that any amount of time suffices to render two attempts to establish sexual contact as wholly unrelated events, even the longest interludes between attempts to establish sexual contact count only as one attempt followed by an attempt to re-establish the original contact. Thus, two attempts to establish sexual contact with either a human or a non-human animal which occur even years apart are (apparently) still only one attempt in legal terms: the initial attempt at sexual contact, followed by an attempt to re-establish the contact that was attempted (and rejected) years before. Although the legitimacy of this interpretation of R. v. Ewanchuk remains untested by a Canadian court, it might not be unintended: the mere passage of time inherently changes nothing

relevant about the circumstances. Though attitudes towards sexual contact may change over time and so an attempt to re-establish sexual contact may succeed, unequivocal evidence that sexual contact is welcomed must precede any further sexual touching. Neither silence nor ambiguous conduct are sufficient for the initiation of (further) sexual contact. "Common sense" is cited as the source of these restrictions, but common sense also supports the idea that attitudes are liable to change (especially) over long periods of time.

The facts of *R. v. Ewanchuk* are such that a series of sexual contacts was attempted in a single, uninterrupted encounter; each was rejected with only brief pauses in between (and during which, it was clear, nothing occurred that might have contributed to a change in the complainant's attitude). It is in this context that the judgment was rendered. Could it apply in a situation where sexual contact, rejected initially, provides grounds for a conviction for sexual assault years later? This seems patently absurd, and it will be a job for the courts to better delimit this particular provision.

It is with *R. v. Ewanchuk* that Lois Pineau may find solace with the Canadian court system's treatment of sexual assault. It is now a legal precedent in Canadian courts that proceeding from one "step" in a sexual encounter to another (i.e., massaging to sexual contact) without "making any inquiry as to whether the complainant consented" has been characterized as "unreasonable" (this was certainly not the case in *R. v. Whitley*). The inquiry need not be verbal (that requirement remains excessive): what is called for is an evaluation of the prevailing circumstances in a given situation. If there is evidence of sexual interest (i.e., unequivocally sexually aggressive conduct, whether verbal or not), then sexual contact may proceed.

It ought to be noted that, while this precedent stands, non-verbal conduct may need to be relatively exaggerated in order for it to be unequivocal. A lover who takes the initiative must suffice, though in the circumstances under consideration here non-consent has very recently been expressed by that very individual and so this is unlikely to happen all that often. Linguistic expression lends itself far more smoothly to such situations, and no doubt is pragmatically resorted to relatively more frequently as a result. Thus, unless the gesture in

question is unmistakably inviting of the sexual contact that is meant to follow it, quite specific verbal inquiries seem required by default in most cases. In the face of resistance, common sense does seem to require that at least this much attention to the “dialectic of desire” be paid.

Some judges have interpreted *R. v. Ewanchuk* as far more revolutionary than it is. Some may see that the burden of proof has significantly shifted following this particular ruling (i.e., “in light of *Ewanchuk*”: *R. v. M.O.* 214). However, the rejection of silence or ambiguous conduct as sufficient grounds for an honest belief in consent has a longer lineage in Canadian courts than that. Ironically, Rosenberg himself makes reference to just such a precedent (*R. v. Ewanchuk* 356). Any “escalated” obligation applies only after non-consent, unwillingness, or lack of agreement has been expressed. The Canadian Supreme Court still holds sexual conduct minus any such indication to a lower standard of accountability. The courts allow for one, very guarded, “strike” before a defendant is declared “out.” It was noted earlier that an attempt to require “unequivocal” indications of consent had been excluded from the proposed revisions to legislation on sexual assault because that would have “produced unfairness to the accused” (Stuart 250; *R. v. Darrach* 502). *R. v. Ewanchuk* does not change that outright. It simply requires a heightened degree of certainty in the wake of a verbal or non-verbal expression of non-consent, unwillingness, or lack of agreement.

In such situations, a more stringent requirement produces no unfairness to the accused. In fact, not requiring the higher standard under such circumstances seems unfair to the complainant. Nonetheless, a likely implication is that a lot of zoophilic contact is would be rendered illegal simply because of it. The specific rejection of the notion that “further sexual touching” can be used to “test the waters” following any expression of non-consent likely invalidates much zoophilia as practiced. The scenarios presented by Peter Singer gain resonance from *R. v. Ewanchuk*. Zoophilic contacts initiated by non-human animals are, *prima facie*, consensual. Zoophilic activities in which no evidence of non-consent ever arises and where no circumstances which vitiate apparent consent are featured also remain unproblematic, in light of *R. v. Ewanchuk*. How much actual zoophilia or

ordinary human sexuality fits these descriptions is impossible to determine.

Many attempts by humans to initiate sexual contacts with non-human animals no doubt feature at least an initial expression of non-consent. This is likely to be particularly true of female non-human animals, some of whom have been observed with some frequency (if not always) to express unwillingness to engage in sexual activity even with members of their own species. Not wanting to appear sexist, it must nonetheless be conceded that males of most species seem less prone to rejecting sexual contact. Female “coyness,” the non-human equivalent of token resistance to sex, must be regarded as an absolute rejection of further contact, and no game, by anyone who expects to avoid being either reckless or wilful ignorant (at least until an appropriate ‘cooling off’ period has elapsed, though currently this is, legally-speaking, infinite). “Further sexual touching” is doubtless the method most often employed to overcome any initial rejection. When combined with the other ‘traditional’ methods of overcoming resistance to sexual contact: letting time go by, accepting silence or equivocal behaviour as indications of a willingness to “try again,” no doubt an accurate description of a lot of actual zoophilia emerges. Ironically, this is also descriptive of a lot of human sexual behaviour.

Following any indication of unwillingness, a higher standard of accountability (not quite that sought by Pineau and Antioch University, but only because it can still be non-verbal) is set in place. Indications of further sexual contact must be unequivocal and, as was argued earlier, that makes almost all instances of zoophilia impossible. Even Piers Beirne’s epistemological requirement is satisfied in *R. v. Ewanchuk*, since once an “unwillingness to engage in sexual contact” is expressed, one “should [i.e., must] make certain” that the unwilling partner has “truly changed [his or] her mind before proceeding with further intimacies.” *R. v. Ewanchuk* makes clear that the obligation to be certain is “incumbent.” The higher standard that one is held to following an expression of non-consent is mandatory and is not simply helpful advice. Until there is an indicator of non-consent, however, the higher standard does not come into play. Till then, the law stops short of requiring that signals of willingness to engage in sexual activity be unequivocal.

The facts that gave rise to the judgment in *R. v. Ewanchuk* are presented here:

The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said “no” on each occasion. He stopped his advances on each occasion when she said “no” but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant. (330-331)

Ewanchuk was nonetheless acquitted twice (331) before the Supreme Court exercised its discretion and convicted him of sexual assault (359, 379). All that occurred happened in a single encounter, though nothing in the judgment suggests that this is necessary. Any amount of time might have elapsed between an indication of unwillingness and an attempt to re-establish sexual contact. The complainant only exhibited what might have been legitimately (but mistakenly) interpreted by Ewanchuk as sexually aggressive behaviour once: when the complainant apparently consented to giving and then receiving a massage of the shoulders, although at this point the complainant was already in a state of fear (340). Thus, there was no consent.

The complainant had not yet exhibited non-consent to further, sexual touching. Her behaviour was equivocal. Had Ewanchuk stopped for good his advances at the first sign of non-consent, he could have avoided a conviction for sexual assault. Had Ewanchuk managed to get his massaging hands from the complainant’s waist onto her breasts before she stopped him with her elbows (he did not: 340), it is still not clear that that would have sufficed to secure a conviction for sexual assault, despite the assertion that proceeding “from massaging to sexual contact without making any inquiry as to whether the complainant consented . . . is not a reasonable step.” That it should suffice would probably please Lois Pineau, but it would also exceed the requirements of due diligence and be unfair to Ewanchuk. Making the line between morally unproblematic sex and sexual assault so fine could not serve to demonstrate that the required mens rea was present in the accused.

Although the standards of proof have shifted in favour of the complainant, it remains the case that “in the absence of . . . vitiating factors . . . the complainant

must be shown to have offered some minimal word or gesture of objection” to indicate non-consent (*R. v. M.L.M.* 79). Given the ruling in this particular case, it is entirely unclear whether the complainant’s fear, absent all other indications of non-consent, would have sufficed to convict Ewanchuk. The pair of acquittals which preceded Ewanchuk’s conviction strongly suggest that such would not have been the case.

What does this imply with regards to zoophilia? Sexual contacts initiated by sexually mature non-human animals, and not objected to by the human animal implicated in the activity, as well as sexual contacts initiated by human animals in circumstances which are legally acceptable when they arise between humans ought to be morally unproblematic – at least in the absence of any recognition that a fiduciary duty applies to the given case. Evidence of non-consent, unwillingness, or lack of agreement bars any further attempts to ‘re-establish’ sexual contact (though, in truth, such contact was never established to begin with) minus prior, unequivocal, sexually aggressive conduct on the part of the non-human animal. It is not immediately apparent, in the case of zoophilia, whether non-human behaviour short of initiating the sexual contact previously rejected could suffice as grounds for thinking that such sexual contact might legitimately be ‘re-established.’ This extends the respect embodied by the notion that “women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in” (*R. v. Ewanchuk* 366) to non-women.

## Chapter 7

# Implications Cannot be Ignored

I am utterly disturbing and create only perplexity. (Socrates, as cited in Allen)

An objection to all forms of sexual contact between humans and animals . . . does not seem to be based on concern for animal welfare, in any obvious sense. Those who wish to sustain such a sweeping objection need to look for other grounds. . . . Obviously, sexual acts involving violence or cruelty to animals ought to be prohibited. And there may well be good accounts of why the proscription against all sexual acts with animals -- including acts that are neither intrinsically violent or cruel -- has outlasted many other prohibitions against non-reproductive sexual acts. But very few people seem to have read the article [i.e., "Heavy Petting"] as raising questions. Many seemed to see no more than the fact that it mentioned sex with animals, and that fact was enough to send them into hysterical abuse, including accusations that I myself was a "zoophile." (Singer, Singer's)

### Where Matters Stand

If treating zoophilia like sexual assault does not make every instance of zoophilia illegal, this is because it is being assumed that sexually mature non-human animals are constitutionally capable of consenting to at least some zoophilic activities. That assumption is made because it is unsound to think of all non-human sexual behaviour as morally suspect. If the conditions of an instance of zoophilia are such that Canadian sexual assault statutes are not violated, then the consent of a non-human animal to sexual contacts with a human animal is afforded as much protection against abuse as is sexual contact between humans. The inevitable result is that some instances of zoophilia cannot be regarded as proper violations of Canadian law with a firm basis in fact.

Outright prohibition of zoophilia cannot be unaccompanied by evidence that non-human animals are in fact constitutionally incapable of consenting to sex, as both Carol J. Adams and Piers Beirne demonstrate despite their best efforts to the contrary. With regards to zoophilia, to err on the side of caution would itself be reckless. In any legal context, such an attitude presumes guilt before innocence has had any chance to be demonstrated and stands the justice system on its head. Unless an argument can be formulated that supports the prohibitions

against zoophilia in Canadian and other societies, they remain criminal acts in name only. Existent prohibitions, at least those which target sexual contacts between sexually mature non-human and human animals, are currently groundless. They are based neither on honest concern for non-human animals' ability to give genuine consent, nor on empirical evidence that sexually mature non-human animals are constitutionally incapable of genuinely consenting to even the slightest and least invasive forms of sexual contact with either humans or non-humans.

### Distinguishing Between Capable and Incapable

The Canadian Criminal Code's declaration that children are incapable of consent is not intended to reflect a factually accurate situation. Merely turning fourteen years of age does not confer on any human animal the capacity to exercise due diligence in sexual matters. Instead, the characterization of children as being incapable of genuinely consenting to sex with adults serves as a clearly delineated border between acceptable and unacceptable sexual behaviour. It is a practical distinction relatively easy to verify whenever the matter acquires legal significance. The line is not entirely arbitrary, though it has been variously formulated by different jurisdictions and for various sexual behaviours (Graupner).

It is illegitimate to classify all non-human animals as constitutionally incapable of consenting to any zoophilic sexual contact while it is accepted that sexually mature non-human animals are ordinarily capable of consenting to sex with each other. Similarly, the age of consent for adult humans cannot be wholly arbitrary. Unlike children, the consensual capacities of dysfunctional adult humans are not correlated with age. Some sexually mature humans may yet be deemed constitutionally incapable of consenting to sex. Perhaps sexually mature non-human animals are like such dysfunctional human adults when it comes to sex.

This has all the inconvenient (if not unsound) consequences of regarding mature non-human animals as incapable of sexual consent:

1. All sexual activity among non-humans becomes morally suspect.
2. All human interventions into the sexual lives of non-human animals become morally identical to such interventions into the sexual lives of dysfunctional

human adults.

If non-human animals truly are incapable of giving consent to sex, then breeding them is sexually assaultive, and allowing them to breed is permitting sexual assault. We should not be titillated, amused or even nonchalant at the sight of two sexually mature non-humans copulating; we ought instead to shake our heads in dismay and wonder what we could have done to prevent it. The spectacle would be morally identical to that presented by two dysfunctional human adults, each constitutionally incapable of consensual sexual relations, nonetheless engaged in sex. Some who fight for recognition of the rights of dysfunctional human adults would argue that we ought not necessarily shake our heads at that, either.

One of the barriers to permitting sexual contacts between dysfunctional human adults is the possible conception of offspring which the parents are incapable of caring for. This is not a viable consideration for barring sexual contacts between ordinary, sexually mature non-human animals. Thus, comparing two sexually mature non-human animals to two sexually active yet constitutionally incapable humans may be unfair. The fact that dysfunctional human animals are incapable of caring for their offspring is an additional concern (among many others) that makes the situations disanalogous. A more perfect analogy might be sex between a pair of sexually mature non-human animals and between a sterile pair of dysfunctional human adults. Non-human animals are very different from dysfunctional human adults, whether sterile or fecund: they are disanalogous. Sterility is disanalogous to an incapacity to raise offspring.

Disregarding capacities that sexually mature non-human animals possess so as to allow for an unwarranted analogy to arise between them and either children or dysfunctional human adults, and that thereby purports to demonstrate that non-human animals cannot consent to sex with human animals, is ad hoc and unsound. It is primarily for this reason that this examination does not recommend that legislation of zoophilia assume a form similar to Section 153.1 of the current Canadian Criminal Code which protects against sexual exploitation of the disabled (Greenspan, Rosenberg 256-257). The intent of Section 153.1 cannot be wholly ignored, however (see below).

