

THE BESTIALITY PROSCRIPTION: IN SEARCH OF A RATIONALE

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Addressing a taboo rarely discussed in scholarly works, this Article analyzes frequently advanced arguments supporting prohibitions on bestiality. Though on a superficial level the arguments seem appealing, upon closer inspection the standard justifications break down under internal inconsistencies. A differently constructed theory may not only provide a rationalized, consistent basis for regulating bestiality, but also lend greater coherence to laws regulating sexuality in general. Part II of this Article explores arguments related to consent; Part III discusses bestiality impermissibly using animals as a means; Part IV examines public health arguments, largely relating to those diseases that can spread easily from humans to animals and vice versa; Part V explores arguments analogizing zoophilia to either pedophilia or homosexuality; and Part VI offers a new rationale for justifying prohibitions on bestiality.

I. INTRODUCTION	122
II. CONSENT	129
A. <i>Are You Seriously Asking If This Is Consensual?</i>	130
B. <i>But Still, Sex Is Different</i>	132
C. <i>No, No, We Mean Informed Consent</i>	134
III. IMPERMISSIBLE USE AS A MEANS	137
A. <i>Cruel to Animals, Ergo Cruel to Humans</i>	138
B. <i>“Literally Antisocial”</i>	140
IV. PUBLIC HEALTH	141
V. WHAT IF ZOOPHILIA IS A SEXUAL ORIENTATION?	145
A. <i>Zoophiles Are Mentally Ill, Homosexuals Are Not</i>	145
B. <i>Well, If It Is a Sexual Orientation, Then It Is More Like Pedophilia Than Homosexuality</i>	147
VI. COERCION AND CONTEXT?	148
VII. CONCLUSION	150

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I. INTRODUCTION

Eloise and Abel lived across the street from one another, but both of their families generally isolated themselves from each other.¹ In many ways, that made sense. Though they occasionally interacted, the families had different routines and rituals, and they even communicated in different languages. In the town of Ocala, the likes of Abel and Eloise just did not mix. The opprobrium that attached to such mixings, though perhaps irrational, was immediate and severe.² Despite these difficulties, Abel and Eloise became very fond of one another. Regularly, Eloise would meet Abel under the luminescent moon. The two would caress, expressing their profound affection. Partially overcoming their language barrier, Eloise and Abel began to sense each other's emotions and eventually fell in love. Eloise labored mightily to keep herself away from Abel. After all, societal disapprobation is a disciplining mechanism, often trumping love.³ Yet, she failed. Despite all the obvious difficulties, Eloise's visits to Abel became ever more frequent and ever more intense, but never overtly sexual. Eventually, a few neighbors began to notice Abel and Eloise's moonlit escapades, but no one found the visits particularly troubling, not even the intensely judgmental teenagers in Eloise's cohort. Feeling an odd sense of comfort despite her suspicions of "pernicious and sustained hostility"⁴ directed at her adoration for Abel, one night Eloise decided that the two should make love. They met in their usual spot, and the two quietly cuddled. Able breathlessly slipped inside of Eloise, a sublimely peaceful experience.⁵

If Eloise and Abel belonged to two very different families who had merely chosen to stay away from each other due to Ocala's⁶ cultural

¹ This story is a fictional account created for purposes of illustration.

² Cf. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly . . . it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982))).

³ Cf. *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.").

⁴ Cf. *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting) ("[H]omosexuals have historically been the object of pernicious and sustained hostility . . .").

⁵ Jesse Bering, *Animal Lovers: Zoophiles Make Scientists Rethink Human Sexuality*, SCI. AM.: BERING IN MIND, <http://blogs.scientificamerican.com/bering-in-mind/2010/03/24/animal-lovers-zoophiles-make-scientists-rethink-human-sexuality> (Mar. 24, 2010) (accessed Nov. 23, 2014) ("When that black mare finally just stood there quietly while I cuddled and caressed her, when she lifted her tail up and to the side when I stroked the root of it, and when she left it there, and stood quietly while I climbed upon a bucket, then, breathlessly, electrically, warmly, I slipped inside her, it was a moment of sheer peace and harmony, it felt so right, it was an epiphany.") [<http://perma.cc/Y5EL-HDZQ>].

⁶ I have selected the town of Ocala because of an incident there where Carlos Romero, 31, was accused of having sex with his miniature donkey, Doodle. David Moye, *Carlos Romero, Accused of Donkey Sex, Lambastes Florida's 'Backwards' Attitude To-*

mores, some might view the duo's sexual liaison as positively transgressive—an attempt to subvert cultural orthodoxy.⁷ But what if Eloise and Abel belonged to different species, one being a human and the other being a horse, cow, or dog?⁸ Rather than a positive transgression, most would likely view the couple's act as the ultimate perversion.⁹

Bestiality, a crime not fit to be named,¹⁰ is a topic so incendiary that it is rarely discussed, much less rationally.¹¹ Sex with animals has not only remained taboo,¹² but indeed has actually become the subject of *new* criminal prohibitions even as other sexual restrictions have fallen by the wayside.¹³ The increased strength of the opposition

wards Animal Sex, HUFFINGTON POST, http://www.huffingtonpost.com/2012/09/18/carlos-romero-donkey-sex_n_1894146.html (Sept. 18, 2012) (updated Sept. 20, 2012) (accessed Nov. 23, 2014) [<http://perma.cc/ZLN7-5K3Z>].

⁷ See generally TRANSGRESSIVE SEX: SUBVERSION AND CONTROL IN EROTIC ENCOUNTERS (Hastings Donnan & Fiona Magowan eds., 2009) (presenting essays that explore the concept of and attitudes towards 'transgressive sex').

⁸ For purposes of exposition, it is immaterial whether Abel or Eloise is the human. Stories abound with descriptions of sex between humans and these types of nonhuman animals. See e.g., PIERS BEIRNE, CONFRONTING ANIMAL ABUSE: LAW, CRIMINOLOGY, AND HUMAN-ANIMAL RELATIONSHIPS 98–99 (2009) (describing the film *Barnyard Love*, which depicts sexual encounters between humans and animals); Rebecca Winters Keegan, *Have You Seen the Horse Sex Movie?*, TIME, <http://www.time.com/time/arts/article/0,8599,1583009,00.html> (Jan. 28, 2007) (accessed Nov. 23, 2014) (describing the documentary *Zoo*, which details the story of “Mr. Hands,” a 45-year-old man who regularly engaged in intercourse with Arabian stallions) [<http://perma.cc/63H2-LU2A>]; *Sexual Assault of Female Rottweiler*, PET-ABUSE.COM, <http://www.pet-abuse.com/cases/2206/FL/US/1> (updated June 28, 2004) (accessed Nov. 23, 2014) (detailing the story of a man who was caught having sex with Nagaisha, a one-year old female Rottweiler) [<http://perma.cc/9SVN-QU6P>].

⁹ See Neil Levy, *What (If Anything) Is Wrong with Bestiality?*, 34 J. SOC. PHIL. 444, 445 (2003) (“[B]estiality [qualifies] as perverse, on the everyday concept of perversion. It also qualifies on at least some standard philosophical conceptions.”); *Leviticus* 18:23 (New King James) (“Nor shall you mate with any animal, to defile yourself with it. Nor shall any woman stand before an animal to mate with it. It is perversion.”).

¹⁰ See e.g., *Perkins v. State*, 234 F. Supp. 333, 335 (W.D.N.C. 1964) (citing previous statutory provision declaring that “[a]ny person who shall commit the abominable and detestable crime against nature, *not to be named* among Christians [i.e., buggery], with . . . [a] beast, shall be adjudged guilty of a felony, and shall suffer death without the benefit of clergy.”) (emphasis added).

¹¹ Cf. John Heilemann, *Big Brother Bill*, WIRED, Oct. 1996 (available at <http://archive.wired.com/wired/archive/4.10/netizen.html> (accessed Nov. 23, 2014)) (discussing child pornography and quoting former Solicitor General Drew S. Days III who described the issue as “incendiary” and “almost impossible to discuss in a reasoned way”) [<http://perma.cc/MB3J-LMJQ>].

¹² Peter Singer, *Heavy Petting*, NERVE, <http://www.utilitarian.net/singer/by/2001—>.htm (2001) (accessed Nov. 23, 2014) (“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. One by one, the taboos have fallen. . . . [But] sex with animals is still definitely taboo.”) [<http://perma.cc/9FKE-GXV6>].

¹³ See Chris Cottrell, *German Legislators Vote to Outlaw Bestiality*, N.Y. TIMES, http://www.nytimes.com/2013/02/02/world/europe/german-legislators-vote-to-outlaw-bestiality.html?_r=0 (Feb. 1, 2013) (accessed Nov. 23, 2014) (detailing Germany's first criminalization of “using an animal for personal sexual activities”) [<http://perma.cc/>

to interspecies sexual relations becomes even more difficult to explain when juxtaposed against another social movement—the animal rights movement.¹⁴ Broadly speaking, the animal rights movement has posited that because nonhuman animals¹⁵ are sentient beings capable of suffering, humans have an obligation to treat these animals with greater moral concern, respecting their dignity.¹⁶ For some, the only

9D5M-HE6B]. *Compare Lawrence*, 539 U.S. at 571–72 (“[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protections to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”), *with e.g.*, 2011 Fla. Laws 42 (codified as amended at FLA. STAT. § 828.126 (2014)) (“A person may not [k]nowingly engage in any sexual conduct or contact with an animal A person who violates this section commits a misdemeanor of the first degree”), and 2007 Tenn. Pub. Acts 510 (codified as amended at TENN. CODE ANN. § 39-14-214 (2014)) (“A person commits an offense who knowingly [e]ngages in any sexual activity with an animal[.]”), and 2006 Wash. Sess. Laws 887 (codified as amended at WASH. REV. CODE § 16.52.205 (2014)) (“A person is guilty of animal cruelty in the first degree when he or she [k]nowingly engages in any sexual conduct or sexual contact with an animal[.]”). It is doubtless true that in the past *punishments* for acts of bestiality were exceptionally severe for both the human and nonhuman animal. *See e.g.*, Edward Payson Evans, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 146 (1909) (describing, among others, “the case of a mule condemned to be burned alive together with a man guilty of buggery.” Because “[t]he quadruped was vicious and inclined to kick (*vitiosus et calcitrosus*), the executioner cut off its feet before consigning it to the flames.”). My only point here is that although criminal laws regulating sex have become increasingly liberalized, in some jurisdictions, there is a notable countercurrent of *new* proscriptions relating to sex with animals.

¹⁴ America’s sexual revolution began at roughly the same time the country was passing historic animal welfare legislation. *Compare Roth v. U. S.*, 354 U.S. 476, 484 (1957) (rejecting First Amendment protections for obscenity, but otherwise upholding First Amendment rights for “ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion”), and Jeffrey Escoffier, *Introduction* to *SEXUAL REVOLUTION* xi, xxi (Jeffrey Escoffier ed., 2003) (attributing America’s sexual revolution to battles over obscenity and pornography, particularly *Roth*), *with Humane Methods of Livestock Slaughter* (Humane Slaughter Act of 1958), Pub. L. No. 85-765 (codified as amended at 7 U.S.C. § 1901 (2012)) (“The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering[.]”).

¹⁵ Of course, humans are animals as well. Throughout this Article, however, the terms ‘nonhuman animal’ or ‘animal’ are used to refer to those sentient beings that are not human.

¹⁶ The animal welfare approach and the animal rights approach are analytically distinct. Animal welfare laws embody the humane treatment principle, which “purports to prohibit us from inflicting unnecessary suffering on animals.” GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* xxiii (2000). In contrast, the animal rights approach embodies the “principle of equal consideration,” which requires extending “to animals the one basic right that we extend to all human beings: the right not to be treated as things.” *Id.* at xxix. That approach, in turn, “would mean that we could no longer justify our institutional exploitation of animals for food, clothing, amusement or experiments.” *Id.* Generally, this Article uses the term “animal rights” to support the idea that animals’ sentience requires humans—at a minimum—to give ethical consideration to both the animal’s interest in avoiding suffering and in experiencing pleasure. *See Alasdair Cochrane, Do Animals Have an Interest in Liberty?*, 57 *POL. STUD.* 660, 667 (2009) (“[T]he physiological structure of animals such as mammals, birds, reptiles, amphibians and fish strongly suggests that they have the capacity for conscious experience . . . which is often taken to be synonymous with ‘sentience’, the

morally acceptable position, given the sentience of animals, is to completely forgo the use of animals.¹⁷ After all, sentient beings have an interest in avoiding unnecessary suffering,¹⁸ and, arguably, the exploitation of nonhuman animals is never necessary in today's world. That view has not been universally accepted.¹⁹ Nonhuman animals may experience pain and, conversely, may experience pleasure.²⁰ And if it is true that respecting the dignity of nonhuman animals requires—at minimum—reducing their suffering, then it is not immediately apparent why the same dignitary interests do not require—at minimum—acknowledging the *possibility* that nonhuman animals may seek sexual pleasure, sometimes with humans. Indeed, the premise's ineluctability, and the inevitably incendiary nature of most discussion, has caused some leading animal rights advocates to go out of their way to state that their approach would not permit bestiality.²¹ In contrast, when some individuals interpreted Peter Singer as even suggesting that retention of the bestiality taboo might be irrational,

capacity to feel pleasure and pain.”). I suggest, therefore, that both the equal consideration principle and the humane treatment principle require advocates of animal rights to articulate a principled basis for denying the animal a potentially pleasurable sexual experience.

¹⁷ See FRANCIONE, *supra* note 16, at xxxiv (“[T]he moral status of animals necessarily precludes their use as human property . . .”); Peter Singer, *Practical Ethics*, in THE ANIMAL ETHICS READER 36, 36–38 (Susan J. Armstrong & Richard G. Botzler eds., 2008) (arguing for “equal consideration” of the interests of animals and finding that consideration of animals’ interest in not suffering would require “radical changes in our treatment of animals” in the areas of human diet, agriculture, science, and entertainment).

¹⁸ See *e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 (Gaunt 2001) (1823) (“[T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?”); FRANCIONE, *supra* note 16, at xxiii (“Like us, sentient nonhumans have an *interest* in not experiencing pain and suffering; that is, they are the sorts of beings who prefer, or desire, or want not to suffer pain.”).

¹⁹ This Article does not seek to enter or resolve the debate on the necessity of nonhuman animal exploitation, but for a rigorous exploration of various points of view on the relationship between humans and nonhuman animals, see generally THE ANIMAL ETHICS READER (Susan J. Armstrong & Richard G. Botzler eds., 2008) (a collection of essays on human–animal studies and responses thereto).

²⁰ See *e.g.*, MARK ROWLANDS, ANIMALS LIKE US 22 (2002) (discussing the ability of vertebrates to feel pain and pleasure); Tamar Stelling, *Do Lobsters and Other Invertebrates Feel Pain? New Research Has Some Answers*, WASH. POST, Mar. 10, 2014 (available at <http://wapo.st/1qpx2a6> (accessed Dec. 22, 2014)) (discussing evidence of pain experience in crustaceans and cephalopods) [<http://perma.cc/8DK9-P7ER>]; Jeffrey Lockwood, *Do Bugs Feel Pain?*, OXFORD U. PRESS BLOG, <http://blog.oup.com/2011/11/bug-pain/> (Nov. 25, 2011) (accessed Dec. 22, 2014) (noting that the presence of internally-produced opioids such as endorphins in some invertebrates suggests those creatures are capable of experiencing both pain and pleasure) [<http://perma.cc/8ARH-KSXY>].

²¹ See *e.g.*, TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS: AN INTRODUCTION TO MORAL PHILOSOPHY 98 (2003) (“Contrary to the implications of utilitarianism, bestiality finds no justification within the rights view.”).

Singer was so pilloried that many still refuse to take any of his ideas seriously.²²

Despite all of that, various arguments are put forth to justify the prohibition on bestiality. These justifications come not only from animal rights advocates, but also from individuals who defend the use of animals in other contexts.²³ Accordingly, attempts to justify, maintain, or propose bestiality proscriptions create some strange bedfellows. Individuals who have never asked whether an animal consents to what else happens to her suddenly trot out the animal's inability to consent as a reason to prohibit bestiality.²⁴ Others, who use animals as means for myriad purposes, baldly assert that bestiality *wrongly* uses animals as means.²⁵ Public health risks, though rarely a reason to outlaw uses of animals, become an interest of exceptional importance.²⁶ Even stranger, perhaps, is the denial of an animal's sexual interest in humans, particularly where humans have a zoophilic orientation.²⁷

²² Singer's comments appeared in a brief essay on taboos surrounding human-animal sexual contact, prompted by Midas Dekker's *Dearest Pet*, which Singer read as demonstrating that such contact was neither rare nor historically new. Singer, *supra* note 12. Singer's essay was "widely perceived as condoning the practice" of bestiality. Levy, *supra* note 9, at 444. Though Singer maintained that he was only examining what reasons underlay the bestiality taboo, the "horrified" media reaction was rapid, as news outlets across the country denounced Singer. *Id.* Indeed, Gary Francione said, "Singer could 'no longer be trusted with the rights of apes.'" BEIRNE, *supra* note 8, at 110 (citation omitted). Singer maintains that he did not say that "there is nothing wrong with sex with animals except where it involves cruelty," but rather he "wanted to raise that question, but . . . did not answer it." *Id.* at 133 n.52 (citation omitted).

²³ Although laws against bestiality are fairly commonplace, I am aware of no law mandating veganism. In some jurisdictions, although human-animal contact is proscribed, the law explicitly condones the use of animals for food or other purposes. Compare OR. REV. STAT. § 167.333 (2013) (making sexual contact with an animal "for the purpose of arousing or gratifying the sexual desire of a person" a misdemeanor), with OR. REV. STAT. §§ 167.312, 167.388 (2013) (criminalizing certain types of interference with livestock production or animal research respectively), and OR. REV. STAT. §§ 167.315(2), 167.320(2) (2013) ("Any practice of good animal husbandry is not a violation of [sections relating to animal abuse in the second and first degrees, respectively.]").

²⁴ See e.g., *The Bestiality Perplex*, SLATE, http://www.slate.com/articles/news_and_politics/chatterbox/2001/04/the_bestiality_perplex.html (Apr. 2, 2001) (accessed Nov. 23, 2014) ("In fact, though Singer does denounce sexual practices that involve outright cruelty, he doesn't really explain how an animal can go about giving consent because, well, you know, animals can't talk.") [<http://perma.cc/S8U2-MAXE>]. But see ANDREW LINZEY, WHY ANIMAL SUFFERING MATTERS: PHILOSOPHY, THEOLOGY, AND PRACTICAL ETHICS 34 (2009) ("It might be claimed that, although animals cannot talk consensually and non-consensually, their actions may manifest consent and the lack thereof.")

²⁵ See e.g., RAYMOND A. BELLIOU, GOOD SEX: PERSPECTIVES ON SEXUAL ETHICS 232 (1993) ("[B]estiality is typically immoral: it typically uses an animal as a mere instrument for human purposes. . . .").

²⁶ *Id.* at 232 (noting that bestiality "can lead to rampant spread of venereal diseases").

²⁷ See e.g., Gieri Bolliger & Antoine F. Goetschel, *Sexual Relations with Animals (Zoophilia): An Unrecognized Problem in Animal Welfare Legislation*, in BESTIALITY AND ZOOPHILIA: SEXUAL RELATIONS WITH ANIMALS 23, 40 (Andrea M. Beetz & Anthony

This Article examines the arguments deployed to support prohibitions against bestiality. Though the standard arguments are superficially appealing, upon closer inspection the arguments tend to break down, primarily because of what I call irrational inconsistency.²⁸ Part I explores the arguments related to consent. Because animals are incapable of consent, the theory goes, sexual relations between humans and animals are always impermissible.

Another justification for bestiality proscriptions is that bestiality is an impermissible use of animals as means. Part II explores that rationale. It too is somewhat problematic because common activities like farming, transportation, rodeos, and zoos typically use animals as means. Yet, many have written that completely proscribing these activities would be extreme.²⁹ What, if any, justification might there be for using animals as a means in these activities but not sexual activities?

Part III examines the public health arguments. On this theory, bestiality is proscribable because sexual relations between humans and animals raise public health concerns, such as the spread of disease.³⁰ The threat of sexually transmitted diseases, however, is not a broadly applicable principle for proscribing sexual relations.

Recently, controversial studies have suggested that a very small minority of humans may exhibit a sexual orientation towards nonhuman animals.³¹ Putting aside the difficult questions that might arise even if science could definitively determine the existence of a zoophilic

L. Podberscek eds., 2005) (“Whether zoophilia in fact ever happens with mutual consent, that is, is wanted and appreciated by the animal, can only be speculated on.”).

²⁸ This Article defines ‘irrational inconsistency’ as either a refusal to take a proffered assertion to its logical conclusion, or an attempt to irrationally limit a theory in such a manner that it would not exclude one’s own “innocuous” activity. For a suggestion that “irrational” may be a ‘misplaced epithet’ in situations like this, see ALVIN I. GOLDMAN, *EPISTEMOLOGY AND COGNITION* 314 (1986) (“It is even clearer that inconsistency of beliefs need not be irrational when this results from failure to notice the inconsistency. . . . Were all the people who failed to notice these inconsistencies irrational? That seems like a misplaced epithet.”).

²⁹ See e.g., Richard A. Epstein, *The Dangerous Claims of the Animal Rights Movement*, in *THE ANIMAL ETHICS READER*, 601, 602–04 (Susan J. Armstrong & Richard G. Botzler eds., 2008) (arguing that forgoing the use of animals is not an option for people in undeveloped countries and that giving animals rights equal to those of humans would “pose a mortal threat to human society”).

³⁰ See Kenneth Rosenman, *Zoonoses—Animals Can Make You Sick*, MICH. ST. U. EXTENSION, Apr. 2002 (available at <http://web.archive.org/web/20061022233827/http://www.cdc.gov/NASD/docs/d000701-d000800/d000752/d000752.pdf> (accessed Nov. 23, 2014)) (describing zoonoses, diseases that can be transmitted through contact with animals) [<http://perma.cc/CKR7-BZYU>].

³¹ See Hani Miletski, *Is Zoophilia a Sexual Orientation? A Study*, in *BESTIALITY AND ZOOPHILIA: SEXUAL RELATIONS WITH ANIMALS* 82, 95 (Andrea M. Beetz & Anthony L. Podberscek eds., 2005) (“[T]he current study very clearly shows that some people (the majority of the participants in the current study) have feelings of love and affection for their animals, have sexual fantasies about them, and admit they are sexually attracted to animals—three components that describe sexual orientation.”).

sexual orientation,³² Part IV explores the arguments supporting bestiality proscriptions, on the assumption that such an orientation exists. Part IV also suggests that the general inclination to analogize zoophilia to pedophilia, rather than to homosexuality, may not work without accepting the validity of one of the arguments for prohibiting bestiality discussed in Parts I–III. Because the three arguments are themselves problematic, the arguments for that inclination become slightly untenable.

Finally, Part V offers a new rationale for justifying bestiality prohibitions. Borrowed from literature regarding sexual activity among persons with intellectual disabilities,³³ this approach eschews a categorical ban on bestiality and instead advocates for a contextual approach grounded in assessing the level of apparent coercion. This approach rationalizes bestiality prohibitions, and in the future might serve to bring greater coherence to laws regulating sexuality. Admittedly, difficult questions will arise under a contextual approach, but indeterminacy resulting from a rationally applied principle is preferable to irrational inconsistency.