A recent case of sexual assault raises troubling questions about capacity to

consent to sexual contact as it is held to apply even to dysfunctional adult humans. In *R. v. A.A.*, it was presumed that an “intellectually disabled” 40-year-old woman was capable of consenting to sexual contacts, even sexual intercourse, because she was in a marital relationship. A conviction for sexual assault was successfully appealed because the judge left the jury with the impression that capacity to consent was relevant (*R. v. A.A.* 386). Though no expert testimony was entered into the record regarding the complainant’s capacity to consent, as is ordinarily required to prove incapacity, the accused himself testified that she “did not operate on the same mental level as . . . his 12-year-old daughter” (383). Nonetheless, capacity to consent was deemed irrelevant because “the complainant was married, presumably consented to intercourse on a regular basis, and can be taken to be capable of doing so on the alleged occasions [i.e., with the accused]” (386). Likewise, the prosecutor of the case at trial advised that the court “ought not to charge on no capacity . . . because she is a married woman” (384).

By pursuing the issue of capacity to consent with reference to expert testimony, the complainant’s husband may have been deemed guilty of sexual assault over a far longer period of time and on more numerous occasions than the accused. This finding was not welcomed by the Crown’s counsel, and it isn’t surprising that the defence counsel agreed to exclude consideration of capacity to consent: doing otherwise would no doubt have increased the likelihood of a conviction. It may, in fact, have secured such a conviction. An appeal of the original verdict (i.e., guilty) was allowed because the court had ineffectively ensured that the jury’s verdict be free of any consideration of A.A.’s capacity to consent.

The process in this case seems to be an intolerable remnant of the out-dated idea that marital rape is conceptually contradictory. It approaches the insensitivity of laws more than a hundred years old ‘protecting’ the best interests of the “feeble-minded” or “insane” female “idiots” or “imbeciles” from “male persons” not their spouses “under circumstances that do not amount to rape” (Bryant 133). The act of becoming legally married conveys no enhancement to a person’s capacity to consent to sexual contacts. Following the example of *R. v. A.A.*, marriage ought to be permitted between adults and children who function at a “mental level” lower than the accused’s daughter or, since the act of marriage

does not by itself convey any capability to consent to sex, sexual relationships between such persons ought similarly to be legally tolerated.

The issue of capacity to consent cannot be done away with simply for the convenience of lawyers arguing a case before a Canadian court in the 21st century, because to (rightly) consider a complainant's capacity to consent relevant raises issues they'd prefer to avoid. The relevance of a capacity to consent cannot legitimately depend on who is implicated by guilt, despite the Canadian Law Reform Commission's statement that "persons with a mental handicap should have the same rights to sexual expression as other members of society" (Bryant 133). Persons with a mental handicap are surely likewise entitled to equal protection against assault.

Piers Beirne and Carol J. Adams operate in a manner similar to the lawyers and the judiciary in *R. v. A.A.*: instead of deeming a participant to sexual activity capable of consent in order to preserve a moral judgment about the situation (i.e., sex within a marital relationship was morally unproblematic), they deem a participant incapable of consent in order to preserve a condemnation of zoophilia. Neither these counsels nor Beirne and Adams would like to make any reference to facts that might call their prejudicial conclusions into question. That appears to be the job of (other) legal analysts, and philosophers like Peter Singer.

### The Anachronism of Statutes Prohibiting Bestiality

Zoophilia currently exists in Canadian law as a crime with its own statutes. It has never been associated with child-sex within that context. It has never been associated with sex crimes against dysfunctional human animals within that context. Those connections are made by theorists like Beirne and Adams. The only connection that has ever existed between zoophilia and any other form of human sexual behaviour in Canadian criminal law is that both it and sodomy were once classified together as a unique offence: buggery. The association between zoophilia and homosexuality in Canadian law is derived from her inheritance of a British legislative tradition, which was exported from the British isles to many

jurisdictions around the world. Zoophilia's association with immorality originally stems not from perceived similarities between non-human animals and either children or dysfunctional human adults, but perceptions that it was unnatural: just as homosexuality purportedly was. The concept of genuine consent had nothing whatsoever to do with it. Unlike the legislative history of the crime now classified as sexual assault in Canada, and the concept of a fiduciary duty (*M.(K.) 63 et al*) the crime of zoophilia has no similarly "evolutionary" case history.

Looking through court records uncovers a wealth of judicial thinking about the crime of sexual assault. No similar accretion exists for the crime of zoophilia. One unintended advantage stemming from a large number of offences arising from any given statute is that judges are able to reform existent legislation to better reflect the public's state of awareness with regards to it. Thus, "rape" laws which were once far more discriminatory towards women have gradually been altered on a case-by-case basis to reflect contemporary views on sex, violence, and the status of women. Similarly, activism by homosexuals contributed to the gradual elimination of prohibitions peculiar to the act of sodomy in Canada until, finally, in 1995 such prohibitions vanished outright (*R. v. C.M.*).

Neither a heavy incidence of verdicts over the decades nor a vocal awareness movement to change the law applies to the crime of bestiality. Attempts by legal scholars and philosophers to draw analogies between children or dysfunctional human adults and non-human animals are, inevitably, unworkably clumsy. They have always been ad hoc: deliberately ignoring non-human animals' ability to function at higher levels than either children or dysfunctional human adults in many circumstances (particularly sexually) so as to strengthen the appearance that incapacity obtains. Once the incapacity to consent to sex is assumed to be legitimate, the implications of such a purported incapacity are legally and morally ignored, except (notably) where sex is concerned. Such analyses remain, simplistically, variously formulated condemnations of perverse sexual desire when they ought to assume the form of far-reaching criticisms of a host of human interventions (scientific, medical, or industrial) into the lives of non-human animals.

Making the assumption that sexually mature non-human animals are incapable of consenting to sexual contacts with human animals also violates the

epistemological barrier which prevents humans from ever knowing how non-humans actually conceive things. While Piers Beirne argues that we can never know whether sexually mature non-human animals actually consent to sexual contacts with human animals the way we (as human animals) understand that act, he has no hesitation to assert that, in matters of sexual consent, sexually mature non-human animals are akin to “moral patients” (i.e., those constitutionally incapable of giving sexual consent). Beirne makes no argument to support how he can know that such an association holds. It is simply asserted, then left to be assumed as factually accurate. It is, at the very least, an extremely ironic assumption on Beirne’s part. It may also be, as was argued above, a perversion of the justice system insofar as it implies guilt for wrong-doing prior to the establishment of innocence.

Carol J. Adams makes a similarly unsupported assumption by implying that sexually mature non-human animals are akin to children, and thus that those who engage in zoophilia are akin to those who rape children. The assumption is once again left to stand by itself. Adams asserts that “the zoophile’s worldview is similar to the rapist’s and child sexual abuser’s. They all view the sex they have with their victims as consensual, and they believe it benefits their sexual ‘partners’ as well as themselves.” It isn’t at all clear that the “rapist” necessarily believes that the sex engaged in is “consensual” as that would no doubt remove some measure of the appeal such an act has for him. The assumption that sexually mature non-human animals are sufficiently and relevantly akin to young children remains undefended. Both groups are deemed constitutionally incapable of consenting to any form of sexual contact with adult humans.

This contrasts with the fact that non-human sexual behaviour is generally held to be, at worst, a morally neutral feature of the world. The zoophile’s world view may sometimes, at least, be similar to that of any conscientious human adult’s (see below). Zoophiles may, in certain circumstances, rightly view the sex they have as both consensual and mutually beneficial with a degree of confidence far higher than any inherent in pedophilic activities. That sexually mature and ordinarily functional mammals, having evolved via sexual reproduction across hundreds of millions of years and countless thousands of generations, lack the

capacity to consent to sexual contact mocks the very idea of non-human sexual maturity.

The question isn't whether non-human animals, having reached sexual maturity, are capable of intra-species sexual contact. The question is what morally relevant element(-s) are introduced to make that innocuous situation morally problematic when human animals implicate themselves in it. The answer to this question isn't so simplistic as merely pointing out that the sex is now between different species. It must also avoid unrealistically branding all non-human animals constitutionally incapable of consenting to any form of sexual contact, a belief which not even Singer's critics hold.

The Canadian Criminal Code explicitly draws a line between children and non-human animals in the matter of being constitutionally capable of consenting to sexual contact. The fact that a child "consented" to sexual activity with an adult is "no defence" in any instances of sexual interference, invitation to sexual touching, indecent exposure, bestiality committed either in the presence of or by a child, or sexual assault (Greenspan, Rosenberg 242). When it comes to sex with adults, consent is no defence when children are involved. Any implication of consent is considered to be fraudulent: children are held to be constitutionally incapable of providing it under such circumstances.

In the statutes concerning zoophilia implicating only adult humans, no similar proviso appears. This is because the statutes legislating sexuality in the Canadian Criminal Code are concerned solely with actions committed by persons, not non-human animals. But this thereby removes any consideration of the capacity for a non-human animal to consent from any assignment of guilt or innocence on a charge of bestiality. The crime of bestiality depends solely on the motivations and capacities of the human participants. Thus, no argument can be made in favour of maintaining this particular legal prohibition of zoophilic activities if it makes reference to the consensual capacities of non-human animals implicated in them. The laws prohibiting zoophilia in Canada are shown to be based entirely on an out-dated notion of sexual propriety and not at all on animal welfare or non-human animals' capacity to genuinely consent to zoophilic contact.

If the capacity of non-human animals to consent to sexual contacts with

humans was a matter of concern to the law in Canada, then “bestiality” (Section 160.1; Greenspan, Rosenberg 261) and “compelling the commission of bestiality” (Section 160.2; Greenspan, Rosenberg 261) would make reference to consent on the part of the non-human animal being “no defence” (just as is done with children). Ironically, Section 160.2 which criminalizes compelling “another to commit bestiality” refers only to another person, not another animal. It is not properly deemed an offence under Section 160.2 if the act was one in which a human animal compelled a non-human animal to partake of sexual contact. Compulsion of a non-human animal is not accommodated in any of the statutes concerning zoophilia. When it comes to children, their consent is legally “irrelevant” because it cannot be given (see above). When it comes to non-human animals, their consent is legally irrelevant because it is of no concern.

Consent is taken to be irrelevant where non-human animals are concerned just as it was deemed to be in the case of *R. v. A.A.*. In fact, it is inconceivable that the notion of non-human consent stands a chance of being accommodated by the law code of any modern, urbanized state. Non-human consent, regarded seriously within the limited context of zoophilic activity, would constitute the thin edge of a wholly legitimate wedge by setting a legal precedent with ramifications for a host of economic (i.e., scientific, agricultural, and industrial) endeavours implicating human interventions into the lives of non-human animals. Such human-centred interventions directly affect the lives of billions of non-human animals daily. No one stops to suggest that perhaps, morally speaking, humans have an obligation to secure the genuine consent of such creatures before doing so.

### Informed Consent

This examination of zoophilia suggests that the assumption that sexually mature non-human animals are constitutionally incapable of consenting to sex ought not to be left unsupported. It should, instead, be examined to see whether it is sound. If the assumption is shown to be sound, then there are implications for human interactions with non-human animals that go far beyond a narrow application

to instances of zoophilia. These implications must be taken seriously, not (as is currently the case) conveniently ignored. Not only the zoophile's but every other human violation of the sexual or physical integrity of non-human animals becomes morally suspect. It ought to be made legally suspect, as well, if laws against zoophilia are to continue being characterized by absolute liability as they do in Canada. That is, "where a conviction can be based on mere proof of the act without any necessity to prove any form of fault on the part of the accused" (Stuart 258). If the assumption is shown to be unsound, then there are implications for the legalization of certain instances of zoophilia which similarly cannot be ignored, nor turned away from with distaste.

If it is indeed true that "a valid consent is an informed consent" and that therefore an "individual must be able to understand the risks and consequences associated with the activity to be engaged in" (*R. v. A.A.* 384) in order to be able to give it, then it must somehow be demonstrated or, at minimum, cogently argued that this state of affairs fails to obtain in any given instance of zoophilia before that act can be condemned as nonconsensual. It is unsound to hold that a sexually mature and -experienced non-human animal is constitutionally incapable of consenting to any form of zoophilic activity. There are no "risks and consequences" inherent in "the activity to be engaged in" that are beyond the ken of such a non-human animal, unless some additional twist is to accompany sex.

The idea that consent to sexual contacts with a human animal was not informed, and therefore invalid, applied with greater force in the Middle Ages. The possibility of being sentenced to death certainly was not something that could have entered into the mind of a non-human animal presented with an opportunity to (say) perform cunnilingus on his mistress, though she may be well aware of it: "the vitiating circumstance must be the factual as well as the imputable cause of the consequence" (Bryant 111). If what is intended and likely to result is only mutually pleasurable sexual contact, with no hidden and harmful result(-s), then it seems very likely that at least some sexually mature and, especially, sexually experienced non-human animals can give informed consent to at least some sexual activities with human animals.

Human awareness of the consequences of sexual behaviour is clearly

different from a non-human animal's. Many humans are aware that the risk of contracting a disease is a feature of sexual contact. Though pregnancy is clearly not a concern in zoophilic circumstances, diseases can be transmitted between human and non-human sex partners. Thus, a human has a perceptual advantage and, consequently, is able to give genuine consent in a manner unavailable to any non-human. It is not enough to pursue sexual gratification if consent to sex is to be considered genuine. A person must also be aware of the risks such pursuit entails. A non-human animal is able to pursue hedonistic gratification, but cannot comprehend the risks of disease-contraction. Thus, non-human animals' consent to sexual contacts cannot be genuine in exactly the same manner as most human animals' can be.

This raises a troubling question: is awareness of disease-transmission mechanisms, and the relative risks involved in particular sexual behaviours, in particular populations, necessary for giving genuine consent to sexual contact? A positive response to this question implies that genuine consent is impossible not just for non-humans but for human animals living in societies lacking scientific models of disease transmission and accurate statistical sampling of the relative risks of infection. The knowledge required for giving genuine consent to sex need not be so exact. Perhaps only a vague idea that some harm (e.g., disease) can come from sexual contact suffices to fulfill the requirements of genuine consent. Still, much human sex throughout history right up till the present will consequently have lacked the quality of genuine consent.

Instances of non-human sexuality are, likewise, never genuinely consensual if any such knowledge is a pre-condition of giving genuine consent to sexual contact. Genuine consent turns out not to depend only on some "constitutional capacity," but on that when combined with certain more-or-less accurate facts about the world around the agent. A paradox which follows this approach is that consent which on the face of things seemed perfectly genuine at the time at which it was rendered can turn out to have been non-genuine once an unexpected threat emerges: sexual consent prior to the identification of HIV and AIDs would have been considered genuine up until the assessment of these new threats inherent in sexual contact. At that point, the former characterization must be

retracted. It turns out that consent which had formerly obtained “genuinely” was not in fact suitably informed of the risks and consequences associated with sex.