Before continuing, however, it is important to limit this Article's factual premises. First, 'bestiality'³⁴ as contemplated here would not result in any physical harm to the animal beyond sexual touching.³⁵ Second, this Article assumes that animals are capable of behaving in a manner indicating consent and pleasure.³⁶ Lastly, this Article accepts

³² For a "slew of unanswered questions," see Bering, *supra* note 5 (exploring questions such as why some species are more often the target of a zoophile; whether some individuals of a species are more "attractive" than others; whether attraction to an immature animal would make someone a "zoopedophile"; and whether zoophilia might be heritable, among others).

³³ See *infra* note 153 and accompanying text (discussing the factors of a proposed contextual approach as applied to a mentally disabled victim).

³⁴ This Article primarily uses the term bestiality. Terms like sodomy, zooerasty, and zoophilia have also been used to refer to sexual contact between humans and nonhuman animals. See Andrea M. Beetz, *Bestiality and Zoophilia: A Discussion of Sexual Contact with Animals*, in *THE INTERNATIONAL HANDBOOK OF ANIMAL ABUSE AND CRUELTY: THEORY, RESEARCH, AND APPLICATION* 201, 202 (Frank R. Ascione ed., 2008) (noting sodomy can denote human-animal sexual contact, anal intercourse, or same-sex activity; suggesting that zooerasty essentially consists of using an animal as a masturbatory aid without any emotional investment on the part of the human; noting that while zoophilia definitions typically include sexual attraction to animals, they may sometimes simply denote "a general love of animals, without any sexual interest or activity").

³⁵ Sexual acts between humans and nonhuman animals can be placed along one or more continua, depending on the degree of harm suffered by the nonhuman animal and the motivations of the human engaged in the bestial act. *E.g.*, BEIRNE, *supra* note 8, at 116–17 ("[S]ome of the key categories of a typology of the forms of animal sexual assault . . . include[] commodification, adolescent sexual experimentation and gender socialization, aggravated cruelty, and zoophilia. These categories stem from variation in the degree of harm suffered by animals and the stated intentions of those who assault them.").

³⁶ In some instances, body language may be sufficient to constitute consent to sexual activity between humans. See *e.g.*, WASH. REV. CODE § 9A.44.010 (2007) ("Consent means . . . words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." (emphasis added)); see also Deborah W. Denno, *Sexuality*,

that some nonhuman animals naturally engage in sexual activity in a manner that is not strictly tied to reproduction.³⁷

II. CONSENT

Most supporters of laws against bestiality initially focus their arguments on the issue of consent.³⁸ At first glance, this seems to be a sensible approach, since consent is “what distinguishes licit from illicit sexual activity between human beings.”³⁹ And indeed, determining what constitutes consent is necessary for the protection of individual autonomy.⁴⁰ But the consent argument fails on a number of fronts. First, consent is not generally a precondition to the myriad uses humans make of nonhuman animals. If consent is generally unnecessary, then it is difficult to see why a different rule should govern sexual uses of animals.⁴¹ Second, even if there were a legitimate basis for broadly asserting that sex is different, it would be necessary to derive a principle that would deny the animal potentially pleasurable sexual

Rape, and Mental Retardation, 1997 U. ILL. L. REV. 315, 387 (1997) (discussing the “smile test” approach for assessing nonverbal consent by those humans with diminished cognitive abilities); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 272 (1998) (“If body language cannot be a legally effective way to express consent, many common modes of indicating a desire for intercourse will have to change radically, or—more likely—the verbal permission requirement will simply be ignored by lovers, dating partners, and perhaps courts and juries as well.”).

³⁷ See BRUCE BAGEMHIL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999) (discussing how animals may engage in homosexual or nonreproductive heterosexual activities); see also Sue M. McDonnell et al., *Spontaneous Erection and Masturbation in Equids*, 44 J. REPROD. FERTILITY (SUPPL.) 664, 665 (1991) (available at <http://research.vet.upenn.edu/Portals/49/91SpontaU.pdf> (accessed Nov. 23, 2014)) (“Spontaneous erection and masturbation appear to be normal equid behaviours, which occur with greater frequency and regularity than previously reported. . . . Spontaneous erection and masturbation do not appear to be related to type of housing or management, level of access to heterosexual behaviour, level of heterosexual performance (libido) or age. Testosterone appears to play a role in regulating these behaviours. Further work is underway to understand the significance and regulation of these behaviours.”) [<http://perma.cc/Q9Z2-WFP3>].

³⁸ See e.g., BEIRNE, *supra* note 8, at 116 (“Given animals’ inability to communicate consent to human sexual overtures, it should be a general principle that *animal sexual assault comprises all sexual advances by humans to animals*.”).

³⁹ Levy, *supra* note 9. But see SCHULHOFER, *supra* note 36, at 254 (“Under most existing criminal codes, the absence of [affirmative] consent does not by itself make intercourse illegal.”).

⁴⁰ See SCHULHOFER, *supra* note 36, at 255 (“Determining what counts as consent is fundamental to the effective protection of autonomy.”).

⁴¹ See Singer, *supra* note 12 (“Some men use hens as a sexual object, inserting their penis into the cloaca, an all-purpose channel for wastes and for the passage of the egg. This is usually fatal to the hen, and in some cases she will be deliberately decapitated just before ejaculation in order to intensify the convulsions of [her] sphincter. This is cruelty, clear and simple. (But is it worse for the hen than living for a year or more crowded with four or five other hens in a barren wire cage so small that they can never stretch their wings, and then being stuffed into crates to be taken to the slaughterhouse, strung upside down on a conveyor belt and killed? If not, then it is no worse than what egg producers do to their hens all the time.”).

interactions with humans, while condoning unconscionable violations of the animal's sexual dignity in the course of farming.⁴² Third, even if the previous objections are unsound, it is not clear that current notions of "consent" represent an appropriate standard for all human sexual relations.⁴³ Surely then, it may not be the appropriate standard for interspecies sexual activity.

A. *Are You Seriously Asking If This Is Consensual?*

The consent rationale is immediately suspicious because the non-human animal's consent to the uses to which she is put is not typically a relevant consideration.⁴⁴ And how could it be? Under the prevailing law in most American jurisdictions, animals are considered property.⁴⁵ Traditional conceptions of property give the owner the right to possess, use, and enjoy the property, generally to the exclusion of *all* others.⁴⁶ The owner's right to enjoy seems to subsume whatever interest in non-

⁴² Human-animal sexual activity is an inherent component of modern industrialized farming. See Bruce Friedrich, *Does Eating Meat Support Bestiality?*, HUFFINGTON POST, http://www.huffingtonpost.com/bruce-friedrich/does-eating-meat-support-_b_773166.html (Oct. 31, 2010) (accessed Nov. 23, 2014) (describing how factory farmed animals—including turkeys, pigs, and cattle—do not mate naturally, but rather are, as a matter of course, subject to the involvement of humans, who engage in "foreplay," masturbate, and penetrate the animals in order to artificially inseminate them, in a process Friedrich describes as systemic rape) [<http://perma.cc/DD99-392F>].

⁴³ See e.g., *Consent and BDSM: The State of the Law*, NAT'L COAL. FOR SEXUAL FREEDOM, <https://ncsfreedom.org/component/k2/item/580-consent-and-bdsm-the-state-of-the-law.html> (accessed Nov. 23, 2014) (describing how sexual activity related to Bondage, Discipline, Domination, Submission, Sadism, or Masochism (BDSM) can result in criminal prosecution as a result of concerned law enforcement or third party involvement, even when the use of physical force or violence in that sexual activity is "clearly consensual") [<http://perma.cc/4MAL-95KB>].

⁴⁴ In saying this, I do not mean to suggest that anyone who makes the consent argument is necessarily a hypocrite. Instead, reflexively focusing on consent epitomizes irrational inconsistency. See *supra* note 28 (defining 'irrational inconsistency' as either a refusal to take a proffered assertion to its logical conclusion or an attempt to irrationally limit a theory in such a manner that it would not exclude one's own 'innocuous' activity). The refusal to give consideration to whether an animal consents to other uses suggests that the consent argument may be a cover for unreflective disgust—an effort to disallow sex with animals while still permitting more popularly considered "important and innocuous" uses of animals, like hunting, raising them for food, and using them for transportation. See Levy, *supra* note 9, at 448 (debating whether any moral distinction exists between using animals for these activities versus sex). But the argument that our supposedly innocuous uses of animals are more important than any sexual uses of animals is really a nonstarter. To allow the necessity of consent to vary with the aggressor's perception of a practice's importance would produce a disrespectful, self-centered culture in which the dignitary interests of society's weakest members are routinely undervalued. Precisely because we perceive some practices as more important, the potential for abuse and ignoring the relevance of consent is at its apex.

⁴⁵ See FRANCIONE, *supra* note 16, at 50 ("In virtually all modern political and economic systems, animals are explicitly regarded as economic commodities that possess no value apart from that which is accorded to them by their owners—whether individuals, corporations, or governments.")

⁴⁶ See BLACK'S LAW DICTIONARY 1335 (9th ed. 2009) (defining property as "any external thing over which the rights of possession, use, and enjoyment are exercised").

use the property might have.⁴⁷ Property rights, however, are not absolute, only protecting the owner from *undue* governmental interference.⁴⁸ Thus an owner's rights must sometimes yield in the face of legitimate, countervailing interests.⁴⁹ Under the property conception of nonhuman animals, therefore, bestiality laws might be thought to operate as limitations on the rights to possess, use, and enjoy.⁵⁰ Some may fight this characterization, arguing that it is actually the animal's dignity and sentience that require us to consider whether she can consent to sex. But herein lies one irrationality of the consent theory. If the animal's dignity and sentience require not just consideration of the animal's consent to sexual acts, but an affirmative legal proscription of bestiality, why would these same interests not require evaluation of all animal uses? After all, we do not typically allow sentient beings to consent to murder,⁵¹ torture,⁵² slavery,⁵³ or peonage.⁵⁴ Thus, if consistently applied, restricting animal use based on lack of

⁴⁷ Cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 783 (2005) ("As a matter of everyday experience, the right to destroy one's own property seems firmly entrenched.").

⁴⁸ See BLACK'S LAW DICTIONARY 1335 (9th ed. 2009) (noting that "the institution of private property is protected from undue governmental interference").

⁴⁹ See e.g., *Commons v. Westwood Zoning Bd.*, 410 A.2d 1138, 1142 (N.J. 1980) ("Use of the property may of course be subject to reasonable restraint.").

⁵⁰ See e.g., Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539, 557 (1995) ("In essence, the term 'property' refers to *priority* of certain kinds of rights of possession or use.").

⁵¹ See generally Noah Leavitt, *Is It Always Torture to Dismember and Eat a Conscious Human Being? Possible International Human Rights Claims in the German Cannibalism-by-Consent Case*, FINDLAW'S WRIT, <http://writ.news.findlaw.com/leavitt/20040108.html> (Jan. 8, 2004) (accessed Nov. 23, 2014) ("In the U.S., the victim's consent is no defense to murder.") [<http://perma.cc/FRF7-5FGX>]; see e.g., NEV. REV. STAT. § 200.035 (2012) (noting that murder of the first degree may be mitigated by the victim's consent, even though consent is "not sufficient to constitute a defense or reduce the degree of the crime").

⁵² See NAT'L COAL. FOR SEXUAL FREEDOM, *supra* note 43 (analyzing the ability of a willing sexual partner to legally consent to injurious BDSM activity under the Model Penal Code and current case law, reaching the conclusion that while Model Penal Code § 2.11(2)(a) and § 210.0(3) *could* be read as allowing consent to "most" injurious BDSM activity, courts uniformly "refuse to accept consent as a defense").

⁵³ See e.g., U.S. CONST. amend. XIII, § 1 (prohibiting slavery and involuntary servitude). Although slavery is *involuntary* servitude, like torture, there may be some acts that are so indistinct from slavery that no person could ever actually volunteer to undertake the act. See e.g., *Superseding Indictment*, No. 10-0024-01 at 1, 6, 9, U. S. v. Bagley (W.D. Mo. 2011) (available at <http://www.scribd.com/doc/52010727/Superseding-Indictment-Sex-Slave> (updated 2014) (accessed Nov. 23, 2014)) (where defendant having victim sign a "sex slavery contract" was evidence supporting criminal charges including Sex Trafficking by Force, Fraud, or Coercion, and Forced Labor Trafficking, stemming from defendant using "force, fraud, and coercion . . . to cause [victim] to engage in . . . commercial sex act[s]") [<http://perma.cc/YB89-JJY6>]).

⁵⁴ See 42 U.S.C. § 1994 (2012) ("The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States[.]").

consent would render animal slaughter,⁵⁵ routine farming practices,⁵⁶ zoos,⁵⁷ and even ritual sacrifice illegal.⁵⁸ Many scholars and animal rights activists have come to this conclusion, and indeed, it may very well be the only logically and morally defensible position. But to the extent that positive law should strive for internal coherence, either the animal's consent is relevant or it is not. Because the law currently fails to take into account the animal's consent in other contexts, justifying current bestiality proscriptions on the consent theory is irrationally inconsistent.

B. *But Still, Sex Is Different*

A strong objection to rejecting the consent theory based on its irrational inconsistencies would be that sex is different. Whereas, consent is simply *irrelevant* in determining whether an individual was murdered or enslaved the argument goes, the entire notion of sexual autonomy is contingent upon requiring validly obtained consent.⁵⁹ But as applied to nonhuman animals, that objection proves too much.

Nonhuman animals are routinely subjected to violations of their sexual autonomy. Companion animals are spayed and neutered, without any consideration of the animal's consent.⁶⁰ Farmers routinely cas-

⁵⁵ See e.g., FRANCIONE, *supra* note 16, at xxix (noting that recognizing that animals have the right not be treated as things "would mean we could no longer justify our institutional exploitation of animals for food").

⁵⁶ Compare R.L. Dennis & H.W. Cheng, *Effects of Different Infrared Beak Treatment Protocols on Chicken Welfare and Physiology*, 91 *POULTRY SCI.* 1499 (2012) (describing the egg industry's routine beak trimming of poultry), with Leavitt, *supra* note 51 (suggesting that dismemberment is always torture).

⁵⁷ See e.g., *Tilikum ex rel People for the Ethical Treatment of Animals, Inc. v. SeaWorld Parks & Entm't*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) (dismissing a Thirteenth Amendment claim brought on behalf of orcas at SeaWorld, an amusement park, because the right not to be enslaved does not extend to nonhuman animals).

⁵⁸ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524–25 (1993) (explaining the role of ritual sacrifice in the Santeria religion). To the extent that ritual slaughter is commanded to atone for sin, it may be conceived as the animal's involuntary servitude in honor of a debt to the animal's owner. See e.g., *Leviticus* 1:1–7 (explaining how one may atone for sins through ritual sacrifice).

⁵⁹ See SCHULHOFER, *supra* note 36, at 255 ("Determining what counts as consent is fundamental to the effective protection of autonomy.")

⁶⁰ The spaying and neutering of companion animals might be justified on utilitarian grounds. See David Boonin, *Robbing PETA to Spay Paul: Do Animal Rights Include Reproductive Rights?*, 13 *BETWEEN THE SPECIES* (Aug. 2003) (available at <http://digitalcommons.calpoly.edu/bts/vol13/iss3/1/> (accessed Nov. 23, 2014)) (discussing how spaying and neutering may help improve the lives of many animals) [<http://perma.cc/7K7J-VEUA>]. Attempting to justify the procedures on other ethical bases, however, may evince irrational inconsistency. See *id.* at 1 ("I oppose factory farming and I support spaying and neutering dogs and cats. And it is easy to see how these two positions can be rendered consistent from a consequentialist point of view. But it is less easy to see how they can be rendered consistent on the deontological, rights-based view . . ."). Ultimately, spaying and neutering present a very difficult question because it is plausible that controlling domesticated animals' reproductive capacity benefits the animals more than it harms them. For instance, spayed females will not have their young babies taken from them. Neutered males might be less aggressive, and therefore have an eas-

trate pigs, bulls, and other animals.⁶¹ Female cows are artificially inseminated and kept constantly pregnant after being placed on “rape racks.”⁶² And when they are lactating, the cows’ milk is wrenched from their udders. Even stallions may have their penises restricted in order to prevent them from ejaculating.⁶³ And so, justifying laws against bestiality as necessary to protect the animal’s sexual autonomy also falters on an irrational inconsistency. The law does not value an animal’s sexual autonomy *as such*, and attempting to justify bestiality laws on the basis that sex is different does not solve the irrationality.

ier time socializing with other animals. The latter point is dubious because aggression is not necessarily tantamount to antisociality. Regardless, those arguments, at bottom, turn on the notion that easily preventable suffering of one type justifies the imposition of the nontrivial risks and dignitary harms associated with spaying and neutering. *See id.* at 3–4 (discussing the limited benefits to the individual animal from being spayed or neutered). That is counterintuitive if we proceed from the premise that every animal is an individual entitled to our respect. It is also ironic since the putative harms that spaying and neutering seek to prevent flow from choices humans made to domesticate animals for our own benefit. It is also plausible that spaying and neutering animals is the lesser of two evils given the situation with which we are currently faced. But, that argument, too, may be based on a utilitarian calculus, because it amounts to accepting the notion that in order to reduce the necessity of choosing between two evils, humans must continue to intrude upon the interests of individual animals. At any rate, a less intrusive method of achieving the same goals would be tubal ligation and vasectomy. *See e.g.*, *Why Tubal Ligations and Vasectomies for Pets Can Be Like Pulling Teeth (And What YOU Can Do About It)*, PETMD, http://www.petmd.com/blogs/fullyvetted/2010/april/ligations_vasectomies-7245 (Apr. 19, 2010) (accessed Nov. 23, 2014) (“From a public policy standpoint, vasectomization and tubal ligation offer the advantage of a less invasive, more rapid brand of sterilization.”) [<http://perma.cc/U8YZ-3GJV>]. But of course, that method of sterilization would not bring about the same behavioral modifications associated with complete gonad removal. *See e.g.*, *id.* (“For cats? Don’t get me started. I don’t yet see a way out of complete gonadectomies for felines. They’re just not behaviorally amenable to in-home living when their ovaries and testicles hold such aggressive sway over their behavior.”). Thus the argument *still* turns on a willingness to impose non-trivial risks and dignitary harms on individual animals to benefit humans, a purely utilitarian calculus.

⁶¹ *See e.g.*, *Swine Castration*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/KB/Policies/Pages/Swine-Castration.aspx> (2014) (accessed Nov. 23, 2014) (“Castration of swine can help control aggressive behavior and improve the palatability of pork.”) [<http://perma.cc/GA3L-TSRP>]. Genital mutilation, when inflicted upon humans, is often viewed as particularly abhorrent. *See e.g.*, 18 U.S.C. § 116(a) (2006) (making it a crime to alter the labia majora, labia minora, or clitoris of any minor human); Female Genital Mutilation, Act 2003, c. 31, § 1 (amended Oct. 30, 2003) (Eng.) (similarly outlawing genital mutilation in England).

⁶² FRANCIONE, *supra* note 16, at 13 (“Dairy cows are repeatedly impregnated—usually on a device called a ‘rape rack’, where they are inseminated by a bull or by a human who manually inserts the bull semen . . .”).

⁶³ *See e.g.*, Sue M. McDonnell, Equine Behav. Lab., U. of Pa. Sch. Of Veterinary Med., *Sexual Behavior: Current Topics in Applied Ethology and Clinical Methods* (June 2002) (available at <http://research.vet.upenn.edu/HavemeyerEquineBehaviorLabHomePage/ReferenceLibraryHavemeyerEquineBehaviorLab/HavemeyerWorkshops/HorseBehaviorandWelfare1316June2002/HorseBehaviorandWelfare2/SexualBehaviorCurrentTopicsinAppliedEthol/tabid/3128/Default.aspx> (accessed Nov. 23, 2014)) (“Attempting to inhibit or punish masturbation . . . is still a common practice of horse managers regionally around the world . . .”) [<http://perma.cc/8K3H-4NRD>].

Shifting the focus of the inquiry to the intent of the human who is violating the animal's sexual autonomy does not solve the problem either. Generally speaking, a human being who touches an animal in a sexual manner might intend to: (1) respond to the animal's medical needs; (2) perform acts related to animal husbandry in an agricultural setting; (3) satisfy the human's sexual urges, irrespective of the animal's urges; or (4) satisfy the expressed sexual desires of the human *and* the nonhuman animal.⁶⁴ As currently articulated, bestiality law certainly reaches acts falling into the third and fourth categories.⁶⁵ Indeed, for some, acts falling into the third or fourth categories invoke a greater sense of moral outrage—more akin to pedophilia than to the rape of an adult.⁶⁶ But for the animal, the disagreeability of a sexual act does not depend on the human's mental state.⁶⁷ And because sexual desire is a concomitant of sexual autonomy, once we concede that animals communicate their pain and pleasure through their behavior, an attempt to rationalize bestiality laws by focusing on animal sexual autonomy and human intent actually makes acts falling into the fourth category the strongest instance for *permitting* interspecies sex.

C. *No, No, We Mean Informed Consent*

One final objection might be that the consent rationale is not irrationally inconsistent because sexual activity requires *informed* con-

⁶⁴ See generally BEIRNE, *supra* note 8, at 117–21 (discussing the general motivations for bestiality); Friedrich, *supra* note 42 (discussing human-animal sexual activity in the context of animal husbandry).

⁶⁵ See e.g., WASH. REV. CODE § 16.52.205 (2012) (proscribing “sexual conduct” and “sexual contact” with animals, but only when the particular acts are “for the purpose of sexual gratification or arousal of the person”).

⁶⁶ The rape of any person is a heinous offense. Nevertheless, some view child-rape as a greater evil. See *Kennedy v. Louisiana*, 554 U.S. 407, 467 (2008) (Alito, J., dissenting) (“Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.”). Because the rape of children provokes tremendous moral indignation, one common discursive move is to compare zoophiles to pedophiles without much critical analysis. See e.g., Bolliger & Goetschel, *supra* note 27, at 42 (“Offenses could be entitled ‘sexual acts with animals’ for example, and the wording could follow the proscriptions of human sexual acts with children. . . . Sexual contacts with these persons are prohibited because of their basic need for protection, and it is irrelevant whether they possibly participated voluntarily in such acts or were physically injured by them.” (citation omitted)). *But see infra* Part V.B (exploring the irrational inconsistency in this view).

⁶⁷ See Andrea M. Beetz, *Bestiality and Zoophilia: Associations with Violence and Sex Offending*, in *BESTIALITY AND ZOOPHILIA: SEXUAL RELATIONS WITH ANIMALS* 46, 64 (Andrea M. Beetz & Anthony L. Podberscek eds., 2005) (“The involvement of sexuality and gain of sexual pleasure for the human makes an important difference in the public opinion on bestiality: it goes against people’s sense of decency. But animals do not hold the human cultural or societal values that say an act is disagreeable just because it is sexual. From the perspective of animals, their own sexual excitement and absence of psychological and physical stress, pain, injury, or death are probably more important.”).

sent.⁶⁸ Sexual activity is only appropriate when both parties are capable of—and actually give—consent.⁶⁹ Accordingly, under the general law of sexual assault in most states, “two circumstances can negate an individual’s consent: (1) the person is asleep or unconscious; or (2) the person is too young, in a drugged condition, or mentally incapacitated.”⁷⁰ Consent is negated in the first circumstance because the victim is not acting as an agent at that time.⁷¹ In the second category, we apply a heightened standard of consent, because even if a victim who is in a “cognitively impaired or underdeveloped state” gives indications of consent, the probability of the victim reaching a different conclusion “when they come to possess full cognitive ability,” combined with the potential of psychological trauma and damage, renders what would otherwise be consent ineffective.⁷² In other words, the victim’s vulnerability justifies the heightened standard. Thus, the animal’s vulnerability means that the informed consent is the appropriate standard. Because this standard can never be met, the argument goes, bestiality is always impermissible.