It ought to be noted that no such requirement is entailed by Canadian law. There is no longer any legal requirement that consent to sex be legitimate only when each individual involved in a sexual encounter is suitably aware of the actual risks of contracting sexually transmissible diseases (Bryant 122-124). None of the considerations examined implies that infection is a factor that can vitiate consent, turning an encounter into an instance of sexual assault. According to Bryant: “fraud as to infection with a sexually transmitted disease is not sufficient to vitiate consent” though such an act may nonetheless be constitutive of assault (123-124). Bryant also cites a case in which “[deceit] concerning the health of the sexual partner [a man infected with gonorrhoea] did not vitiate consent [of his spouse]” (126). Subsequent discovery of an infection does not change the fact that genuinely consensual sex acts preceded and led to its contraction.

Even if engaging in sex with the knowledge that one carries a transmissible infection capable of producing a chronically debilitating or potentially lethal effect might rightly be an offence liable to criminal prosecution, this can remain so in instances of zoophilia, except that only the human partner can be held legally liable. Humans clearly cannot depend on non-human sexual partners to inform them of the presence of an infection before engaging in sexual activity, but the same can be said of many human sex partners. In cases of zoophilia, a human who deliberately engages in sexual activity with a non-human can be held responsible for recklessly inconsiderate behaviour in exactly the same way that he or she would be had the sex partner been another person although the legal consequences of any such action might vary, depending on whether a human or a non-human animal was exposed to infection.

Deliberately infecting a non-human animal with a venereal disease is not a criminal act in Canada. The same can clearly not be said to hold true of humans so infected. This shows that the possibility of contracting an infection through sexual contact cannot be what makes zoophilia illegal in Canada. It is not a matter relating to the ability to give genuine consent that has made zoophilia morally and legally questionable. Rather, it is shown simply to be the sexual nature of the behaviour,

combined with a generally-held aversion to it.

The same was until recently a tenacious stance towards homosexuality.

A non-human animal engaging in sexual activity with a human who knows to the best of her ability that she carries no infectious agent can give genuine consent to sex since no possibility of unforeseen infection exists to any degree greater than that which is implicit in the most conscientious sexual contact. The requirement of genuine consent does not entail that knowledge of a risk be actually applicable to any given situation. It entails, rather, possession of an accurate perception of the risks entailed by a situation in fact: if nothing unforeseeable exists, under the circumstances, then genuine consent obtains by default.

To think otherwise is to hold genuine consent to a much higher standard than due diligence, perhaps even to an unattainable one. Every situation potentially holds unforeseeable consequences. No one can foretell the whole of the consequences of undertaking any particular act (as well as the consequences of not having chosen differently under the circumstances). The law does not require that individuals be aware of every actual risk in any given circumstance before granting that consent under such circumstances was genuine. It could not.

With regards to zoophilia, if the human partner has taken reasonable steps to ensure that she cannot transmit an infection to a non-human partner, then the non-human partner's consent can be considered genuine. Under such circumstances, the non-human animal can give consent to sexual contact with a fully adequate "understanding of the risks and consequences associated with the activity to be engaged in." To have that requirement apply literally is to raise the standard to something unattainable even by the most well-intentioned and well-informed of individuals. It may even be speciesist to think that human terms of awareness can be forced onto non-human animals, which ordinarily run the risk of infection every time they engage in sex whether they are aware of it or not. Holding non-human animals to an elevated standard of due diligence, a human standard, renders all of their sexual conduct morally suspect.

Gary Francione sees "informed consent" as the Achilles heel of zoophilia. He is not alone in this (Carnell). Francione writes that non-human "animals can no more give informed consent to [sexual] contact than can children or the mentally

impaired” (Francione, Gary). The trial judge in *R. v. A.A.* noted that “informed choices” are impossible when “severely lacking in the sophistication, maturity, or intellect necessary to properly scrutinize what is being requested” (384). The same judge did not question the legitimacy of an intellectually handicapped woman’s capacity to (*R. v. A.A.* 384):

1. exercise her right to marry;
  2. enter into sexual relations with her husband;
  3. enter into a months long sexual affair with a man not her husband;
- though there were informal (i.e., non-expert) indications, based on her “mental level” of functioning, that these might not have been “informed” choices. It is possible that concessions made by the courts in favour of this woman’s capacity to consent were illegitimate. Given that they were upheld in two Ontario courts as recently as May 10th, 2001, this is unlikely. Their judgments may be valid. If so, it may follow that a sexually mature, if not sexually experienced, non-human animal likewise has the capacity to consent to nothing more than mutually pleasurable sexual contacts with a human animal meeting none of the conditions of sexual assault. It seems accurate to say that such non-human animals are able to “properly scrutinize what is being requested” in such instances. This can hold even if the actions of the courts in the case of *R. v. A.A.* are overturned.

No matter what direction Canadian courts take in future with regards to *R. v. A.A.* or the crime of sexual assault, the issues that surround human interactions with non-human animals remain liable to cogent and complete examination. Such an examination need not be limited to matters of sexuality, but must surely include them. The prejudice and presumption that currently supports legislation prohibiting all forms of zoophilia in Canada must be replaced with a legitimate foundation. Such a foundation may in the end allow that Peter Singer was at least partially correct, and that not every instance of zoophilia can rightly be deemed illegal, or it may not.

According to Piers Beirne:

If a sexual assault on an animal by a human is a harm that is objectionable for the same reasons as is an assault on one human by another -- because it involves coercion, because it produces pain and suffering and because it violates the rights of another being -- then it would seem to constitute a sufficient condition for the censure of the human perpetrator. (Rethinking)

The central "if" must be suitably addressed, not left to beg the question. If zoophilia involves "coercion" or "produces pain and suffering" or "violates the rights of another being," then it ought to be deemed illegal activity. Turning Biene's conjunctive set of conditions into a disjunction gives much greater strength to his evident intentions towards zoophilic activities. It also brings the statement made by Biene into line with Canadian jurisprudence and this examination's hypothesis that "sexual assault on an animal by a human is a harm that is objectionable for the same reasons as is an assault on one human by another."

## The Fate of Section 160 and the Crime of Bestiality

It was suggested earlier that the statutes prohibiting zoophilia be removed from the Canadian Criminal Code, and that zoophilia be subsumed under other statutes in the law. There are currently three statutes in Canadian law addressing "bestiality"(Greenspan, Rosenberg 261-263):

- 160.1 Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
- 160.2 Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
- 160.3 Notwithstanding subsection (1), every person who, in the presence of a person under the age of fourteen years, commits bestiality or who incites a person under the age of fourteen years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Section 160.1 would disappear entirely, along with the idea that zoophilia is an absolute liability offence. Offences would be considered sexual assaults, and perhaps also as a similarly damaging instance is cruelty to (non-human) animals. Any such simple substitution of charges, as the laws stand now, would of course

be very imperfect. This examination of zoophilia merely opens the debate on whether illegal sexual contact with a non-human animal ought to (or can) be treated similarly to the way illegal sexual contact with a human animal is.

That sexual assault is a crime not limited to human animals is clear, but sentencing considerations for zoophilic assault are likely to be very different from what they are in cases of assault against a fellow human. Such a distinction is by no means speciesist, as such a procedure is relevantly affected by human and non-human capacities to be harmed by an assault. As non-humans were shown to be less liable to some types of coercion, so non-humans have a narrower capacity for suffering (e.g., cultural sources of guilt and shame are peculiarly human).

One significant contrast between sexually mature non-human and adult human animals is the intention of so-called rape-shield provisions. These are necessary in cases of sexual assault involving human animals, due to culturally ingrained stigmas attached to being female. Rape-shield provisions are meant to prevent prejudicial assumptions about girls and women from entering the court (Osolin 624-625, 634, 670-672; Park 864-865, 868-871; *R. v. Ewanchuk* 370, 372, 377; *Seaboyer* 604, 630, 650-656, 660-669, 679-683). These cultural artifacts regarding girls and women have no matching application in cases of sexual assault against non-human animals. Contrary to a rape-shield, evidence that a non-human animal implicated in sexual activity with a person was sexually experienced prior to such contact may well count as probative evidence towards a finding that it was capable of consenting to zoophilic contacts.

A consideration that has no parallel in human sexuality is the fact that some non-human females are cyclically receptive to sexual contacts. A non-human's being in "heat" may count towards a finding that sexual contact was consensual. Finding otherwise may count against it. Some persons might make the claim that being in "heat" is an interference with normal decision-making processes and so vitiates consent. This criticism may be speciesist, in so far as it looks at a phenomenon from the perspective of an animal that can't experience it. This may commit a mistake similar to that made by those who characterize domestication as slavery, insofar as the "slavery" of domestication is not identical to human slavery.

If sexual assault is applicable to non-humans, then it must somehow take estrus into account. Sexual contacts with male non-human animals don't feature this additional complication. As ludicrous as such considerations may seem, they reflect an honest concern for the facts as they apply to certain instances of zoophilia.

Section 160.2 of the Canadian statute that prohibits zoophilia is best suited to inclusion under the statutes prohibiting sexual assault, as "compelled" acts of sex are assaultive. It should be noted that the compulsion referred to is not against the non-human animal, but against a fellow human animal being forced to engage in sexual contact with a non-human. Section 160.3 is best suited to inclusion under prevailing statutes prohibiting "indecent" acts and acts tending to "corrupt" morals. If that were the case, then committing zoophilia "in the presence of" another person would be regarded as any other sexually explicit activity performed in "public" (Sections 173 and 174; Greenspan, Rosenberg 282-286). "Inciting" a child to commit zoophilia would be regarded as similar incitement to engage in sexual activity with another person currently is: both would remain illegal as they constitute invasions of a child's autonomy which cannot be demonstrated to be in that child's best interests.

As a final note, there is indeed a statute that prohibits "corrupting children" in the current Criminal Code of Canada (Greenspan, Rosenberg 280-282):

172.1 Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

"Sexual immorality" is not defined. It is likewise unclear whether simply partaking in sexual immorality "in the home of a child," not the child's presence, suffices to "endanger the morals of the child" or to "render the home [unfit] for the child." It is certainly not clear that adultery is any longer sufficient for the bringing of a criminal charge of corrupting the morals of a child. "Habitual" drunkenness isn't defined, nor is "vice." One can begin to see that this statute may also be a remnant of an earlier age, another bit of 'junk DNA' in the modern Code. This section of the Canadian Criminal Code seems, like the statutes against "bestiality," open to reform given

contemporary moral attitudes. Even more surprising is the definition of “child” in Section 172.3: “a person who is or appears to be under the age of eighteen years” (Greenspan, Rosenberg 280). The “corruption” of children need not implicate any actual children in a legal sense at all. It is unclear if “appearances” in this instance refer to something like ‘mental age’ or to externally perceived criteria. Therefore, the statute applies with equal force to both children and to young persons. Like the statutes addressing the crime of bestiality, Section 172 of the Criminal Code of Canada seems overdue for a critical review.

### In the Name of Science, the Pursuit of Wealth, or Political Expediency

Unlike children, it is remarkable how deeply non-human animals’ sexual integrity may be violated in the interest of science without eliciting the interest of either legal authorities or the censure of those who have criticized Peter Singer. Mel Allen, quite remarkably, documented his efforts to investigate the orgasmic potential of female chimpanzees. The data obtained formed his Master’s thesis at the University of Oklahoma in 1977. Allen “manually stimulated the circumclitoral area and vagina (pubococcygeus) of several adult, adolescent, and juvenile chimpanzee females” (Allen, Lemmon 19). Allen noted that “most of these females permitted stimulation to continue to sexual arousal” (19). It took Allen an average of 20.3 intra-vaginal “digital thrusts” to produce “perivaginal muscular contractions” (19). Furthermore, “on one occasion, when both clitoral and vaginal stimulation were being concurrently provided,” no doubt a tricky investigative procedure, the chimpanzee “reached back to grasp the thrusting hand of the experimenter and tried to force it more deeply into her vagina” (22-23). Allen’s ground-breaking conclusion: “there can be little doubt that the female chimpanzee actually experiences her orgasm” (23-24).

This “discovery” was questioned by “a female colleague who observed several experimental sessions [who] found it incredible that [the] chimpanzee was experiencing anything even approaching the emotional characteristic of orgasm in

women” (Allen, Lemmon 23) despite “transudate secretion, clitoral tumescence, vaginal thickening and expansion, hyperventilation, involuntary muscle tension, arm and leg spasms, clutching, facial expressions . . . and a panting vocalization” (22). While Allen’s chimpanzees shared physical cues of sexual arousal observed in humans, there is no way to determine whether any of the emotional aspects of human sexual arousal were present. This is simply to acknowledge the epistemological barrier emphasized by Piers Beirne earlier and a concession that humans, though apes, are not chimpanzees. Allen’s “female colleague” is right to be skeptical, but there can be little doubt that the chimpanzees experienced something akin to human sexual pleasure.

It would be something to know how Peter Singer and his critics would react to Allen’s research. Certainly some would react as they might’ve to certain experiments undertaken at Texas Medical School which ‘discovered’ that “compressing a tomcat’s balls produces ‘a painlike response’” (Benson 530). It seems obvious that, had Singer undertaken anything at all similar to Allen’s activities with the family dog, his critics would have been all the more determined to oust him from his position at Princeton, discredit his philosophical views (whether related to zoophilia or otherwise), and have him arrested. It also seems evident that, given that the “experimental sessions” were mutually satisfying (sexually for the chimps, intellectually for Allen), Singer must condone them as morally acceptable.

Though a utilitarian might look approvingly at the results of Allen’s experimentation, it is far from clear whether it would meet the restrictions imposed on acceptable instances of zoophilic contact suggested by this examination. Given the shocking contrast between the natural environment of such non-human animals and their confined state, and the fact that their confinement likely did approach the standard that vitiated consent in *R. v. Ewanchuk*, it seems likely that no genuine consent could have been given in the circumstances and that Allen ought not to have indulged his curiosity. Given the soundness of an argument that defends the idea that fiduciary relationships obtain between human animals and non-human animals in their care, Allen’s activities were clearly immoral.

One of the conveniences implicit in defining the offence of bestiality as

contact for the purpose of human sexual gratification is that the very same contact in any other context remains utterly beyond question on identical grounds. Neither Singer nor his critics make any argument that establishes a morally relevant distinction between identical activities, only one of which features human sexual gratification. “Milking” semen from a non-human animal for scientific, medical, or industrial purposes is not an activity liable to criminal prosecution. Deriving sexual gratification while doing so is. A researcher, veterinarian, or farmer who derives sexual gratification in the course of her job breaks the law while a colleague doing the very same things, minus sexual gratification, does not.