Admittedly, the irrationality in this argument is perhaps the most difficult to tease out. Vulnerability, however, cannot form the basis for permanently ruling out the ability to give consent to sex. If it did, then humans with intellectual disabilities would be permanently denied the ability to consent to sex. Some courts, recognizing this conundrum, have “refused to ‘adopt the fiction that all persons are mentally or judgmentally equal’”⁷³ but also would not “presume that a mentally retarded person was incapable of consent to sexual intercourse.”⁷⁴ Instead, such courts must determine whether the victim is able to “appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it ‘struggles to make itself articulate in law.’”⁷⁵ This is a sleight of hand, because the appraisal prong means that the intellectually disabled are “held to a higher consent standard than their nonretarded counterparts,” whose ability to consent is not predicated on demonstrating an ability to weigh potential social fallout should

⁶⁸ See e.g., *Bestiality Perplex*, *supra* note 24 (“[I]t isn’t immediately obvious that even if an animal *could* tell you its intimate desires that this would constitute informed consent, any more than would a ‘yes’ from a *homo sapiens* under the age of 18.”).

⁶⁹ See Levy, *supra* note 9, at 446 (discussing informed consent).

⁷⁰ Denno, *supra* note 36, at 340.

⁷¹ MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 31–33 (2011) (explaining that all creatures who are agents are entitled to bodily integrity, which includes security against sexual assault).

⁷² Levy, *supra* note 9, at 447 (citations omitted).

⁷³ Denno, *supra* note 36, at 345, 346 (quoting *People v. Easley*, 364 N.E.2d 1328, 1333 (N.Y. 1977)). Denno describes this approach as “the morality test,” noting it is used in Alabama, Colorado, Hawaii, Idaho, New York, and Washington.

⁷⁴ *Id.* at 346 (quotations omitted).

⁷⁵ *Id.* at 346–47 (quoting *People v. Easley*, 364 N.E.2d 1328, 1333 (N.Y. 1977) (quoting BENJAMIN N. CARDOZO, *PARADOXES OF LEGAL SCIENCE*, 17, 41–42 (1928))).

their sexual behavior become known.⁷⁶ This double standard, which requires people with intellectual disabilities to reach a higher bar for consent than that asked of their non-disabled counterparts, is widespread: all but nine states have some sort of explicit judicially-created test to determine if a person with impaired intellectual functioning can consent to sexual activity.⁷⁷ Functionally, therefore, these rules, and others like it, constitute “legally enforced celibacy for mentally retarded persons and overzealous moralizing about who can and cannot engage in sexual relations.”⁷⁸

The result is a tremendous denial of the intellectually disabled person’s dignity. First, if the standard for consent is higher for the disabled than the nondisabled, then the disfavored status of diminished mental capacity becomes the basis for applying additional burdens on the basis of status. This is irrational even as the United States (U.S.) Supreme Court has sometimes used the term.⁷⁹ Second, while there is room to debate the innate cognitive potential of the intellectually disabled, it is plain that an opportunity for sexual satisfaction is a dignitary interest of the highest order.⁸⁰ Permanently depriving such a person of that opportunity therefore constitutes an irrational double indignity.

⁷⁶ *Id.* at 349, 353, 392.

⁷⁷ *Id.* at 344–46 (The nine states without an explicit test are Connecticut, Maryland, Massachusetts, Michigan, Minnesota, Missouri, South Dakota, West Virginia, and Wisconsin, though they do “discuss evidence of the victim’s mental disability as a means of determining capacity to consent.”).

⁷⁸ *Id.* at 343 Denno explores six different tests that states have developed as standards to measure the ability of intellectually disabled persons to consent to sexual activity. The tests “reflect a continuum ranging from the most expansive definition of incapacity . . . to the most narrow.” *Id.* at 344. Expansive conceptions of incapacity, whether based on intellectual capability, age, or even species, increase the likelihood that individuals falling within the zone of incapacity are reduced to some form of celibacy.

⁷⁹ See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (finding a state constitutional amendment irrational because it, in part, “singl[ed] out a certain class of citizens for disfavored legal status or general hardship”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance because it rested “on an irrational prejudice against the mentally retarded”); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (finding the federal food stamp program’s exclusion of households with non-related individuals was without any rational basis).

⁸⁰ See NUSSBAUM, *supra* note 71, at 31 (“But whereas there is room to argue about whether innate potential differs across people, human dignity, from the start, is equal in all who are agents in the first place (again, excluding those in a permanent vegetative state and those who are anencephalic, thus without agency of any kind).”). A proper respect for the dignity of all means that “a decent political order must secure to all at least a threshold of . . . [b]odily integrity,” that encompasses “opportunities for sexual satisfaction.” *Id.* at 33. See also *Lawrence*, 539 U.S. at 567 (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

And so it must be with animals. While an intellectually disabled person *might* be able to “appraise the nature of stigma [and] the ostracism” associated with sex, an animal cannot comprehend what those concepts mean to humans.⁸¹ This lack of comprehension on the part of the animal therefore renders application of the informed consent standard even *more* irrational, because the informed consent standard can never be met by animals, who would therefore be effectively deprived of opportunities for sexual pleasure.⁸²

III. IMPERMISSIBLE USE AS A MEANS

A second line of reasoning for rationalizing bestiality proscriptions is that bestiality impermissibly uses animals as a means. As one scholar put it, bestiality is “typically immoral: it typically uses an animal as a mere instrument for human purposes.”⁸³ Although this argument is conceptually distinct from the consent theory, the position’s obvious irrationality is the same. If bestiality uses animals as a mere means for human purposes, then so too does animal slaughter, routine farming practices, zoos, and perhaps even ritual slaughter.

An initial response may be, however, that these other, more common uses are fairly innocuous to humans, whereas bestiality is impermissible because it “inculcate[s] undesirable habits and disposition in the agent,” specifically encouraging the treatment of persons as mere objects or sexual activity with humans absent informed consent.⁸⁴ One could then ground this distinction on two different bases. First, a human who displays these types of habits toward animals may in turn eventually act the same way toward human beings. Second, bestiality is “literally antisocial” because it “does not create links between

⁸¹ See Denno, *supra* note 36, at 346 (quoting *People v. Easley*, 364 N.E.2d 1328, 1333 (1977)) (discussing the court’s task in morality-test jurisdictions).

⁸² It might be that allowing vulnerable individuals to have sex with one another is qualitatively different from allowing those same individuals to have sex with those to whom they are vulnerable. But disparate intellectual capacity does not, by itself, render the sex impermissible. If it did, one might wonder whether geniuses would ever be permitted to have sex with anyone of inferior intellect. See *infra* Part VI (proposing a contextual analysis which might address the possibility of coercion from differences in intellectual ability). For example, some mental health professionals insist that situational competency is the appropriate standard for sex among or with the intellectually disabled. As applied to persons with diminished intellectual ability, the situational competency standard respects the autonomy of the cognitively disabled because the individual “may be capable of consenting to some forms of sexual contact with a certain individual in a particular setting but not to other forms of sexual contact with the same, or other, individuals in other settings.” Denno, *supra* note 36, at 355–56 (citation omitted).

⁸³ BELLIOTTI, *supra* note 25, at 232.

⁸⁴ Cf. Levy, *supra* note 9, at 449 (noting the objection to sex with people who are permanently mentally handicapped, because “engaging in such sexual activity would tend to inculcate undesirable habits and dispositions in the agent”).

human individuals or groups, perpetuate genetic survival, or improve evolutionary fitness.”⁸⁵

A. *Cruel to Animals, Ergo Cruel to Humans*

Essentially, the first rationale attempts to use bestiality as a proxy for the propensity to commit violent sexual crimes against humans.⁸⁶ Therefore, proscribing bestiality is necessary because anyone who commits bestial acts “poses a definitive risk” of cruelty “not just to animals, but to fellow human beings.”⁸⁷ For our purposes, this reasoning is irrational; one of this Article’s factual premises is that, in some instances, sex between humans and animals can occur without cruelty or demonstrable harm to the animal.⁸⁸ Indeed, if we assume that the human seeks to emphasize “positive reactions from the animal, such as approaching the person, cuddling, rubbing against the person, not trying to move away, and displaying sexual excitement,”⁸⁹ then bestiality might encourage understanding sexual partners as emotive beings, not objects.⁹⁰

But even if we relax this Article’s factual predicates for a moment, the argument is still inconsistent and irrational. First, it depends upon a simultaneous “flattening of the human-animal distinction,” since it posits that “those likely to abuse animals are equally likely to abuse humans,” while defending a “strict distinction between the two,” since humans and animals should not have sex.⁹¹ Perhaps it is true that violence toward animals may lead to violence toward humans, but then compassion toward animals would seem to lead to compassion toward humans; this is a reason to avoid any violent or coercive use of animals at all, a view routinely described as “radical.”⁹² Second, al-

⁸⁵ Rebecca Cassidy, *Zoosex and Other Relationships with Animals*, in *TRANSGRESSIVE SEX: SUBVERSION AND CONTROL IN EROTIC ENCOUNTERS*, *supra* note 7, at 91, 95.

⁸⁶ *Id.* at 105.

⁸⁷ *Id.*

⁸⁸ See *supra* notes 34–37 and accompanying text (assuming no harm to the animal beyond sexual touching, animals may indicate consent and pleasure, and animals engage in sex for nonreproductive purposes).

⁸⁹ Beetz, *supra* note 67, at 63. This argument is hardly unassailable. “Despite the continuing affirmations of zoophiles, that their intimate relationships with animals are not characterized by violence and subordination, but rather by a mutual attitude of respect and trust,” in some instances, animals are “degraded as sexual objects,” akin to live sex toys. Bolliger & Goetschel, *supra* note 27, at 40. But even if this latter view were true more often than not, that does not efface the *possibility* that in some cases bestial relationships may give rise to compassionate tendencies in humans.

⁹⁰ Cf. SCHULHOFER, *supra* note 36, at 272–73 (proposing human conduct affirming the choice to participate should govern rape law rather than “unambiguous evidence of protests”); Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 666 (“We are all hurt by a world in which sex is reduced to a base, non-communicative physical act.”).

⁹¹ Cassidy, *supra* note 85, at 105.

⁹² Levy, *supra* note 9, at 448 (“[T]he opponent of bestiality could bite the bullet and accept that the use of animals in farming, for transport, and so on, is impermissible on the same grounds as bestiality. Some *radical* animal activists hold just this view.” (em-

though many studies document the existence of a link between animal abuse and interpersonal “human-on-human” violence, there is not conclusive evidence of a causal or chronological relationship between these phenomena.⁹³ Other studies demonstrate that “if a person experienced a history of sexual abuse,” that person is more likely to go on to sexually or physically abuse animals.⁹⁴ This seems to fit with the prevailing notion that many perpetrators of sexual violence were themselves once victims of abuse.⁹⁵ Because child abuse remains underreported,⁹⁶ treating anyone as a criminal who commits a bestial act not only leaves the root of the problem unaddressed, but also might thereby perpetuate the cycle of violence among humans and also humans and animals.⁹⁷ This risk is even greater where bestiality results in imprisonment because many perpetrators emerge from jail and prison even more violent than when they entered.⁹⁸ Accordingly, criminalizing bestiality is not an obviously rational method of reducing violence.

phasis added)). I do not endorse the view that forgoing the use of all animals is radical. Rather, I highlight this view to note the irrational inconsistency these arguments display. Consistently applying one’s moral convictions is hardly radical, but is instead quite laudable. *But see* Ralph Waldo Emerson, *Self-Reliance* 50, in *ESSAYS: FIRST SERIES* (Floating Press 2009) (1841) (“A foolish consistency is the hobgoblin of little minds.”).

⁹³ Beetz, *supra* note 67, at 51.

⁹⁴ *Id.* at 50 (“Animal cruelty is frequently linked to a history of interpersonal abuse; the experience of corporal punishment in adolescence, physical abuse, and sexual abuse significantly increases the likelihood of animal abuse occurring.” (citations omitted)).

⁹⁵ *See e.g.*, Arnon Bentovim & Bryn Williams, *Children and Adolescents: Victims Who Become Perpetrators*, 4 *ADVANCES IN PSYCHIATRIC TREATMENT* 101, 101 (1998) (“Given the [high] proportion of young abusers who are themselves victims of sexual abuse, understanding the continuities between sexual victimisation and sexually abusive behavior has been important.”).

⁹⁶ *See* Ruth Gilbert et al., *Burden and Consequences of Child Maltreatment in High-Income Countries*, 373 *THE LANCET* 68, 69 (Jan. 3, 2009) (describing studies of child abuse and the under-reporting that oftentimes ensues); *see also* Tiffany Sharples, *Study: Most Child Abuse Goes Unreported*, *TIME* (Dec. 2, 2008) (available at <http://www.time.com/time/health/article/0,8599,1863650,00.html> (accessed Nov. 23, 2014)) (“Children in highly developed countries suffer abuse and neglect much more often than is reported . . .”) [<http://perma.cc/E2JL-NBC7>].

⁹⁷ Indeed, exposure to violence and abuse may create inordinate psychological stress in the victims, predisposing them to commit acts of violence and abuse themselves. *See e.g.*, Jennifer Dillard, *Note: A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress through Legal Reform*, 15 *GEO. J. POVERTY L. & POL’Y* 391, 396 (2008) (“The countless stories of slaughterhouse employees inflicting pain on animals ‘just for fun’ indicate that the nature of the slaughterhouse work may have caused psychological damage to the employees because the employees’ actions certainly rise to the level of abnormal cruelty that would cause concern among the general population.”).

⁹⁸ *See e.g.*, Kenneth E. Hartman, *Supermax Prisons in the Consciousness of Prisoners*, 88 *PRISON J.* 169, 172 (2008) (“The supermax [prison] is the ultimate whetstone of human behavior, sharpening those who survive its rigors and deprivations to a keen edge. The only behavior it seems to actually deter is that which could result in the successful transition from prison to free society.”).

B. “Literally Antisocial”

A variation of the “undesirable habits” rationale is that bestiality is *literally* an antisocial act. Like incestuous relationships, bestiality does not “create links between human individuals or groups, perpetuate genetic survival, or improve evolutionary fitness.”⁹⁹ The latter two justifications can be immediately rejected. Not since the discredited eugenics movement has genetic survival or evolutionary fitness served as a rational basis for legislation.¹⁰⁰ At any rate, at least for those engaged solely in interspecies sex, there would be no demonstrable effect on genetic survival or evolutionary fitness since they would not produce offspring, effectively removing themselves from the gene pool. Further, it is not entirely clear whether the state has an articulable rational basis for proscribing incest between adults.¹⁰¹ Accordingly, the comparison to incest on those grounds is unsatisfying.

Suppose, however, that society’s interest in forging “links between human individuals or groups” is compelling.¹⁰² It is once again unclear how proscribing bestiality is actually tailored to that interest. Humans who engage in bestial acts are perhaps a prototypical example of an “anonymous and diffuse” minority, who are not readily identifiable and may not have close or frequent interactions with each other.¹⁰³ In the early days of the internet, zoophilic communities blossomed.¹⁰⁴ For the first time, these individuals found others who were like them, and thus formed communities whereas none previously existed.¹⁰⁵ But, in the face of continued hostility and increasing prosecutions, these internet

⁹⁹ Cassidy, *supra* note 85, at 95.

¹⁰⁰ *Compare* Buck v. Bell, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”), *with* Denno, *supra* note 36, at 337 (“The ‘deinstitutionalization’ and ‘normalization’ movements of the 1970s and 1980s . . . promoted the view that society’s general welfare could no longer justify infringing upon the rights of mentally retarded persons, including their fundamental right to procreate.” (footnotes omitted)).

¹⁰¹ See *e.g.*, *Lawrence*, 539 U.S. at 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”). *But see* Muth v. Frank, 412 F.3d 808, 819 (7th Cir. 2005) (Evans, J., concurring) (“Certain varieties of sexual conduct clearly remain outside the reach of *Lawrence*, things like prostitution, public sex, nonconsensual sex, sex involving children, and certainly incest, a condition universally subject to criminal prohibitions.”). Whether behavior being universally criminally prohibited serves as a rational basis for legislation under the U. S. Constitution is beyond this Article’s scope.

¹⁰² Cassidy, *supra* note 85, at 95.

¹⁰³ See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724, 729 (1985) (discussing how the discreteness-anonymity continuum “measures the ease with which people *outside* a group can identify group members”).

¹⁰⁴ See *e.g.*, Miletski, *supra* note 31, at 1, 18 (noting that in the 1990s, many zoophiles found other “zoos” on the internet, changing their lives by giving “them a new self-understanding, and connect[ing] them with like-minded friends.” (citation omitted)).

¹⁰⁵ *Id.*

communities did not lead to a visible public culture for zoophiles.¹⁰⁶ ‘Zoos,’ as they call themselves, have thus remained in the shadows, often resulting in impoverished personal interactions, except on the internet.¹⁰⁷

Moreover, if we were to concede that society has a legitimate interest in fostering links between individuals and groups, many currently unobjectionable activities might be viewed with skepticism. Would a state be able to force an elderly woman who lives only with her cats to associate with other humans?¹⁰⁸ Would those who choose a life of solitude potentially be subject to the reaches of the criminal law?¹⁰⁹ The implications here for such wide swaths of law are so startling that the rationale is difficult to take seriously.

IV. PUBLIC HEALTH

Somewhat distinct from the consent and means arguments are those primarily based upon public health concerns.¹¹⁰ While concerns for physical injury and allergic reaction in both the human and the

¹⁰⁶ See *e.g.*, Bolliger & Goetschel, *supra* note 27, at 25–26 (“[Z]oophilia largely remains a social taboo . . . [and] many people would conceal such experiences because of it being an illegal, punishable offense.”).

¹⁰⁷ See *e.g.*, *id.* at 26 (“Because the topic of zoophilia is persistently hushed-up . . . it is understandable that it is believed to be a rare phenomenon. But the . . . overwhelming amount of zoophilic material that can be found on the Internet, prove[s] that this is a false conclusion, and indicates the existence of an underground ‘scene.’” (citation omitted)).

¹⁰⁸ Compare Marie-José Enders-Slegers, *The Meaning of Companion Animals: Qualitative Analysis of the Life Histories of Elderly Cat and Dog Owners*, in COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIP BETWEEN PEOPLE AND PETS 237, 240 (Anthony L. Podberscek et al., eds. 2000) (noting how pets may emotionally benefit elderly individuals living alone), with RANDY O. FROST & GAIL STEKETEE, STUFF: COMPULSIVE HOARDING AND THE MEANINGS OF THINGS 119–20, 132–33 (2010) (discussing the potential link of animal hoarding to mental illness and the need for state intervention to protect humans and animals).

¹⁰⁹ That solitude would be a basis for criminal sanctions is a startling proposition. *Cf.* HENRY D. THOREAU, THE HEART OF THOREAU’S JOURNALS 173 (Odell Shepard ed., Dover Publ’n, Inc., 1961) (1927) (“You think that I am impoverishing myself withdrawing from men, but in my solitude I have woven for myself a silken web or *chrysalis*, and, nymph-like, shall ere long burst forth a more perfect creature, fitted for a higher society.”). And what of other activities, such as home-schooling, religious enclaves, or gated communities in which others limit their interactions to those most like them? Would those arrangements be disrupted? For a suggestion that the state may have an interest in preventing social isolation, see Ross Thomas, Note, *Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities*, 22 CORNELL J. L. & PUB. POL’Y 205 (2012) (arguing that social isolation undermines heterogeneous society, in turn sapping the civic bonds necessary for a deliberative democratic state).

¹¹⁰ Although some have called violence a public health crisis, this Article uses the term public health to refer to the spread of disease. *E.g.*, ALAMEDA CNTY. PUB. HEALTH DEP’T, VIOLENCE IN OAKLAND: A PUBLIC HEALTH CRISIS (2006) (available at <http://www.acphd.org/media/53622/violoakland.pdf> (accessed Nov. 23, 2014)) [<http://perma.cc/2QBM-4ECV>].

animal are always present,¹¹¹ an additional basis for these arguments seems to be the spread of infectious disease. Infections that can be transmitted from animals to humans are called zoonoses.¹¹² While some zoonoses may be transferred through casual contact with animals, for others, the risk of infection may be greater in activities that expose humans to animals' bodily fluids.¹¹³ Because some infections in animals may have unknown consequences in humans, the argument goes, bestiality can and should be criminalized on the basis of public health.¹¹⁴ This argument is irrational on at least three bases. First, sexual activity between humans and animals is not a particularly efficient means of disease transmission to the larger human population.¹¹⁵ Second, public health in the U. S. is in an execrable state,¹¹⁶ largely due to preventable diseases that are increasingly traced to the use of animal products, and yet we do little about it.¹¹⁷ Third, the rationale, if accepted, would be inconsistent with usual approaches. Although knowingly exposing another to a sexually transmitted disease (STD) may be criminally actionable,¹¹⁸ the risk of disease transmis-

¹¹¹ See e.g., Frank R. Ascione, *Bestiality: Petting, "Humane Rape," Sexual Assault, and the Enigma of Sexual Interactions Between Humans and Non-Human Animals*, in *BESTIALITY AND ZOOPHILIA: SEXUAL RELATIONS WITH ANIMALS* 120, 126 (Andrea M. Beetz & Anthony L. Podberscek eds., 2005) (citing reports of injuries to humans including one study that "describe[d] ten cases involving two men and eight boys seen in hospital clinics for injuries to their genitals that were the result of animal bites (eight by dogs and one each by a horse and a donkey)").

¹¹² Rosenman, *supra* note 30 (describing various health considerations relating to zoonoses).

¹¹³ See *id.* (noting the modes of acquisition for several zoonoses and demonstrating that rabies may be transmitted through bodily fluids).

¹¹⁴ See BELLIOTTI, *supra* note 25, at 232 (noting that bestiality "can lead to rampant spread of venereal diseases"); see also L.Swa_, *Petition to Denmark: Bestiality is Very Dangerous to Public Health Due to Zoonotic Diseases*, CHANGE.ORG, <http://www.change.org/petitions/petition-to-denmark-bestiality-is-very-dangerous-to-public-health-due-to-zoonotic-diseases> (Oct. 7, 2011) (accessed Dec. 22, 2014) (demonstrating public health panic can be used to frame calls for bestiality bans, without necessarily requiring scientific backing) [<http://perma.cc/H7GG-C5F4>].

¹¹⁵ See *infra* note 124 and accompanying text (discussing the "exceptional" nature of human-to-human sexual zoonotic disease transmission).

¹¹⁶ This is true both in terms of health and healthcare. See Grace Rubenstein, *New Health Rankings: Of 17 Nations, U.S. Is Dead Last*, THE ATLANTIC, <http://www.theatlantic.com/health/archive/2013/01/new-health-rankings-of-17-nations-us-is-dead-last/267045> (Jan. 10, 2013) (accessed Nov. 23, 2014) (discussing a study revealing that Americans are, in general, less healthy than citizens of sixteen other industrialized nations) [<http://perma.cc/QAF2-HNHH>]; Dan Munro, *U.S. Healthcare Ranked Dead Last Compared to 10 Other Countries*, FORBES, <http://www.forbes.com/sites/danmunro/2014/06/16/u-s-healthcare-ranked-dead-last-compared-to-10-other-countries> (June 16, 2014) (accessed Nov. 23, 2014) (Despite the U.S. having "the most expensive healthcare system in the world," the U.S. ranks quite poorly on many indicators of national health.) [<http://perma.cc/52UD-E5FB>].