Unless the zoophile’s peculiar wants interfere with the proper execution of her duties, unless they inform a conflict of interest that precludes looking to the non-human animal’s best interests, there is no morally relevant difference between her case and any other. It ought to be noted that, with the exception of the veterinarian’s professional commitments, the researcher and the farmer can regularly disregard the best interests of non-human animals in their care with no fear of legal consequences. They can hardly do otherwise, if they are to pursue their ends. Singer is right to point out the hypocrisy inherent in such double standards, though he does so much too briefly.

The Humane Society of the United States has also proposed “model” legislation for the regulation of zoophilia. Its provisions are revealing, given many of the observations already made in this examination.

1. “A person is guilty of sexual animal abuse, or bestiality, when the person engages in or submits to any sexual act involving sexual contact, penetration, or intercourse with the genitalia, anus, or mouth of an animal. An animal is defined to include every living creature other than a human being.”

Defining zoophilia as “abuse” is circular. Defining “animal” by excluding humans is contrived. Merely “submitting” to “any sexual act” with a (non-human) animal is zoophilia. Thus, a person who fails to actively discourage a dog from humping his or her leg is guilty of zoophilia – whether or not the person derived any sexual gratification from the experience. Failing to discourage this contact is not merely in bad taste. A person sexually assaulted (as unlikely as that may be, it is no less relevant) by a non-human animal is likewise guilty of bestiality. The woman who was assaulted by an orangutan is guilty herself for having submitted

to the act. Removing sexual gratification as a necessary component of the sexual assault changes the nature of the act (*R. v. K.B.V.* 200-201; Bryant 96). To allow it to stand here is akin to attributing guilt to any person who submits in any manner to an instance of sexual assault.

2. "No person may commit an act of sexual animal abuse, or bestiality, in the presence of a minor."

This is already a feature of contemporary Canadian legislation, would remain an offence under the reforms suggested by this examination, and can be dealt with without prohibiting all other instances of zoophilia. The impropriety of zoophilic contacts in the presence of a minor ought to be addressed similarly to other, more ordinary forms of human sexual contact. Standards of propriety rightly determine what can and cannot be done in the presence of minors, in public, or in particular social settings. The relatively innocuous nature of non-human sexuality is, however, symptomatic of attitudes which also permit most humans to feel little or no discomfort at the idea of considering non-humans liable to inhumane treatment, either in the course of scientific research or the turning of non-human animals into food items.

They are not like us. There is a personal investment in determining whether or not a given circumstance is discomforting. It is a subjective process strongly influenced by social mores. Since there are certainly distinctions between human and non-human animals, such that most humans as a group identify far more closely with their fellows than with non-humans, cultural attitudes towards the propriety of non-human sexuality are likely to remain different from those held towards human sexual behaviour (and for good reason: they are not like us).

3. "No person may force another person to engage in or submit to any sexual act, or bestiality, involving an animal."

This is already a feature of Canadian legislation, and can be dealt with without prohibiting all other instances of zoophilia. It should be noted that Canadian legislation goes even further than The Humane Society's proposal when it prohibits not only "forcing" but simply "inciting" the commission of zoophilia by a child (a child is also a "person"). In Canada, merely counseling a minor to engage in zoophilic activity is enough for legal prosecution. Forcing someone to

engage in unwanted sexual activity is sexual assault, and ought to be addressed as such. The law need not -- nor should it -- distinguish between instances of sexual assault involving zoophilic contacts and those which do not as if these are inherently different crimes.

4. "No person may use an object to sexually abuse an animal."

This particular offence can be dealt with if zoophilia is treated similarly to sexual assault, with the condition that not all sexual stimulation of a non-human animal with an object necessarily qualifies as "abuse." Again, referring to sexual "abuse" with an object in the statutes of the proposed legislation renders it circular. The HSUS might have settled on banning all cases of sexually stimulating a non-human animal with an object, which would seem to achieve its stated aims, but, despite appearances, The HSUS's proposed legislation does not ban outright the sexual stimulation of a non-human animal with an object, for reasons which will become apparent in its eighth Article. The HSUS could have banned such activity only if undertaken for the purpose of sexual gratification, but this would clearly target something other than the welfare of the non-human animal being abused. It made the very deliberate choice not to: abuse for the purpose of agricultural, scientific, industrial, or otherwise economic gain would not be abuse.

5. "No person may videotape or otherwise record sexual animal abuse. Sexual animal abuse is pornography and the distribution of illicit material of [sic] the act is illegal."

Describing such material as "illicit" begs the question of its legitimacy. The proper place to deal with pornography is not to group it under sexual offences but to include it in legislation that treats obscenity and "community tolerance" standards. Zoophilia is sexual behaviour. Depictions of zoophilia in media is not. Canadian law and that of other jurisdictions contain separate statutes sanctioning sex and its depiction. In Canada, it is not the case that sex which can legally be depicted and sex which can be legally engaged in match. It is also not the case that sex which is illegal cannot be legally depicted, although this situation has been rectified in large part with the abolition of the peculiar rules once governing sodomy. There is no relationship of dependence in either direction. While it is legal for an adult to engage in sexual contacts with a fourteen-year-old,

pornography which involves or even purports to depict a person under the age of eighteen is illegal. While it is illegal to commit sexual assault, it is legal to pornographically depict acts that mimic sexual assault. Following this model, it may be legal to engage in certain acts of zoophilia, yet illegal to reproduce said acts in any media. The moral implications of sexual behaviour and of its depiction are not identical, and so can be regarded separately without contradiction.

6. "Killing an animal or causing an animal physical harm for sexual gratification is prohibited."

Obviously, yet doing so "in the name of science," or in the course of economically-driven interventions into the lives (and deaths) of non-human animals is not. For The HSUS, especially, this seems an untenable distinction.

7. "Any sexual contact with an animal constitutes abuse; no evidence must be presented that documents that an animal suffered physical or emotional injury."

It may only be a minor point that this wording literally criminalizes sexual contact between non-human animals. Perhaps it ought to be made explicit that the "sexual contact" referred to here is zoophilic. This begs Peter Singer's question of whether zoophilic contacts that don't evidence "that [a non-human] animal suffered physical or emotional injury" ought nonetheless to be illegal. It is to avoid addressing that question entirely. It also makes explicit the fact that it is human sexual gratification which is to be precluded by the legislation, and that this is not to be based on any reference to the well-being of the non-human animal implicated in an instance of zoophilic behaviour.

8. "Nothing in this Act shall be construed to prohibit the practice of routine collection of semen from animals for acceptable animal husbandry practices."

To have omitted this clause is to have damned the "model legislation" to defeat in any publicly answerable legislative body. It is an ad hoc maneuver based solely on considerations of self-interest to exclude "acceptable animal husbandry practices" from the legislation. It concedes the truth to Singer's statement (heading this chapter) that "an objection to all forms of sexual contact between humans and animals . . . does not seem to be based on concern for animal welfare, in any obvious sense" because those who (like The HSUS) have called for such a ban have inevitably shown blindness to its implications outside the realm of human sexuality. The HSUS blatantly acknowledges that such

implications exist and ought to be credited for doing so, but then it disavows any responsibility to address such wholly relevant implications, and perhaps that is worse than ignorance.

The HSUS position overtly demonstrates that its campaign is aimed at the banning of deviant human sexual gratification, not animal abuse. Any tactics that result in a focus solely on zoophilia, to the exclusion of other human interventions into the sexual integrity of non-human animals commits the same mistake. To cite a relatively striking example:

Consider the manual milking and artificial insemination of parent turkeys in modern food production. When you see a man pushing a tube into a turkey hen's vagina, and massaging a male turkey's genitals to get him to ejaculate into the tube that will thus be used, you quickly enlarge your notion of what constitutes obscenity, and illusions about some of the things you were brought up to regard as wholesome and upright, like Thanksgiving dinner, dissolve into a black hole. (Davis)

According to The Humane Society of the United States, this and other sexually-invasive agricultural practices are not morally problematic -- permitting a sexually mature dog to hump a stranger's leg is. The former are apparently not constitutive of "sexual contact," as difficult as that may be to conceive.

It is easy to expose The HSUS's political pragmatism for the opportunistic doctrine that it is. Human animals decide whether an act of semen collection is "routine" or "acceptable" -- not the non-humans implied in the act. The HSUS does not endorse legislation that would interfere excessively with prevailing agricultural practices, even if such practices do in fact constitute violations of the sexual integrity of non-human animals. The focus of the proposed legislation is to criminalize a human's deriving sexual gratification from zoophilic contacts, not a defence of non-human sexual integrity. The following procedure is agricultural and, according to The HSUS, is thereby not a "sexual act" (Crump, Crump 2):

While applying firm pressure, the shaft and glans are manipulated in a rhythmic fashion until the horse responds with pelvic thrusting. As the horse thrusts forward, the hands follow the thrusting motion. Steady pressure is maintained on the shaft. Simultaneously, the glans is rhythmically massaged with rotation motion, with the thumb massaging the firm protuberance of the corpus cavernosum penis into the glans penis. During initial training of a stallion, the position of the hands as well as the rhythm and strength of the pressure applied to the shaft and glans are varied depending on the response of the stallion, with the goal of inducing deep pelvic thrusts and engorgement of the glans characteristic of normal copulatory response.

Zoophiles may undertake this same procedure to no agricultural purpose. The

animals employed seem very responsive to the procedure, since “generally, training is accomplished within one or two sessions. Novice stallions have produced ejaculates during the first attempt” (Crump, Crump 3). Moreover:

Once trained, [the 18 stallions] often appear more attentive to the operator and the plastic bag [used to collect the semen] than to a mare . . . one stallion we worked with routinely achieved erection in the stall when the operator approached with the plastic bag, and with manual stimulation, he ejaculated (without the stimulus of a mare or of an olfactory stimulus [i.e., urine from mare in estrus]). In apparent anticipation of collection, two of our stallions consistently backed away from the stimulus mare toward the operator who was crinkling the plastic bag. (3)

The data indicates how non-human animals can come to regard certain human interventions into their lives as hedonistically advantageous. One may take issue with the resultant “corruption” of “nature’s way” but, by doing so, one must contend with the implications that such a view has on a host of agricultural and scientific practices – none of which are illegal.

With animal welfare concerns firmly in mind, one must consider what the behaviour evidenced by these stallions says about their regard for the skillful “manual stimulation of the penis” by a human handler. The procedure is not without detractions, however: “large, tall horses may thrust with enough force to unbalance or knock down the handler . . . it is difficult to adequately manipulate the larger glans penis typical of large, tall horses” (Crump, Crump 4). No negative effects to the non-human animals was noted, despite obvious risks run by their handlers.

## The Proper Grounds for Moral Judgments of Zoophilic Activities

Suggesting that there are differences that matter between the agricultural and domestic uses to which non-human animals may be put begins to approach a possible solution to the moral status of zoophilic activities. The HSUS’s proposed legislation does not succeed in protecting all animals from sexual abuse, as Peter Singer rightly points out when he refers to efforts to ban zoophilia outright. The approach which follows is novel, in so far as neither Singer nor his critics have suggested anything similar. It will entail the application of the notion of a fiduciary duty to human relations with non-human animals.

There is a long legal history regarding fiduciary relationships between persons in Canada. This helps to establish the proper scope of a proposal to extend the applicability of fiduciary relationships to the context of zoophilia. If it can be shown that fiduciary relationships obtain between human and non-human animals and that they are derived from the superior capabilities of human animals to exert control over the lives of non-human animals, then it will be proposed that such an observation will render morally problematic many instances of zoophilia, and particularly those initiated by human animals. The nature of the relationship that obtains between a given human and non-human animal is quantifiable and easily perceived, and has clear implications for the morality of zoophilic contact since it affects whether or not genuine consent is possible, under what forms and in what circumstances.

Any moral treatment of zoophilic activity must be situational, due to the great variety of forms that such behaviour might take, and must respond to circumstances, unless and until evidence arises which condemns even the least suspect form of zoophilia. The laws against zoophilia as they currently stand in Canada are legally convenient in ways similar to “age of consent” restrictions. Defining an age of consent is legislatively pragmatic, but necessarily creates injustice since chronological age is only correlationally relevant to the development of a genuine capacity of consent. Thus, some cases which law invalidates are morally unproblematic (and vice versa). Defining all zoophilic contact as condemnable commits a similar error: there are no evident moral grounds in prevalent Canadian legal thinking for prohibiting an adult human animal from engaging in any sexual contact with a willing, sexually mature and -experienced non-human animal save those that describe sexual assault.

There are obviously harmful forms of zoophilic contact which are rightly condemnable (e.g., physically destructive sexual penetration). Harm is not correlationally relevant to every form of zoophilic contact, however. In some instances, one is hard-pressed to make a cogent argument that harm could result (e.g., masturbation of a sexually mature and -experienced non-human animal which is not reckless, wilfully ignorant, or evidently constitutive of sexual assault). Due to zoophilia’s myriad forms, an outright ban of zoophilic activity would be

unjust according to any principle of Canadian law which can be called non-speciesist.

An age of consent restriction might remain constitutionally viable (though at times discriminatory) under prevailing Canadian law because it protects children from strongly correlated harms. A similar restriction for all zoophilic contacts is not so sound: non-human animals are sexually disanalogous to children and some zoophilic activities do not appear to be harmful on any empirical grounds whatsoever. The likelihood of harm correlated with some zoophilic activities is simply too much reduced from that associated with sexual contacts between adults and children to justify its being an absolute liability, if harm is to serve as the rationale behind the prohibition itself. Philosophically speaking (i.e., literally), even the outright ban represented by defensible age of consent restrictions inevitably result in wrongful convictions and unwarranted acquittals since such distinctions ignore the subjectivity in a capacity to consent.

## Chapter 8

### More Than A Duty of Care

The Report of the Committee on Sexual Offences Against Children and Youths [The "Badgley Report"], released in 1984 . . . suggested a definition of person in a position of trust as including parent; step-parent; adoptive parent; foster parent; legal guardian; common-law partner of child's parent, step-parent, adoptive parent, foster parent, or legal guardian; grandparent; uncle, aunt; boarder in young person's home; teacher; baby-sitter, group home worker; youth group worker; and employer. (Greenspan, Rosenberg 243 & 254)

#### Fiduciary Relationships and Sexual Exploitation

Section 153 of the Canadian Criminal Code addresses the criminal offence of "sexual exploitation" (Greenspan, Rosenberg 253-256). This crime can be committed against two groups particularly vulnerable to sexual exploitation at the hands of ordinary adult persons: young persons and persons with mental or physical disabilities. Young persons are those aged fourteen to seventeen. They are standardly capable of consenting to sexual relations with adults, but are not themselves adult in the eyes of the law. The sexual exploitation of a young person:

is predicated upon either the accused being in a position of trust toward the young complainant or the young person being in a relationship of dependency with the accused. If either relationship exists and the accused commits acts amounting to either sexual interference . . . or invitation to sexual touching . . . then the offence is committed. (Greenspan, Rosenberg 255)

The sexual exploitation of a person with a mental or physical disability:

is predicated upon either the accused being in a position of trust toward the [mentally or physically disabled: sic] complainant or the [mentally or physically disabled: sic] person being in a relationship of dependency with the accused. If either relationship exists and the accused for a sexual purpose incites or counsels the complainant to touch any person's body directly or indirectly with an object or a part of the body, the offence is made out . . . [if] . . . the touching is without the complainant's consent. (Greenspan, Rosenberg 257)

Of course, such statutes make no reference to non-humans. Nonetheless, the intention of providing protection against sexual exploitation can properly find application in zoophilic situations.