¹¹⁷ See *infra* notes 125–26 and accompanying text (discussing the links from consuming animal products and suffering from obesity, heart disease, and diabetes).

¹¹⁸ See e.g., MO. REV. STAT. § 191.677(1) (2013) ("It shall be unlawful for any individual knowingly infected with HIV to . . . [a]ct in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to

sion, without more, has never been accepted as a basis for restricting sexual activity.¹¹⁹

Human contact with animals has always involved the risk of contracting an infectious disease.¹²⁰ Indeed, “more than half of the infectious diseases of humans are zoonotic in origin.”¹²¹ And even where diseases are not yet known to be zoonotic, infection in animals may be a warning sign of infectious disease risk to humans.¹²² The majority of zoonotic infections in humans, however, come from direct contact with the bodily fluids of diseased animals.¹²³ In other words, the risk of infectious disease is present irrespective of the sexual nature of the contact between the human and animal. Further, it is unclear whether human-to-human transmission of zoonotic infections resulting from bestiality is a cause for concern, as documented cases are considered exceptional.¹²⁴ Because sexual activity does not seem to be a particularly prevalent mode of zoonotic disease transmission, justifying bestiality prohibitions on this rationale is unsatisfying.

One objection to this reasoning might be that focusing on infectious zoonotic disease unduly narrows concern for public health. Broadening the scope beyond the sexual transmission of zoonotic disease, however, only highlights the irrational inconsistency present in the public health rationale. In the U.S., obesity, heart disease, diabetes, and cancer are endemic.¹²⁵ Increasingly, studies show that the spike in these disease rates may be attributable to the consumption of animal products.¹²⁶ Yet, in the face of this evidence, some Americans still view a whole-food, plant-based diet as radical.¹²⁷ Surely then, a legislative prohibition against the consumption of animal products on a public health rationale would not only seem radical, but perhaps in-

HIV . . . [t]hrough contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal sexual intercourse[.]”.

¹¹⁹ Cf. Ayres & Baker, *supra* note 90, at 601–02 (proposing a new crime for “reckless sexual conduct” involving a first-time sexual encounter without condom protection).

¹²⁰ PETER M. RABINOWITZ & LISA A. CONTI, HUMAN–ANIMAL MEDICINE: CLINICAL APPROACHES TO ZOONOSES, TOXICANTS, AND OTHER RISKS 105 (2010).

¹²¹ *Id.*

¹²² *Id.* at 106.

¹²³ See *id.* at 108–09 (charting common infections and noting “direct contact” as a common zoonotic transmission route).

¹²⁴ See *e.g.*, *id.* at 126 (“In humans, person-to-person infection [of brucellosis] has been reported through breastfeeding, childbirth, bone marrow transplants, sexual contact, and transfusions, but *these modes of transmission are considered exceptional.*” (emphasis added)).

¹²⁵ See *e.g.*, T. COLIN CAMPBELL & THOMAS M. CAMPBELL II, THE CHINA STUDY: THE MOST COMPREHENSIVE STUDY OF NUTRITION EVER CONDUCTED AND THE STARTLING IMPLICATIONS FOR DIET, WEIGHT LOSS AND LONG-TERM HEALTH 13–15 (2006) (charting the startling increase in rates of obesity, diabetes, and heart disease among all age groups in the U.S.).

¹²⁶ See *e.g.*, *id.* at 21 (encouraging the consumption of a plant-based diet to guard against the “largely unappreciated health dangers of consuming animal-based foods, including all types of meat, dairy, and eggs”).

¹²⁷ See *supra* note 92 (addressing how some consider foregoing all uses of animals as “radical”).

tolerable. If that is true, then it is unclear, once again, why a different rule should obtain simply because the activity involved is sexual. Indeed, although the law occasionally *prescribes* conduct for public health reasons,¹²⁸ proscribing sexual activity on the basis of public health seems disquieting. For one, as stated earlier, the opportunity for sexual pleasure is a dignitary interest of exceptional importance.¹²⁹ If the public health rationale were accepted as legitimate, it would provide a basis for regulating *any* sexual activity that might be thought to present the risk of disease. Persons with sexually transmitted infections, for example, could suddenly find themselves subject to the criminal law.¹³⁰ Indeed, specific sexual acts could be proscribed on the basis of public health.¹³¹ One could even imagine all unprotected sex being criminalized unless the parties were married or in a sufficiently committed relationship. These results show that using public health as a rationale for “criminalizing any additional dimension of sexual activity is abhorrent,”¹³² because the argument admits of no apparent limiting principle. Accordingly, the public health rationale is also irrationally inconsistent and cannot justify criminal prohibitions of bestiality.

¹²⁸ See e.g., 42 U.S.C. § 264 (2012) (authorizing the quarantine of individuals in order to prevent the spread of communicable diseases); Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 9, 2003) (listing cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, and SARS as “quarantinable communicable diseases”); see also *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (establishing the constitutionality of state compulsory vaccination laws when they are “necessary for the public health or the public safety”).

¹²⁹ See *supra* note 80 and accompanying text (noting the right to dignity encompasses a right to seek sexual satisfaction).

¹³⁰ See e.g., MO. ANN. STAT. § 191.677(1) (criminalizing knowingly exposing another person to an STD without his or her consent). Supporting this rationale, however, might lead to criminal sanctions against any person with a sexually transmitted infection who transmits it to another person, whether willing or unwilling, to a knowing or unknowing partner, even if prophylaxes were used. Because this might result in legally enforced celibacy for people with sexually transmitted disease and their partners, such a law would, at the very least, raise some constitutional concerns. See *Lawrence*, 539 U.S. at 567 (2003) (“[A]dults may choose to enter . . . [certain] relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”).

¹³¹ For example, perhaps *unprotected* anal sex might be criminalized on this basis. See e.g., Fengyi Jin et al., *Per-Contact Probability of HIV Transmission in Homosexual Men in Sydney in the Era of Highly Active Antiretroviral Therapy*, 24 AIDS 907, 908 (Mar. 2010) (“It has long been demonstrated that receptive unprotected anal intercourse (UAI) with an HIV-positive man is the major behavioral risk factor for HIV transmission among gay and other homosexual men[.]”). Although after *Lawrence*, 539 U.S. at 567, states may not criminalize consensual sodomy between adults, perhaps criminalizing *unprotected* sodomy would raise a different, though equally difficult, constitutional question. Cf. Ayres & Baker, *supra* note 90, at 666 (“[I]ncreasing condom use . . . would substantially reduce the force of STD epidemics . . . [and a] proposed criminal statute is an efficacious method of increasing condom use.”).

¹³² Ayres & Baker, *supra* note 90, at 666 (suggesting that many readers would draw that conclusion, but arguing nonetheless that such criminalization might be acceptable).

V. WHAT IF ZOOPHILIA IS A SEXUAL ORIENTATION?

One central reason the justifications for prohibiting bestiality seem irrationally inconsistent is that they attempt to cabin their rationale in a way that would not have an impact on a large majority of the population. In other words, there is an attempt to proscribe certain ‘deviant’ activities, while excluding from the proscription certain ‘innocuous’ acts that raise similar concerns. But if certain conduct is closely correlated with a particular class of persons, this approach is deeply troubling because “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”¹³³ Increasingly, studies show that a small fraction of humans may have a zoophilic sexual orientation.¹³⁴ If we proceed on this Article’s factual premises,¹³⁵ it becomes necessary to squarely address whether there is a principled basis for treating zoophiles differently than homosexuals.

A. Zoophiles Are Mentally Ill, Homosexuals Are Not

One argument is that zoophiles, unlike homosexuals, are mentally ill. Indeed, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) treats zoophilia as a “paraphilia not otherwise specified.”¹³⁶

¹³³ *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (quoted in *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring)).

¹³⁴ See generally Miletski, *supra* note 31, at 95 (suggesting that zoophilia may be a demonstrable sexual orientation); Bering, *supra* note 5 (discussing the controversy and expansion of studies of zoophilia as a possible sexual orientation).

¹³⁵ See *supra* notes 34–37 and accompanying text (assuming no harm to the animal beyond sexual touching, animals may indicate consent and pleasure, and animals engage in sex for nonreproductive purposes). This theory would not require exemptions from *generally applicable* criminal laws that may have an incidental burden on putative future sexual orientations. Thus, for example, even if it could be established to some degree of certainty that some individuals have a ‘somasochistic sexual orientation,’ stabbing one’s partner three hundred times would probably still be criminal assault. See NAT’L COAL. FOR SEXUAL FREEDOM, *supra* note 43 (“BDSM activity, even where clearly consensual, can be and frequently is prosecuted under state criminal laws dealing with assault, aggravated assault, sexual assault or sexual abuse.”); see e.g., Affidavit in Support of Search Warrant filed by Michael Walisiewicz, Detective, Milwaukee Police Department 2 (Nov. 7, 2011) (available at <http://www.thesmokinggun.com/file/satanic-assault> (accessed Nov. 23, 2014)) (describing investigation into a 2011 incident in Milwaukee, Wisconsin, where a victim was restrained and suffered over 300 “puncture wounds . . . lacerations and slash wounds” at the hands of a defendant who characterized the incident as beginning with sex involving consensual cutting which “quickly got out of hand.”) [<http://perma.cc/WU9D-56E3>].

¹³⁶ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 523 (4th ed. 1994) [hereinafter DSM-IV] (“Paraphilia Not Otherwise Specified, includes other Paraphilias that are less frequently encountered [than exhibitionism, fetishism, frotteurism, pedophilia, sexual sadism, transvestic fetishism, and voyeurism]”); Martin P. Kafka, *The DSM Diagnostic Criteria for Paraphilia Not Otherwise Specified*, 39 ARCHIVES OF SEXUAL BEHAVIOR 373, 375 (2010) (discussing zoophilia’s DSM-IV designation as “Paraphilia NOS”). See also DSM-IV at 522–23 (Paraphilias are “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving . . . nonhuman objects, . . . the suffering or humiliation of oneself or one’s part-

When a mental illness leads to overt acts, the argument goes, laws prohibiting the conduct are justifiable.¹³⁷ This argument is irrational for at least two reasons. First, it does nothing to counter the proposition that “making the conduct that defines the class criminal,” is the most palpable form of discrimination.¹³⁸ Indeed, if a particular act can be explained by mental illness, this might ordinarily be seen as a reason for giving the person psychiatric treatment, not treating him as a criminal, thereby further stigmatizing the individual.¹³⁹ Second, homosexuality was considered a mental illness until 1974.¹⁴⁰ Given that some psychiatrists *still* believe homosexuality is a mental illness,¹⁴¹ it is not beyond the realm of possibility to suggest that perhaps it could be included again in the DSM.¹⁴² Accordingly, it would be irrationally

ner, or . . . children or other nonconsenting persons, that occur over a period of at least 6 months.”). Although the DSM-V superseded the DSM-IV on May 18, 2013, it has been widely criticized. I therefore continue to cite the DSM-IV. *See e.g.*, COALITION FOR DSM-5 REFORM, *A Brief History of the Division 32 Effort to Reform DSM-5*, <http://dsm5-reform.com/about> (accessed Jan. 16, 2015) (outlining critique of DSM-V from the British Psychological Society and twelve divisions within the American Psychological Association) [<http://perma.cc/2292-YLD4>].