Neither class of persons protected against sexual exploitation is deemed

incapable of giving consent in situations where no “relationship of dependency” or “position of trust” is evident. Thus, Canadian jurisprudence deems illegal certain sexual contacts while at the same time allowing that complainants in such cases are fully capable of exercising genuine consent under different circumstances. If it can be shown that certain non-human animals are at least sometimes in similarly dependent positions vis-a-vis certain human animals, then zoophilic sexual contacts under such circumstances might properly be deemed legally and morally problematic for that very reason.

The conclusions of the Badgley Report, cited at the start of this chapter, while constituting expert opinion, do not carry the weight of judicial decisions. In the case of *R. v. Galbraith*, it was noted that:

a 27-year-old man is entitled to have sexual relations with a 14-year-old girl unless one of three conditions prevails. They are: a position of trust, a position of authority, or a relationship of dependency. . . . However inappropriate the relationship may appear to those of us with a traditional view of the company a 14-year-old should keep, the association does not become criminal without the added ingredient of dependency. (252-253)

In *R. v. Galbraith*, J.D. (the complainant) was a runaway provided with shelter, food, and some amount of money by the defendant who, “three weeks” after moving in with the 27-year-old, “initiated sexual relations” with him (250). The situation does not constitute sexual exploitation for a number of reasons (*R. v. Galbraith* 253), leading to the conclusion that “there is nothing in the evidence before us which suggests that J.D. had no other reasonable alternative but to live with the appellant” (254).

It is difficult if not impossible to effectively this verdict into a zoophilic context, as his criteria are either too vague or entirely inapplicable to sexual situations involving non-human animals. J.D. simply had freedoms typically denied to most domesticated non-human animals. Her behaviour might find its closest parallels with the “stray” who wanders from place to place, virtually self-sufficient and more parasitic on human society than dependent upon it. This situation is very disanalogous to most situations that give rise to zoophilic incidents. If the typical zoophilic scenario involves non-human animals that are in direct relationships of dependency with those who engage in sexual contacts with them, as seems likely, then Galbraith’s interactions with J.D. cannot provide much

guidance in judging it.

An in-depth attempt to clarify the notion of “authority” can be found in R. v. Matheson, where it is noted that:

“authority relationships” are numerous, e.g., parent and child, teacher and pupil, employer and employee and superior and junior ranks in military and other organizations. In each of these organizations, there is a power or right to enforce obedience in some respect . . . [additionally, a doctor or therapist has] the power to influence his or her patients by way of persuasion (573)

To place matters in a zoophilic context: “authority relationships” obtain, prima facie, between pets and their owners or handlers, and between domesticated animals and their care-givers. Pet-owners are in certain instances closely analogous to parents, with pets assuming the standing of children. Some pet-owners go so far as to adopt this attitude overtly.

That the biological facts of parentage fail to hold in such cases is morally irrelevant. As the Badgley Report suggested, anyone who assumes the role normally assigned to a biological parent assumes the corresponding position of authority over those in his or her care. Animal trainers might be considered as analogous to teachers. Social non-human animals like dogs recognize and respond to the hierarchy of the pack, and there is no reason to assume that this fails to hold in “family” units that include human animals. Thus, human animals can acquire authority recognized by certain non-human animals. Certain non-humans can therefore recognize their own positions of dependency and subservience to humans able to control the environment in which they exist.

Simply being in a position of dependency, however, does not constitute sufficient grounds to judge a given instance of sexual contact either immoral or illegal. It is not the case that every instance of sexual contact between teacher and student, or even doctor and patient, is rightly characterized as such: “simply because the doctor/patient relationship is one of trust involving an imbalance of power, this does not mean that sexual activity between doctor/patient will involve an ‘exercise of authority’ within the meaning [of sexual assault statutes]” (R. v. Matheson 587). Additionally to being in a position in which authority may be exercised, sexual exploitation involves an element of harm:

. . . as a result of his unprofessional and criminal activity [two patients of a highly intelligent and experienced psychologist] have suffered harm. . . .  
[the psychologist] deliberately groomed and manipulated [the two patients] to satisfy his lust, knowing that doing so would harm them.  
(*R. v. Matheson* 589; note also *Norberg* 255)

A zoophile who does not groom a non-human animal for sexual activity knowing that harm to the non-human animal will result or are likely result, as standards of due diligence seem entirely applicable, escapes the censure here given to *R. v. Matheson*. As proof of harm resultant from being in a position of vulnerability is a requirement of Canadian law, it is unlikely that all zoophilic activities constitute instances of sexual exploitation.

The first (Canadian) Supreme Court case to address the crime of sexual exploitation was *R. v. Audet*. The definition of a relationship of dependency was attempted in that case:

. . . the term “relationship of dependency” refers to a relationship -- originating from biological, legal or social ties or even specific circumstances -- in which the young person is subject, related or tied to the adult in such a way that he or she loses independence or freedom of action. (178)

Given its broadest application, young persons often and perhaps constantly, on some level, find themselves in circumstances that bring a loss of “independence or freedom of action” without this thereby vitiating the young person’s ability to consent to sexual contacts. There must clearly be some minimal degree of excessive dependency that vitiates consent, not simply some intangibly hypothetical restriction of personal freedom.

Substituting both “non-human animal” for “young person” and “human animal” for “adult” in the suggested definition above places the concept into a zoophilic context. There seems no good reason why such a substitution cannot or ought not to be made, thereby defining a set of circumstances in which zoophilia becomes morally suspect. Again, the aim is to eliminate speciesism by addressing the relevant similarities and contrasting elements of zoophilic and non-zoophilic circumstances. The question is how much dependency is excessive, and therefore capable of vitiating sexual consent.

## Inherently Fiduciary Relationships

There are relationships in which trust and authority are viewed as almost inherent: “teachers will, apart from exceptional circumstances, be in positions of trust and authority towards their students” (*R. v. Audet* 196, 197-199). Bryant broadens the class of potentially problematic relationships dramatically: “parent, guardian, spouse, teacher” (116). The inclusion of “spouse” by Bryant is a wholly unexamined extension to those sorts of relationships mentioned by the Badgley Report. This appears unintended, as the spousal relationship lacks any inherent dependency relation. The same cannot be said of humans with control over the daily lives of non-human animals. Apart from exceptional circumstances, morally acceptable zoophilic contacts implicating such humans are precluded.

Zoophilic contacts in “exceptional” circumstances may not be legal liabilities but *R. v. Audet* suggests otherwise:

... a presumption [that teachers are necessarily in a position of trust and authority towards their students does not make] the crime of sexual exploitation an absolute liability offence [since the Crown must still prove that the teacher touched a student] “for a sexual purpose.” (199-200)

Touching for the purpose of sexual gratification is criminal behaviour if it occurs within a fiduciary relationship. No teacher may engage in physical contact with a student if, by doing so, the teacher seeks sexual gratification. Putting matters into a zoophilic context: no human animal in similar standing towards a non-human animal can ever rightly engage in zoophilic contacts with it. This restriction holds even if the sexual contact is initiated by the non-human animal (compare *R. v. Matheson* 566).

Dissenting opinion in *R. v. Audet* makes a crucial point:

[majority] interpretation . . . removes the obligation of the Crown to prove that an accused teacher was in a position of trust or authority, and places the obligation on the accused to disprove that such a position existed. This is a burden that an accused in our system should not bear. The accused’s right . . . to be presumed innocent, is paramount and should not be compromised, whether by presumption of fact or otherwise. (203)

This suggests that a teacher may not be in any position of trust or authority over a student simply for being a teacher. In a zoophilic context, it suggests that being a

human animal may be insufficient grounds to prohibit all sexual contact.

Audet involved the violation of the trust of a young person, not an adult. The adults whose trust was violated in *R. v. Matheson* were psychiatric patients in a doctor-patient relationship, and so were more vulnerable to exploitation than such adults ordinarily would have been. It is unclear whether a professor engaged in a sexual relationship with an adult student is thereby guilty of sexual exploitation, even if the professor's touching is unquestionably for sexual gratification.

No violation of a fiduciary duty occurs unless the dependency inherent in that relationship is what permitted exploitation to occur. It is certainly conceivable that a teacher can engage in a sexual relationship with a student and still respect the best interests of that student, however uncommonly such circumstances may hold in fact. Such a relationship need not be harmful in the manner of the case against Wynrib. Both *Norberg* and *R. v. Audet* demonstrate that harm is necessary to turn a relationship into an instance of sexual exploitation. Thus, if harm is not part of a fiduciary relationship, then that relationship can be likewise be sexual without thereby becoming morally problematic.

### The Necessity of Harm

The exclusion of demonstrable harm from consideration or, at the very least, overt disregard for the best interests of the more vulnerable party to a fiduciary relationship, combined with the idea that "spouse" rightly distinguishes persons between whom fiduciary duties arise, leads to apparently unintended consequences when interpreted in accordance with rulings already cited in this examination. In keeping with majority opinion in *R. v. Audet*, circumstances arise such that spouses who are also young persons (i.e., who are 14 to 17 years old) cannot touch their husbands or wives "for a sexual purpose" without thereby establishing the grounds for a charge of sexual exploitation.

More striking, given the verdict and behaviours of the prosecution, the defence, and the judiciary in *R. v. A.A.*, exercise of the right to marry may 'trump'

any fiduciary duty between spouses -- if harm is excluded from consideration -- in so far as A.A.'s spouse was deemed rightly capable of engaging in activities with her, presumably for the purpose of mutual sexual gratification, despite A.A.'s having been deemed incapable of exercising the judgment of a typical adult -- albeit inexpertly. It was conceded, without condemnation from any of the parties involved, that A.A. was incapable of exercising a capacity for consent equal to a 12-year-old girl's (i.e., her capacity to consent to sex was child-like). If A.A.'s spouse can be deemed to have acted in a morally unproblematic manner, it can only be as a result of his being found to have respected the best interests of A.A. and, thereby, to have incurred no avoidable harms against her. The same applies, with equal force, to all instances of spousal sexual contact with young persons.

### Community Standards of Conduct

A central consideration in evaluating whether or not the trust inherent in any fiduciary relationship has been violated appears to be the following: "If the type of sexual relationship at issue is one that is sufficiently divergent from community standards of conduct, this may alert the court to the possibility of exploitation" (Norberg 256; note also *R. v. Matheson* 577; Norberg 311). Only the dissenting opinion in *Norberg* alludes to the fact that this statement originated in a non-sexual (i.e., a commercial) context. This allows for a reader to easily misinterpret its implications, since community standards of propriety in commercial transactions are liable to very different terms of judgment from private sexual relations. Dissenting opinion in *Norberg* notes specifically that "with respect, community standards of sexual conduct have no bearing on the question of whether or not there was consent to sexual contact in a particular case" (311).

It is important to note that, even in the cases of *Norberg* and *R. v. Matheson*, mere divergence from community standards of conduct does not in and of itself constitute grounds for positing any violation of trust. It is certainly true that, as it is generally accepted that doctors not engage in sexual contact with their patients nor teachers with their students, so the owners, keepers, handlers, or

trainers of non-human animals are even more strongly cautioned against zoophilic contacts within such relationships since in the latter cases' divergence from community standards may be even more pronounced. A more definite guide to evaluating instances of zoophilia is needed if any firm conclusions regarding their legal standing are to be reached, since community standards may be wholly breached without committing sexual assault.

Regarding human interactions with non-human animals as fiduciary might provide just such guidance. The fiduciary relationship "is the same relationship as that which exists between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward" (Norberg 271). Comparing the relationship which obtains between spouses to that which arises between parent and child is dubious. The spousal relationship can be fiduciary, but need not necessarily be such – unlike the other sorts of human relations cited in Norberg which entail a fiduciary duty inherently. Relationships between humans and the non-human animals that they own, keep, handle, or train are almost exclusively fiduciary.

Zoophiles purport to feel affection for non-humans in a manner akin to how ordinary folk love their fellows. The animals with which they engage in zoophilic activities are almost exclusively domesticated examples of a species. The two required elements of authority and dependence are therefore, also, nearly universally present. Since "fiduciary relations are designed not to satisfy both parties' needs, but only those of the entrustor [i.e., the weaker party]" (Norberg 273), moral and legal judgments of any particular instance of zoophilia turn on whether or not the best interests of the non-human animal were served by the act. This certainly limits the circumstances in which zoophilic activities are morally or legally defensible.

The nature of a fiduciary relationship depends on circumstances prevailing in particular instances. In the case of hunting non-human animals, there is no relationship of dependency nor is any recognizable position of authority applicable. If hunting is immoral, it is on some other basis than that which grounds a fiduciary relationship. In the case of raising livestock, a relationship of dependency and a position of authority certainly exists. Despite this, the law is

just as certainly unprepared to impose upon farmers the duty to respect the best interests of their livestock (i.e., property). The economic consequences of such a policy shift would be enormous. The “imposition of a fiduciary duty” carries with it “draconian consequences” (Hodgkinson 467). One can set aside the unfortunate connotations of the term “draconian,” as most fiduciary circumstances are hardly oppressive, the idea implied here is simply that a fiduciary duty is to be taken seriously. *M.(K.)* recognizes a fiduciary’s “strict” standard of conduct (63). One cannot recognize a fiduciary duty inherent in one’s standing to another being and fail to adjust one’s behaviour accordingly.

Relationships of dependency and authority surely also accrue to researchers and the non-human animals used in their experiments. Economic arguments would likely undermine any global attempts to introduce the concept of the animals’ best interests to scientific research, as well as certain utilitarian arguments which ultimately depend on not-entirely-speciesist assumptions about the comparative value of human and non-human life. Relationships of non-human dependency and of human authority also apply in virtually all cases of “working” animals (i.e., non-human animals as tools) and pet-ownership (i.e., non-human animals as family). The question is not whether such relationships might be optimized by zoophilic activity, but whether zoophilic activity is ever in the best interests of specific non-human animals implicated in them.

*Hodgkinson* introduces an idea that some may interpret as turning all this around. Making reference to *Norberg*, it was found that “the sexual relationship diverged significantly from the standards reasonably expected from physicians by the community” (412). This statement suggests that deviation from community standards of sexual relations is relevant to making a decision to prohibit deviant conduct. It makes to reference to harm or to exploitation. But this is misleading. In fact, in *Norberg*, it was harm resulting from exploitation that violated the fiduciary duty between doctor and patient. Even *Hodgkinson* notes that “any reasonable practitioner in the defendant’s position would have taken steps to help the addicted patient, in stark contrast to the deplorable exploitation which in fact took place” (412). Given the facts of the case, harm resulted directly from the power

imbalance inherent in a fiduciary relationship.

Wynrib abused his position of authority when he arranged to feed his patients' addictions to prescription painkillers in exchange for sexual favours. This is very different from simply saying that a doctor having sex with his patient, being divergent from the sort of behaviour that a community expects from its doctors, suffices to prove that a fiduciary obligation is violated. The idea that community standards alone can determine the boundaries of a fiduciary obligation is unsound. Homosexual contacts between members of a fiduciary relationship are not rendered morally problematic for their being deviations from a community standard of sexual conduct (i.e., homosexual). If sexual contact is prohibited, then it is prohibited tout court and for being at odds with the weaker party's best interests.

### What Fiduciary Relationships Are (and Aren't)

Fiduciary relationships of any sort have certain defining features. In *M.(K.)*, fiduciary relationships are characterized as possessing three qualities:

1. "The fiduciary has scope for the exercise of some discretion or power. (63)
2. "The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests." (63)
3. "The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power." (64)

It is due to the combination of these factors that the stronger party to a fiduciary relationship is morally constrained to act only in the best interests of the weaker. This "can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary" (*M.(K.)* 65; note also *Hodgkinson* 378-379, 468). The virtue of loyalty grounds a fiduciary duty, and this is taken to be an even deeper moral commitment than a duty of care (*Hodgkinson* 468). "Profit" here is to be taken at its broadest application. Though the concept of fiduciary duties arose within an economic context, "profit" refers to personal gain of any sort. Thus,

procuring sexual gratification within the context of a fiduciary relationship becomes morally problematic.

Restrictions placed on the more powerful party cannot be read as analogous to some utilitarian maximization of benefit to the weaker party in all matters. "A relationship may properly be described as 'fiduciary' for some purposes, but not for others" (M.(K.) 66). A doctor acting in the capacity of a doctor cannot rightly violate the trust of a patient insofar as medical treatment is concerned, since a patient expects that a physician will, to the best of his or her ability, alleviate whatever condition necessitated entry into this particular fiduciary relationship to begin with. This does not mean that a doctor must do whatever he or she can to serve the patient's best interests. That could conceivably entail the doctor's handing over the keys to her car because the patient will otherwise be late picking his children up from school, and that's ridiculous. Likewise, becoming someone's spouse does not entail the immediate and total sacrifice of all of one's own interests and opening oneself completely to the behest of that spouse. And this is not due to some vague consideration that doing so would actually not be in the spouse's best interests (it might very well be!).

Pursuit of the more powerful party's self-interest in a fiduciary relationship must in no way be counter to the weaker party's best interests. Thus, while a wife should not finish watching a film before calling emergency services to get medical help for a husband whose had a heart attack, she may well linger in the bath despite her husband's complaints. The more powerful member of a fiduciary relationship cannot simply concede a willingness to engage in behaviours not immediately conducive to the weaker party's best interests, even if sorely tempted to do so. In a medical context: "the fact that a patient acquiesces or agrees to a form of treatment does not absolve a physician from his or her duty if the treatment is not in accordance with medical standards" (Norberg 315).

In a zoophilic context: the fact that a non-human animal acquiesces or agrees to sexual contact does not absolve an owner, keeper, handler, or trainer from honestly taking into consideration the non-human animal's best interests before proceeding (or not) with sexual contact. Whether or not zoophilic contact is in the best interests of any particular non-human animal will be determined by the

specific circumstances of individual cases, despite wholly undefended and somewhat bizarre assertions such as that:

*Prima facie*, it would seem that sexual (and in the case of the female animal, reproductive) satisfactions are more important in the life of an animal than they are in that of a human being. (Devine 492)

Peter Singer's question might now become, in a given instance: would this sexually mature male dog be healthiest and happiest in his situation if certain mutually satisfying zoophilic activities included him? If so, then the trust of the fiduciary relationship between the dog and his handler has not been violated and such activity ought not to be in any manner restricted. Fiduciary duties have even been honoured to a degree that stifling the non-human animal's normal sexual impulses would not have achieved.

### Not Equating Sexually Mature Non-Human Animals and Children (Again)

An argument is being established that would see recognition of a fiduciary duty between human animals and non-human animals in their care. Adding to the list of fiduciary relationships already recognized in Canadian jurisprudence is by no means radical: "the categories of fiduciary, like those of negligence, should not be considered closed" (M.(K.) 63). Also, the idea that a fiduciary duty arises when human animals take non-human animals under their care is entirely in keeping with the fact that "to date, the law has imposed a fiduciary obligation only at the extreme of total reliance" (Hodgkinson 467-468). Among the many types of intra-human fiduciary relationships is that between parent and child. "Parents exercise great power over their children's lives, and make daily decisions that affect [sic] their welfare. In this regard, the child is without doubt at the mercy of her parents" (M.(K.) 64). The very same can be said of humans and the control that they are capable of exercising over the welfare of non-human animals in their care. Such relationships may be even more strongly fiduciary, as the vulnerability of non-human animals is even greater than that of small children. Non-human animals enjoy almost none of the protections that society affords to children, after all.

Sex between parent and child is wrong: "the relationship between parent and child is fiduciary in nature, and the sexual assault of one's child is a grievous breach of the obligations arising from that relationship" (M.(K.) 10; note also 42, 58, 62). It is inconceivable that anyone can be confident that an act of incest is in the best interests of the child. The damages that result from incestuous contacts are well known. Rates of incidence of such harms are such that incestuous activities are very likely to produce injury to the child:

Experts have . . . noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction. (M.(K.) 36)

Thus, any instance of incestuous contact certainly qualifies as "reckless."

Post-incest syndrome is a recognized title for a host of inter-related harms associated with incestual contact (M.(K.) 9). Incest has "gained recognition as one of the more serious depredations plaguing Canadian families," and the "damages wrought by incest are peculiarly complex and devastating" (M.(K.) 17). Among the most insidious aspects of incest (M.(K.) 27-28):

Incest instills feelings of guilt and shame in the child, and these negative connotations become incorporated into the child's self-image . . . [a] sense of responsibility . . . is conferred on the abused child for both instigating the incestuous activity and maintaining silence to ensure family stability. The child is given the power to destroy the family and the responsibility to keep it together.

Imagine yourself in the role of a child with an abusive father or sibling and you can't tell the secret as to what happens between the two of you because if you reveal it the family will be destroyed, they will all scatter away, your mother might kill herself or suffer an illness of devastating proportions, your father, who is the perpetrator of this, will reject you and not love you. You, as a child of eight or nine or ten, become in one sense a person of authority in this family, you control what is going to happen to you and everyone else.

Imagine being a child of eight or nine or ten and facing these awesome powers you have been entrusted with and, at the same time, being so dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to.

The damage that accrues to a victim of incest are not limited to those cited. "Much of the damage is latent, only manifesting later in adulthood" (M.(K.) 28):

The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.

This depressing accounting of the harms likely to result from incestuous contact serves as a contrast with a zoophilic context.

There can be no doubt that children are liable to suffer from sexual contacts with adult humans in ways unimaginable to non-human animals. As was stated earlier, the scope of coercive actions which may be employed against humans is disanalogous with that applicable against non-humans. Similarly, the range of harms to which a child is liable in no way matches that to which a non-human is susceptible. Zoophilic contacts are unlikely to produce “feelings of guilt and shame” (at least, in the non-human). Non-humans implicated in zoophilic activity do not “blame themselves” for it, nor do they develop a sense that they have been “given the power to destroy the family and the responsibility to keep it together.” The long-term effects of incest likewise are not manifested in non-human animals that have partaken of zoophilic activities. Non-humans are blissfully unaware of matters that a child cannot hope to ignore.

These considerations do not in and of themselves legitimize any zoophilic contacts whatsoever. They only demonstrate that sexually mature, even sexually active non-human animals are disanalogous to children. Whether or not a given instance of zoophilic contact is morally unproblematic remains dependent on its having respected the duties inherent in a fiduciary relationship. The differences between the harms likely to result from incest and those likely to arise out of zoophilic contact demonstrate that certain (i.e., mutually satisfying) zoophilic contacts are far more liable to do respect to fiduciary obligations than incestuous ones. Singer’s critics who wish to equate non-humans with children ought not to rush to such a judgment, as the analogy fails to hold in ways relevant to any moral judgment about the acceptability of at least some zoophilic activities.

## Benevolence

Coping with the overt sexuality of a pet can prove frustrating:

. . . canines have raging hormones, especially unneutered males. . . . my unneutered German shepherd cross, Jiboo, has resigned himself to leg-humping, courting the pillows on my bed, and general malaise. So . . . I will procure a tryst [with a female dog] for Jiboo. Other options, such as castration or, more disturbing, manual stimulation -- which, I was horrified to discover, an acquaintance performs regularly on his 120-pound Great Dane -- are not desirable. (Halprin 15)

Danyaël Halprin is unsuccessful in her quest to alleviate Jiboo's condition, but her efforts (i.e., placing a personals ad on behalf of Jiboo, and stapling up flyers at a popular local dog-park) reveal that she is taking her fiduciary duty towards Jiboo seriously -- even if those around her see those efforts as mis-guided; even if they may be mis-guided. Her actions apparently stem from a sincere desire to be benevolent towards her pet. The source of Halprin's "horror" is ambiguous: is it due to the fact that her friend's pet is child-like in its ability to consent to "manual stimulation," or is it because she finds mimicry abhorrent? If the former, then Halprin cannot claim to be all that interested in the welfare of non-human animals -- since her friend's activity is assaultive. If the latter, then her horror results from a matter of taste: the activity is okay for those inclined to it, not otherwise -- and not for Halprin herself.

It would appear, given Halprin's apparently sincere concern for Jiboo's well-being, that a marked personal disinclination towards zoophilic contact is what leads her to find the activity horrific. There is no indication that any part of Halprin's reaction to discovering her friend's activities was to report him to authorities. It is doubtful that as a result of her published confession authorities will seek Halprin out to discover her friend's identity so as to determine whether either animal abuse or bestiality had occurred (and prevent its future occurrence). As with Mark Steyn satirical treatment of zoophilic activity above, Halprin's demonstrates that common-sense attitudes do not equate sexually mature non-human animals with children. If any fiduciary duty exists towards non-human animals, then any zoophilic activity is only morally or legally justifiable if engaging in it would be better for the weaker (i.e., non-human) participant than would denying such participation. Otherwise: moral, legal, and-or economic (i.e., fines) sanctions may well be

appropriately levied.

Zoophiles do not inherently share any professional duty towards non-human animals such as that entailed by being a veterinarian. Nonetheless, the power imbalance inherent in interactions between human and non-human animals is typically as great as any found in more traditional examples of fiduciary relationships. It is typically greater than that found in relationships between humans, and often is as great as that typically found between adults and very young children. This is not to deny the autonomy of sexually mature non-human animals but it does suggest that, in certain contexts such as the owning of non-human animals for purposes of companionship, it is proper to designate such relationships as fiduciary -- if concern for the well-being of non-human animals is to be taken seriously.

A farmer or researcher is in a fiduciary relationship with a non-human animal in every respect save legal recognition of that fact. The required components of authority and dependency apply in full force, yet the notion is not extended towards non-humans. Similarly to the idea of non-human animal consent, the idea of the legal recognition of a fiduciary duty towards non-human animals cannot find application in the prevailing Canadian legal context. Unless the manner in which the welfare of non-human animals is reconsidered, neither the question of consent nor the notion of fiduciary duty can ground prohibitions against zoophilic contacts in Canadian law. Further inquiry into the scope of the dependency relationships which arise between human and non-human animals must precede any final judgments about the moral standing of particular instances of zoophilia. Such investigation nonetheless avoids the pitfalls of deeming non-human animals constitutionally incapable of genuinely consenting to sexual contacts with humans and those dependent upon trying to determine what's really going on in the minds of non-human animals.

This approach puts animal welfare at the forefront, where it belongs, in place of a concern for maintaining a traditional code of human sexual morality. It does justice to Singer's view that concern for animal welfare ought to ground any stance on zoophilia. Such inquiry may not deem that every instance of zoophilia is worthy of both moral condemnation and legal prohibition, but nonetheless

provides the best hope of a cogent response to a practice that will endure in Canadian and other human societies.

## A 21st Century Effort to Reform Animal Abuse Laws by the Canadian Parliament

The relative dearth of judicial developments of the crime of bestiality in Canadian law has been referred to already. Unlike the crime of sexual assault, with the related offences of sexual exploitation and sexual interference, and the defunct statutes criminalizing the act of rape, zoophilia has received very little attention in Canadian courts. Martin's Annual Criminal Code (2002) makes reference only to a ruling more than two decades old (Greenspan, Rosenberg 263). This case, *Regina v. Triller*, involved an instance in which a drunken man was observed through binoculars apparently attempting to engage in sex with a male golden labrador retriever (412). While a veterinarian could not determine whether any actual penetration occurred, the presence of dog hairs on both Triller's pants and shorts (combined with the eyewitness reports) sufficed for the laying of charges against him (412). According to the version of the Criminal Code then extant, buggery and bestiality both fell into Section 155 (having not yet been seen as different crimes). Both of these activities are referred to as "crimes against nature" (*R. v. Triller* 413) in Black's Law Dictionary, as cited in the verdict.

Sodomy, until recently, was a criminal act in Canada: the abolition of anal intercourse as a criminal offence occurred in 1995 (Greenspan, Rosenberg 261). It is no longer a sexual activity distinguishable from vaginal intercourse, legally-speaking, in Canadian courts. In *R. v. Triller*, "sodomy" described a far broader class of behaviours:

[Sodomy is] carnal copulation by human beings with each other against nature, or with a beast . . . Sodomy is oral or anal copulation between persons who are not husband and wife or consenting adult members of the opposite sex, or between a person and an animal . . . (413)

This out-dated notion of sexual propriety once found far wider application in Canadian courts than it does today, with the exception of zoophilic contacts which

remain trapped in anachronistic moral conceptions of “crimes against nature.” In attempting to formulate a verdict against Triller, the judge makes reference to a judicial history hopelessly out of touch with contemporary jurisprudence: *R. v. Brown*, 1889; *R. v. Shaid*, 1926; *R. v. Bourne*, 1952; *Ausman v. Veal*, 1858; *State v. Poole*, 1942 (*R. v. Triller* 413-414).

Attempting to settle a contemporary sexual assault case through reference to rulings as antiquated as these would produce verdicts ludicrous in the eyes of today’s Supreme Court of Canada. Unfortunately, the same cannot be said about zoophilic contacts. Brown was concerned with the question of “whether a duck was an animal” (*R. v. Triller* 413). Veal “relied upon biblical references to support its opinion,” and determined that “bestiality” could only occur between “a human being and a brute of the opposite sex” (*R. v. Triller* 414). Legal rulings on zoophilic contacts can no longer depend upon such bizarre concerns, if they are to be in any way justifiable. The rationale for any legislation must be sound and internally consistent with the body of law.

Canadian statutes concerned with “injuring or endangering cattle” (Section 444), “injuring or endangering other animals” (Section 445), and “causing unnecessary suffering” to animals (Section 446) have far more robust judicial histories than does the crime of bestiality (Greenspan, Rosenberg 684-687). Only the crime of injuring or endangering cattle includes jail time as a possible consequence of an offence, and even then the maximum sentence of five years is only half of the ten year maximum sentence which can be imposed following a conviction for bestiality (Greenspan, Rosenberg 261-262, 684-687). The law imposes less severe punishments when non-human animals are regarded as property, as they are in Sections 444-446, than when non-human animals are regarded as sexually enticing. The infliction of injury, exposure to endangerment, and causing of unnecessary suffering to non-human animals likewise merits less severe legal deterrence in Canadian law than does engaging in sex-play with them. No argument is offered in defence of this stance, which is entirely wrong-headed with regards to animal welfare concerns.

This inverted ranking of punishment severity gets ‘righted’ immediately

after one considers Canadian law from the perspective of human-, rather than non-human, animals. The law is only “upside down” from the point of view of a non-human animal: with punishments tied not to their best interests, but to the best interests of human animals for whom non-human animals are – legally-speaking -- mere articles of property. If any aspects of Canadian law are speciesist, there is no surely better evidence for it than this: the law provides punishments for the abuse of non-human animals based on the harms that such abuse brings to human interests and the last remnants of a particularly speciesist notion of “crimes against nature.”

There is an effort underway to revolutionize the treatment of animals under Canadian law. Bill C10-B includes provisions which, if approved, will recognize non-human animals as more than simply the property of human animals. One of the motivating reasons behind the reform is the recognition of a link between acts of cruelty against non-humans and the development of, or correlation with, similarly cruel acts aimed at humans (Lafreniere; Laghi; Gardiner, Rodenburg; CFHS i, 4, 25-27). Recognition of wrongs done to non-human animals, under Bill C10-B, will come not because of their status as property but because of their capacity for suffering (Lafreniere).

The class of “animals” would receive a new definition under Canadian law: “[an animal is] a vertebrate, other than a human being, and any other animal that has the capacity to feel pain” (Lafreniere; CFHS i-ii, 11). Specific mention that an animal is a vertebrate is redundant, since a capacity to experience pain is the relevantly operative condition for inclusion in the class. This definition suffers from the same flaw as that proposed by The HSUS, namely that humans are artificially excluded from the class of organisms defined as animal. Such a flaw might be overlooked, if the result was that non-human animals received greater protections under Canadian law -- protections that reduce the inherent speciesism of said laws to a degree which can be accommodated by reason. Unfortunately, this does not appear to be the case.

Though “all animals that satisfied [this] definition would be protected . . . current provisions limit their application to certain types of animals (for example, cattle and domesticated animals)” (Lafreniere; also CFHS 11). Not every “animal,”

as defined by the proposed legislation, would be equally protected against abuse. The reason for this apparently groundless limitation of the law's application is the fact that "the Minister of Justice categorically stated before the Standing Committee on Justice and Human Rights that activities that are currently lawful will continue to be lawful under the new provisions" (Lafreniere). The effect of the proposed legislation is not to expand the range of prosecutable offences against non-human animals under Canadian law (with one exception: Bill C10-B "makes it an offence to wilfully or recklessly poison, injure or kill a 'law enforcement animal' [i.e., "a dog, a horse or any other animal used by peace officers"] in the execution of their duties while it is aiding or assisting a peace officer engaged in the execution of his or her duties" (Lafreniere)). Instead, Bill C10-B merely provides stiffer penalties for activities traditionally regarded as abusive (CFHS iii).

This tradition stretches back quite nearly wholly intact to the 19th century (Tongerloo, Smith; Laghi; CFHS 3, 4). While the penalties to which a person is liable are increased under Bill C10-B, the bounds of right and wrong have been shifted hardly at all. Even the exceptional case stipulates that the added protections against harm apply only while the "law enforcement animal" is engaged in the execution of its [sic] duties while it is aiding or assisting a peace officer engaged in the execution of his or her duties. Bill C10-B gives no special protections to "law enforcement animals" while "off-duty." Such a situational prohibition from harming a non-human animal demonstrates that it is not the capacity for a non-human animal to suffer that grounds Bill C10-B. Rather, it is the capacity for an act of harming a non-human animal to bring about human economic or -professional hardship which grounds the provisions of Bill C10-B. Any fear "that currently lawful practices (hunting, trapping, medical research, farming, etc.) would be challenged in the future as violating the new cruelty to animal provisions" is explicitly described as "baseless" (Lafreniere; CFHS 6-8).

Conviction rates for non-human animal abuse would likely remain just as anemic as they were before the introduction of Bill C10-B (Gardiner, Rodenburg; CFHS 2-3), except that those convicted would receive harsher punishments (not so harsh as those levied against zoophiles, however). Bob Van Tongerloo, Executive Director of the Canadian Federation of Humane Societies, stated that

the proposed revisions to existing statutes aimed at preventing non-human animal abuse in Canada “makes it more difficult for individuals to bring private prosecutions for animal cruelty.” How much abuse Bill C10-B will deter, if passed into law, is wholly beyond determination, though it’s “hoped that [increased penalties] would deter people from abusing animals and generally lead to crimes against animals being treated more seriously” (Lafreniere).

The proposed revisions to Canadian law are not very daunting in their effects: “[for example] the offence of causing unnecessary pain . . . would not be made out unless there was no lawful purpose involved or the pain was avoidable having regard to other reasonably available methods” (Lafreniere). Presumably, there is some “lawful purpose” in each of the cited “lawful practices,” and so the determination of whether a particular activity constitutes abuse worthy of legal prosecution turns on whether or not “the pain was avoidable having regard to other reasonably available methods.” Determining what is “reasonably” available will (must?) no doubt be interpreted in a speciesist manner, and economic impact will likely ground most such determinations in actual practice, if for no other reason than that most of the “lawful practices” are economic in nature.

The cited “lawful practices” permit “over 400,000,000 animals to be killed in Canada each year” (CFHS iv, 8). Determining whether the suffering of a non-human animal was “unnecessary” rests on what impact the avoidance of said suffering ultimately has on some human animal’s well-being, and “inherently permits causing substantial pain to animals as a defence if it was necessary to do so to achieve a lawful purpose” (CFHS iv). Following passage of Bill C10-B into law, though it would no longer be the case that the law concerns itself primarily with the “protection of human proprietary interests” (Lafreniere), since non-human animals would no longer be classified as a form of property, nonetheless Canadian law would still concern itself primarily with human interests where it is the welfare of non-human animals that is compromised.

Despite the obvious limitations of Bill C10-B, some Canadian animal welfare advocates have responded to it with unrestrained gratitude. The Chair of the Status of Animals Committee of the Canadian Federation of Humane Societies called Bill C10-B “a significant advancement for the protection of animals

in Canada,” and optimistically added that “[Bill C10-B] will serve as a deterrent to crimes against animals” (Gardiner, Rodenburg). Bob Gardiner lauds Bill C10-B despite asserting that “animal abuse should be considered a serious offence based on the fundamental moral value of animals as beings capable of suffering” (Gardiner, Rodenburg). While Bill C10-B begins to make such a recognition, it almost wholly fails to live up to the implications that follow. While Bob Gardiner believes that “too many cases of animal cruelty fell through the cracks due to our outdated legislation,” he seems not to realize that Bill C10-B would allow more of the same, despite having vastly improved the timeliness of the legislation.

### The Crime of Bestiality Under the Proposed Reform

Bill C10-B makes no reference at all to zoophilic activities. Though moving animal abuse statutes out of the section of the Canadian Criminal Code addressing property rights, Bill C10-B maintains the distinction between sexual and non-sexual abuses of non-human animals by humans. This distinction remains despite tautologous assertions that “cruelty is cruelty” (CFHS 9) and “violence is violence” (Gardiner, Rodenburg), and it continues to permit comparatively far more serious legal consequences for mutually satisfying sexual contacts than for heinous physical abuse -- and no consequences at all for even heinous physical abuses incurred for a “lawful purpose.” Animal welfare advocates see no need to beef up the prohibitions against zoophilia, and they apparently see no cause for such sanctions to be watered down.

The Canadian Federation of Humane Societies, in its brief to the Standing Committee on Justice and Human Rights, only indirectly mentions the crime of bestiality. There, the practice is referred to as “an unnatural sexual indulgence” (CFHS 21) -- once more revisiting the notion of “crimes against nature.” The CFHS finds it “interesting” that:

a longer term of imprisonment is provided for, even though no person is directly injured, nor is there a requirement that any unnecessary pain, suffering or injury has occurred to the animal. This offence apparently has less concern for the animal and more concern to protect society at large from an immoral and indecent act which offends society’s rules of propriety. (21)

The CFHS makes the undefended, therefore circular, assertions that zoophilic contacts are “immoral” and “indecent.” The (im-)morality of mutually satisfying zoophilic activity has not been established or brought into question by anything that the CFHS includes in its brief.

Society’s rules of propriety ought not to be what governs the legality of sexual indulgences occurring in private settings if they are neither constitutive of assault nor inherently dangerous. No evidence of a link between mutually satisfying zoophilic contacts and behaviours harmful to humans or non-humans has been produced by either the CFHS or any of Peter Singer’s critics. The CFHS declares the “prevention of cruelty to animals” to be “a fundamental moral value,” and states that the “bedrock” of “civilization itself is to prevent violence that harms victims” (CFHS 22). If this is the case, then the CFHS can hardly continue to support Canadian legal prohibitions against all instances of zoophilic contact while permitting the continuation of overtly cruel and invasive “lawful practices.”

By the CFHS’s own declarations, zoophilia can be victim-less: in mutually satisfying instances of zoophilic contact, no person is “directly” injured (“indirect” harm may be possible, though no case is made for that conclusion) and no non-human animal is subjected to “any unnecessary pain, suffering or injury.” Were mutually satisfying zoophilic contacts to be considered in all seriousness under the full provisions of Bill C10-B, they would never be found worthy of criminal prosecution by it. Similarly, while the advocates of Bill C10-B (Lafreniere; Laghi; Gardiner, Rodenburg; CFHS i, 4, 25-27) cite a correlation between the sadistic torture of non-human animals and the criminal assault of humans, they cite no analogous link between mutually satisfying zoophilic activities and any subsequent threat of harm to any animal -- human or otherwise.

## Chapter 9

# Philosophy in Society

A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance.  
(Sansregret 586)

### The Aim of Philosophical Inquiry

Useful inquiry often begins with someone intrepid asking an unconventional question. Here is a partial (yet representative) quotation of the contents of an electronic message sent by Peter Singer to Gary Francione with regards to “Heavy Petting,” as cited by Francione (More):

[Since] you appear outraged by the suggestion of sex between a human and an animal, perhaps you can answer the central question I [Peter Singer] was raising. Let me put it more clearly: if sexual contact between a human and an animal was not contrary to the desires of either of them, did give pleasure to both parties, and caused no harm, present or future to either, would it be bad? If so, why?

The raising of a question -- no matter how ridiculous that query may seem -- ought to be responded to with cogent argument, not emotional hyperbole or public pillory. This bold presumption grounds the very idea of academic and intellectual freedom even while it undermines ignorance and prejudice. Any reply that a question brings ought to be sound and directed towards the issues raised by it, not fallacious or evasive.

One manner in which this question of Singer’s might have been responded to would be to reword it, sending it back as: “if sexual contact between a human and a child was not contrary to the desires of either of them, did give pleasure to both parties, and caused no harm, present or future to either, would it be bad? If so, why?” Assuming that an intellectual exchange on this issue was possible at all (as it should be!), deeper issues implied by the question ought to arise. The ideal result of such an inquiry is a sound conclusion with broad rational appeal. Instead, here is a wholly representative excerpt from Francione’s reply to Singer:

[Your] "clarification" fails to address legitimate concerns expressed about the use of "cunt" and other sexist expressions in your essay, or the concern that you should not in any way support sexist garbage like Nerve in the first instance . . . after "Heavy Petting" and your neo-Nazi views on infanticide, nothing would surprise me. . . . I had heard that you were planning to issue a "clarification" and I had hoped that it would contain an apology for what was a remarkably irresponsible act on your part, as well as a clear condemnation of all acts of bestiality. (More)

Pointing to supposedly sexist terms appearing in "Heavy Petting" does not address Singer's question. Disparaging the publication in which "Heavy Petting" appeared does not address it. Characterizing Singer as a "neo-Nazi" fails to do so. Asking for an "apology" and characterizing Singer's raising of the question as "a remarkably irresponsible act" does likewise as does "hoping" for "a clear condemnation of all acts of bestiality." Calling for Singer's resignation as President of the Great Apes Project utterly avoids addressing the issues his question raises, as well (Francione, Gary).

This examination of zoophilia is meant to have provided a cogent and reflective response directed to Peter Singer's question. It was motivated in large part by the fallacious and mean-spirited attacks, both against Peter Singer himself and the question he raised, that followed publication of "Heavy Petting." Friends of Animals president, Pricilla Feral, calls Singer's position "shocking and disgusting;" Megan Metzellar dismisses Singer's question as a "meaningless hypothetical" and states that "if [Singer] has any sense left he will realize the potential fallout [to the animal rights movement] from this essay and retract his position;" Theodora Capaldo states that "some people may care about [Singer's] thoughts on bestiality from some perverse unconscious desires," implying that no legitimate examination can possibly follow from the question (Carnell). This author holds that no one ought ever be made to feel the need to apologize or suffer regrets for having initiated debate.

Singer is quoted as having said: "I thought, what the hell. I'll do it [i.e., write a review of Dearest Pet] anyway [i.e., despite the reaction that may bring]. I'm a little unsure as to whether that was a wise thing to do" (Washington). There is no way to approach a controversial subject without worry, unless one is either some type of sociopath or reckless. Though I cannot speak for Peter Singer, some

persons are motivated by integrity and courage to undertake answering hard questions. The crime of bestiality is an anachronistic inconsistency in contemporary Canadian society that begs for a closer look. However, given the potential consequences of such an inspection, particularly with the emotionally charged and accusatory reactions that Singer's suggestion drew already in sight, it has to prove a frightening prospect to any conscionable individual.

## How Not to Do Philosophy

Peter Berkowitz's reaction typifies the sort of superficial treatment that Peter Singer's question has received in American popular media. He makes a series of assertions which are meant to discredit Singer's position as stated in "Heavy Petting."

1. "The suppressed -- and obviously false -- premise [in Peter Singer's argument] is that if an activity is represented in art, then it can't be bad."

Singer does not "suppress" this premiss because he, too, doubtlessly finds it to be "obviously false." Singer's references to art simply provides the context of a historical record in which representations of zoophilia occur. Singer is only making reference to the facts that:

- a) Zoophilia occurs in many different cultures.
- b) Zoophilia seems to have occurred throughout human history.

These facts cement the idea that zoophilia is not quite as anomalous as some may suppose. A similar tactic was adopted by this author in referring to studies of human sexual behaviour and fantasy. Singer nowhere suggests that "if an activity is represented in art, then it can't be bad." Surely Singer does not hold that artistic representations of rape or murder, both more prevalent than depictions of zoophilia, do not thereby absolve rapists and murderers.

2. "The suppressed -- and no less obviously false -- premise [in Peter Singer's argument] is that if human beings engage in an activity, then it can't be bad."

Again, Berkowitz is being uncharitable, and is mis-representing Singer, who nowhere suggests that he believes that "if human beings engage in an activity, then it can't be bad." In fact: Singer holds that (as Berkowitz himself

quotes): “the only consideration we need bear in mind in using animals to satisfy our sexual desire is whether we are causing cruelty.” The fact that people do cause cruelty to animals makes it incoherent for Singer to hold the view which Berkowitz attributes to him. Consider:

- a) If human beings engage in an activity, then it can't be bad.
- b) Human beings treat animals cruelly.
- c) Therefore, treating animals cruelly can't be bad.

Singer clearly holds premiss b), so (according to Berkowitz) Singer is committed to holding that treating animals cruelly can't be bad (which is clearly false).

- 3. “If animals are entitled to the protection of what we today call human rights, isn't sex with them, absent consent, rape?”

Asking the question rhetorically gets Berkowitz no closer to an answer. No matter what the answer turns out to be, there will be consequences for the ways in which human animals treat other animals. Peter Singer surely concedes that sex with non-human animals without their consent is akin to rape. Berkowitz cannot fault Singer for condoning zoophilia, however, without an argument to the effect that non-human animals are constitutionally incapable of consenting to sexual contacts with human animals. Not surprisingly, Berkowitz only begs that question. Singer may be equally guilty of question-begging when he asserts that zoophilia should in some instances be legal, but at least he can point to a slew of cases where human interventions into the sexual integrity of non-human animals currently carry no legal consequences. At least Singer can point out the hypocrisy inherent in every attempt to make all sexual contacts between human and non-human animals illegal.

- 4. “Non-human animals have their needs, too. But to infer from this that sex with animals does not offend ‘our status and dignity as human beings’ is just as fallacious as saying that since animals can be vicious predators, a man can be a vicious predator without offending his status and dignity as a human being.”

Peter Singer confines his statements to sex. He states that human animals engage freely in sex. He states that non-human animals engage freely in sex. He asserts that in certain situations (i.e., mutually satisfying ones) there's no problem with human and non-human animals freely engaging in sex together. If consensual recreational (i.e., non-procreative) sex among humans is neither degrading nor

dehumanizing, then adding a non-human partner to the situation isn't either (unless 'species' is a morally relevant distinction). Contemporary Canadian society accepts "sex for sex's sake." Sexual contacts between humans can be every bit as impersonal and shallow as zoophilic ones. That does not make those who engage in such contacts "less than human." It is certainly not illegal to engage in sex that amounts to nothing more than mutual masturbation. Berkowitz's analogy between zoophilia and predation does not hold, as it relies on a faulty premiss that nothing (non-human) animals do has the effect of "offending the status and dignity of a human being." The effects of "vicious predation" are akin to assault, attempted murder, or murder itself. Singer makes no argument to the effect that such crimes ought to be abolished. Singer's reference to "the status and dignity of a human being" is partly tongue-in-cheek. One of the points of "Heavy Petting" is that an insistence on seeing humans as "beings" and not as "animals" and non-humans as "animals" and not as "beings" has contributed to warped attitudes towards and harmful treatments of non-humans by humans.

5. "A fundamental reason for prohibiting sex with animals is the human desire to join sex . . . with love. . . . but such thoughts touch on matters of the heart and the longings of the soul, human depths and heights for which there seems to be no place . . . in Professor Singer's one-dimensional world."

This criticism of zoophilia is similar to Lois Pineau's criticism of "non-communicative" sex insofar as both she and Berkowitz are trying to legislate care. If it were true that "a fundamental reason for prohibiting sex with animals is the human desire to join sex with love," then love-less sexual activity between humans ought also to be prohibited by law. Masturbation does not contribute to "the human desire to join sex with love," either (unless, perhaps, it's "self-love"). At the very least, Berkowitz has to provide an argument to the effect that permitting zoophilia erodes the likelihood of humans associating love and sex. If such an argument could be made, and if harm to society follows from it on a scale that warrants the prohibition of zoophilia, then Berkowitz has a point.

Even if such an effort succeeds, however, contemporary Canadian society accepts that sex can be loveless and remain morally unproblematic. If there are negative consequences to Canadian society from holding this attitude, they are not deemed serious enough to warrant legal sanctions. In most quarters, the belief

that love-less sex is not an issue for debate is a given. It seems entirely sound that the most rewarding human relationships occur within tightly symbiotic and deeply affectionate bonds. It is also obvious that no such closeness is available from non-humans, despite what the most devoted zoophile may claim. However, no justification for legally prohibiting every instance of zoophilia can be obtained from these apparent truths.

Peter Singer had the temerity to wonder: "There are cases that you can imagine (of sex with animals) that don't seem to do harm to animals. The question then is what is really wrong with that, why do we have that taboo? I just wanted to raise those questions" (Washington). This examination of zoophilia assumes that, like any other inquiry, Singer's merits a sound reply. Peter Singer's inquiry merits more than scare tactic sub-titles, "This Could Be Your Kid's Teacher," and innuendoes: "much of Singer's review is simply not fit to be reprinted" (Lopez). It merits a response capable of being sustained within the context of a modern, pluralistic democracy, not one which is limited to any particular world-view: "when it comes to bestiality, the debate is not so much about what God wants as what animals want" (Boxer).

No one who holds Biblical scripture as an article of faith can regard zoophilia as anything but immoral. A great many immoral acts, according to the Bible, are no longer (if they ever were) illegal. For good or ill, a prohibition against zoophilia in contemporary Canadian law cannot rest on "what God wants." Put another way: "important questions of science and public policy [should not be settled] by appealing to religious beliefs which many people deny and no one can establish scientifically" (Lafollette, Shanks 51-52).

Peter Singer's inquiry should not be dismissed as a "publicity stunt," as it is by Gary Francione: "my opinion is that the spotlight has grown cold with the infanticide business, so he needs to gear up again and remind us what a controversial person he is" (Cannonie). Even if Singer's comments on zoophilia were wholly motivated by an obsession with garnering media attention to himself, this doesn't invalidate the issues he raised through indulging that desire. It might make Singer into the enfant terrible of modern philosophy, but questions about human interactions with non-humans raised by him would lose none of their

philosophical, moral, or legal validity because of Singer's character.

Peter Singer's inquiry should not be used to further any particular political agenda. This is how Laura Vanderkam employs it:

In [Peter Singer's] world of extremes, if bestiality can be pushed into philosophical discourse, then the debate over whether Boy Scouts should have gay scout leaders or over San Francisco's new sex-change policy for municipal employees starts to seem quaint. If he busies mainstream Americans with trying to put out brushfires like this one on our left fringe, then the long, slow burn in the center of the culture war becomes less relevant. It becomes almost . . . normal. And that's what radicals like Singer want.

Vanderkam attributes to Peter Singer the motive of diverting attention from gay Boy Scout leaders and San Francisco transsexuals as a means towards discrediting the American Left in general. Is Singer out to promote the "long, slow burn in the center of the [American] culture war"? It's doubtful that he was mindful of it when he came to deciding whether to write "Heavy Petting." There is certainly no evidence that Singer's real motive for tackling zoophilia in print was to set himself up as a decoy for a wild goose chase initiated by the American Right. Likewise, the issues that are raised by Singer's statements should not be swept out of sight for being inconvenient to the promotion of some other agenda.

Several of Singer's critics decry his stance not for what it says about zoophilia itself, but out of fear for what effects his words might have for the animal welfare movement: Megan Metzellar warns of "the potential fallout [for the animal rights movement] from this essay [i.e., "Heavy Petting"]," Theodora Capaldo states that "'Heavy Petting' will come back to haunt us and . . . will be used against us," and Gary Francione adds the opinion that "Peter [Singer]'s disturbing view that humans and non-humans may enjoy sexual contact as part of 'mutually satisfying activities' will only further harm the cause of animal rights" (Carnell). Serious discussion of zoophilia is alienating to many people. Singer's critics quite rightly fear that his statements might be used to set back the animal welfare movement. Nonetheless, suppression of the discussion cannot be justified due to this legitimate fear alone.

It is fallacious to condemn the idea of animal rights by reference to any statement(-s) made by Peter Singer. While fallacious appeals to an ignorant public may suffice to sway opinion away from legitimate concerns, it falls to those

who would fight for the recognition of the rights of non-human animals to raise their own voices in correcting these errors. In order to be morally conscientious, one need not remain silent in the face of a perceived injustice just so as to avoid diverting attention from another.

If the best reaction that Peter Singer's inquiry could elicit are those that multiplied in the wake of "Heavy Petting," then it seems likely that he has raised a topic for which there are no easy answers. It is always simplest to either quickly take hold of handed-down assumptions or become evasive when confronted with difficult questions. In the end, however, neither tactic is ever adequate. It is not sufficient to adopt a line from G.E.M. Anscombe: "I do not want to argue with him -- he shows a corrupt mind" (Devine 487; Hursthouse 86-87).

The Canadian Criminal Code is up for review once again (see Rodrigue, Tibbets). It is unclear whether existing legislation describing the crime of bestiality, in whole or in part, is to be included in this revamping. Perhaps zoophilia in Canada will be re-evaluated along lines suggested by this examination. Perhaps zoophilia will be completely ignored, and remain a crime with an out-dated moral foundation. Perhaps zoophilia will be treated along lines suggested by Peter Singer's critics. Perhaps, finally, some other treatment of the phenomenon will emerge. In any case, judges who find themselves confronted with a person charged with the commission of bestiality must not allow groundless presumptions to guide verdicts on sexual contacts between human and non-human animals. To fail in this is to allow injustices to be committed against a minority interest which will likely never be able to sway public opinion. Similarly to the legal treatment of homosexuality until very recently, such a situation permits the legislated suppression of harmless behaviours. This ought to be an intolerable intervention into the lives of the citizenry of any responsible government in a contemporary, pluralistic, and rational democracy.

### Concluding Remarks

Attempts to recognize just what lies at the bottom of a prohibition of zoophilic activity bring to light the idiosyncrasies of human attitudes towards non-

human animals. It is a common assumption that such a taboo can be grounded on the fact that non-human animals are constitutionally incapable of consenting to sexual contacts with humans. Recognition of such an incapacity, and positing it as the rationale behind the prohibition, carries consequences that are honoured in Canadian society.

If it is true that a constitutional incapacity to consent grounds a legal or moral prohibition of zoophilia, then it likewise leads to similar legal and moral prohibitions against other non-consensual human interventions in the lives and non-human animals. Typical industrial practices such as farming become suspect. As no similar ban of non-consensual interventions is enforced, a ban on only sexually gratifying ones is shown to be ad hoc and, therefore, unconstitutional. Criminalizing zoophilic contacts becomes a convenient, though wholly unfair oppression of a sexually deviant minority. It has nothing to do with respect for non-human animal welfare (or -autonomy).

Changing the argument, so that in fact non-human consent doesn't matter, removes a barrier to zoophilic activities. If non-human consent is not to be taken seriously, then a host of human practices like farming can continue unhindered at least by concerns for non-human autonomy. Failing to take non-human animal consent seriously, however, would likewise permit zoophilic activities to continue and may remove any grounds for the law against bestiality currently in effect in Canada.

Arguing that zoophilic contacts are harmful in the way that pedophilic contacts are (a common position among Peter Singer's critics) fails to acknowledge that sexually mature, even sexually active non-human animals are very much disanalogous to children.

Most if not all zoophilic contact might be prohibited if it is recognized that the requisite elements for the positing of a fiduciary obligation apply to human animals and the non-human animals in their care. As all the elements are in place, it is both morally and intellectually requisite to recognize that such a duty does in fact obtain.

This recognition would have far-reaching implications. Common farming practices and other human interventions in the lives of non-humans become

suspect once again. Limiting such suspicions to a zoophilic context because doing otherwise is unpalatable is, again, philosophically, morally, and legally untenable.

The values that underlie Canadian jurisprudence have been the focus of this examination. Laws in Canada properly derive from virtues embodied in both the Charter of Human Rights and Freedoms and that country's Constitution. Attempts to subsume a prohibition of all zoophilic contacts under the ethical principles of prevailing Canadian jurisprudence inevitably brings far-reaching consequences for human interactions with non-human beings -- none of which is currently taken seriously. Recognition of such consequences, and the idiosyncratic manner in which zoophilia is singled out for criminalization, leads to a declaration that current Canadian laws against bestiality are unconstitutional.

A ban of most, if not all zoophilic activities is possible by reference to virtues that currently ground Canadian law. Given those virtues, such a ban seems inevitable. Such a ban would take non-human consent seriously and therefore have enormous implications for the industrial use of such beings. The failure to respect this fact renders current statutes pertaining to bestiality untenable. Instead of confronting these wide-ranging implications, courts may effectively sacrifice what would be a desirable ban on (almost) all zoophilic activity so as to perpetuate widespread, non-zoophilic interventions into the lives of non-human animals.

The most appropriate way to address the philosophical implications of zoophilia is to take non-human consent seriously. This is not likely to be the manner in which Canadian courts may some day proceed -- but not because such a course diverges from basic Canadian values. Rather, taking non-human consent seriously entails radical adjustments to numerous, commonly-accepted practices. These changes would directly affect millions of Canadians, indirectly affect almost all of them, and interfere with the production of many billions of dollars in revenues. Though Canadian legal prohibitions of all zoophilic activities do not withstand critical examination given their current context, a considered elimination of them may well result from a desire to perpetuate relatively indefensible and profit-oriented interventions into the lives of non-humans rather than from considerations directly related to particular zoophilic activities themselves.

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