¹³⁷ *See e.g.*, *U. S. v. Irely*, 612 F.3d 1160, 1203, 1225 (11th Cir. 2010) (vacating the criminal sentence of a pedophile who never sought treatment despite assaulting over fifty girls, including some 4-year-olds, as insufficiently short because the district court unreasonably viewed the man as acting with “impaired volition” due to his mental illness and because of “the devastating and permanent harm that this type of crime inflicts on its young victims”).

¹³⁸ *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (quoted in *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring)).

¹³⁹ Whether criminal prosecutions and punishments are appropriate for those who have diagnosed mental illnesses that may cast doubt upon their actual culpability is beyond the scope of this Article. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 351–53 (1997) (addressing the constitutionality of indefinite *civil* commitment of violent sex offenders in the context of conviction for sexual molestation of children). It should be noted, however, that “[f]or some individuals, paraphiliac fantasies or stimuli are obligatory for erotic arousal and are always included in sexual activity.” DSM-IV, *supra* note 136, at 523. Criminalizing bestial acts, then, would work not only to potentially deprive a non-human animal of a mutually pleasurable experience, but would effectively mean that the human being suffering from the illness would never have a sexually satisfying non-masturbatory experience.

¹⁴⁰ *See* Andreas De Block & Pieter R. Adrians, *Pathologizing Sexual Deviance: A History*, 50 J. SEX RES. 276, 285 (2013) (explaining that homosexuality was not removed from the DSM until 1974).

¹⁴¹ *See e.g.*, Gabriel Arana, *My So-Called Ex-Gay Life: A Deep Look at the Fringe Movement that Just Lost Its Only Shred of Scientific Support*, THE AMERICAN PROSPECT, <http://prospect.org/article/my-so-called-ex-gay-life> (Apr. 11, 2012) (accessed Nov. 23, 2014) (describing the work of the National Association for Research and Therapy of Homosexuality (NARTH), “the country’s largest organization for practitioners of ex-gay therapy”) [<http://perma.cc/YF77-L83J>].

¹⁴² My research has not identified any disorder that was *actually* removed from the DSM, but later put back in. Part of what makes a paraphilia a “mental disorder” is whether “[t]he behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.” DSM-IV, *supra* note 136, at 523. Accordingly, societal attitudes toward the particular sexual proclivity necessarily influence the diagnostic criterion. Interview with Lisa Willis, Former Dir., Univ. Counseling Ctr., Univ. of Rochester (Apr. 21, 2012). Although society is

inconsistent to maintain that whether particular conduct is properly subject to legal proscriptions depends upon the vagaries of the American Psychiatric Association.

B. Well, If It Is a Sexual Orientation, Then It Is More Like Pedophilia Than Homosexuality

A further objection may be that even if zoophilia is a sexual orientation, then it is more like pedophilia than homosexuality.¹⁴³ Surely then, the argument would go, statutory rape laws, which make it illegal to have sex with children, discriminate against pedophiles as a class.¹⁴⁴ If those are fine, despite their palpable discrimination, then laws against bestiality should be acceptable too. Although initially difficult to see, there is an irrational inconsistency in this argument as well. First, statutory rape laws may themselves “reflect contemporary, economic, political, social, and cultural anxieties,” and thus repress even those they seek to protect.¹⁴⁵ Second, statutory rape law does not

increasingly tolerant of homosexuals, making it less likely that homosexuals experience clinically significant distress or impairment, this may not always be the case with other sexual proclivities. *See Lawrence*, 539 U.S. at 568–71 (tracing vacillating historical attitudes toward homosexual conduct); *see generally* BEIRNE, *supra* note 8, at 97–112 (2009) (exploring shifting historical and cultural attitudes regarding sex between humans and animals).

¹⁴³ *See e.g.*, BEIRNE, *supra* note 8, at 115 (“Indeed, if we cannot know whether animals consent to our sexual overtures, then when we tolerate sexual relations between humans and animals, we are as blameworthy as when we fail to condemn adults who have sexual relations with infants or with children . . . who, for whatever reason, are unable to refuse participation.”); Bolliger & Goetschel, *supra* note 27, at 40–42 (noting that “the comparison to homosexuality . . . is not appropriate,” and that laws regulating sexual acts with animals “could follow the proscriptions of human sexual acts with children.” (citations omitted)).

¹⁴⁴ It is perhaps useful here to clarify precisely what is meant by the term pedophile: one with sexual interest in prepubescent children. The DSM-IV defines it to involve “sexual activity with a *prepubescent* child (generally age 13 years or younger).” DSM-IV, *supra* note 136, at 527 (emphasis added). “Because many late adolescents have physical characteristics that are largely indistinguishable from those of adults, some level of sexual attraction to late *adolescents* is common among adults of all sexual orientations. . . . Indeed, although the term ‘ephebophilia,’ denotes a sexual preference for adolescents around fifteen to nineteen years of age, the DSM IV does not list the term, likely because ‘[f]ew would want to label erotic interest in late- or even mid-adolescents as a psychopathology.’” Antonio Haynes, Note, *The Age of Consent: When is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 CORNELL L. REV. 369, 391 n.177 (2012) (citations omitted) (emphasis added).

¹⁴⁵ CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 138 (2004). Statutory rape is mostly a colloquial term, as opposed to a strictly legal one. The title of the offense varies by state and includes such names as “rape in the *n*th degree . . . , sexual assault in the *n*th degree . . . , sexual battery in the *n*th degree . . . , statutory sexual seduction, sexual abuse of a minor, child sexual abuse, child molestation, child rape, and indecency with a child.” *Id.* at 164. Whatever the offense is called, generally “if the victim is under that certain age and not married to the perpetrator, he or she is presumed incapable of giving informed and valid consent to sexual activity; therefore, consensuality is not permitted as a defense to the crime.” *Id.* at 9 (citation omitted). Notably, the age of consent in various states has been as low as 7-

automatically render sex with ‘children’ illegal, but instead codifies a legal presumption of the age at which a minor not only is likely to have sexual desires, but can also simultaneously appreciate the “potential consequences of their sexual activity.”¹⁴⁶ As a result, statutory rape law itself is quite nuanced and rarely results in all-encompassing criminal prohibitions.¹⁴⁷ Pedophiles—as the term is clinically understood—generally prefer youths who have not yet reached puberty, meaning the victims are not yet capable of hormonal sexual desire.¹⁴⁸ If we continue to assume that the hypothetical animal this Article invokes has communicated her sexual desire to the human, this assumption presupposes that the animal is *capable* of sexual desire. By definition, then, the victims of pedophilia are distinguishable from the nonhuman animal this Article is premised upon. Accordingly, zoophilia may be distinguishable from pedophilia, and attempting to link the two is yet another example of irrational inconsistency.

VI. COERCION AND CONTEXT?

While the most oft-stated justifications for prohibiting bestiality are plagued by irrational inconsistencies, a different theory may actually provide a basis for regulating bestiality and may also bring coherence to the entire realm of sexuality legislation. What may underlie society’s desire to prohibit bestiality is the notion that there is something deeply troubling with sexual relationships of unequal power. These relationships are infused with the possibility of coercion.¹⁴⁹

That is not to say, however, that unequal power alone can be the definitive criterion. Interactions between adults and children, patients and their caretakers, the intellectually disabled and persons of superior intelligence, generally have unequal power and thus are potentially coercive.¹⁵⁰ But, so are “most adult heterosexual [relationships]

years-old and as high as 21-years-old. *See id.* at 10, 23–24 tbl.1.1 (charting ages of consent from 1885 to 1999 and age spans in the fifty states in 1999).

¹⁴⁶ *See* Haynes, *supra* note 144, at 374 (“The age of consent represents the solemn legislative judgment that minors are mature enough to appreciate the potential consequences of their sexual activity . . .”).

¹⁴⁷ *See e.g.*, CONN. GEN. STAT. § 53a-71 (2012) (“A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person[.]”).

¹⁴⁸ This argument does not rule out the possibility that children who have not yet reached puberty may derive pleasure from sexual contact. Instead, puberty itself serves as the beginning of one’s sex drive. *See* Stephen B. Levine, *The Nature of Sexual Desire: A Clinician’s Perspective*, 32 ARCHIVES SEXUAL BEHAV. 279, 280 (2003) (noting that sexual drive has a necessary “biological component [that] has an anatomy and neuroendocrine physiology”). Accordingly, whatever pleasure prepubescent children may derive from sexual contact is necessarily unrelated to their sex drive.

¹⁴⁹ *See e.g.*, BEIRNE, *supra* note 8, at 114 (“[S]exual assault against women differs from normal consensual sex because the former is sex obtained by one or some combination of physical, economic, psychological, or emotional coercion . . .”).

¹⁵⁰ *See* Catharine MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 54 (1979) (explaining that in settings of imbalanced power, coer-

and even gay and lesbian intercourse as well.”¹⁵¹ Coercion, then, could be assessed in context, according to the situation. Under this totality-of-the-circumstances approach,¹⁵² a coercion-based theory would look at a wide range of factors, including evolving knowledge about nonhuman’s capabilities as well as the context of the sexual conduct.¹⁵³ While this approach would not create a bright-line rule, crafting such rules—including ‘no sex with animals’—inevitably result in arbitrary exceptions.¹⁵⁴

Moreover, a contextual approach with coercion as a principal feature would actually bring a fair amount of coherence to laws that regulate sexual conduct. For example, laws regulating sexual activity between nursing home employees and residents might be reexamined. While some of those relationships are not always coercive and can be mutually enriching for both parties involved,¹⁵⁵ they are sometimes troubling. On the other hand, sex that is now always legal but seemingly problematic might well become proscribable. Imagine a destitute mother who is unable to pay her rent. If her landlord were to say, “I will let you miss this month’s rent, so long as you have sex with me tonight,” many would think that even if the mother agreed to the landlord’s demands, something exploitative had occurred. While most modern rape statutes would not reach a situation like this,¹⁵⁶ a contextual approach adequately accounting for coercion might. Not only would this approach permit greater latitude for sentient beings to seek sexual gratification, it would also serve as a basis for regulating abusive relationships in a manner that current legislation may not.¹⁵⁷

cion can be “unwanted sex under the gun of a job or educational benefit,” but that “between the clear coercion and the clear mutuality . . . exists a murky area where power and caring converge”); *see also* CHRISTINE HOFF KRAEMER, *EROS AND TOUCH FROM A PAGAN PERSPECTIVE: DIVIDED FOR LOVE’S SAKE* 36 (2014) (noting that in relationships with an imbalanced power dynamic there is a distinction between exploitation, “where vulnerability is taken advantage of, and coercion, where the use of force removes the possibility of consent”).

¹⁵¹ BEIRNE, *supra* note 8, at 114.

¹⁵² *See* Denno, *supra* note 36, at 378 (advocating a contextual approach in which various factors would be analyzed to determine the permissibility of sex).

¹⁵³ *See id.* at 425–34 (describing factors to consider in determining a mentally disabled victim’s capacity to consent).

¹⁵⁴ *Cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1067–68 (Stevens, J., dissenting) (noting that bright-line rules are often “arbitrary and unsound . . . and theoretically unjustified” and that most categorical rules are “only ‘categorical’ for a page or two in the U.S. Reports,” since once they are stated, exceptions are “quickly establishe[d]”).

¹⁵⁵ *See* Beetz, *supra* note 67, at 61 (“[S]ome animals . . . seem to enjoy the attention provided by the sexual interaction with a human or initiate the sexual interaction themselves.” (citations omitted)).

¹⁵⁶ *See e.g.*, Maria Testa & Kurt H. Derman, *The Differential Correlates of Sexual Coercion and Rape*, 14 J. INTERPERSONAL VIOLENCE 548, 550 (1999) (“[S]exual coercion involves verbal or emotional pressure whereas rape and attempted rape typically involve force . . .”).

¹⁵⁷ Fully sketching out the contours of such an approach is beyond the scope of this Article. It goes without saying, however, that where criminal penalties might attach on

VII. CONCLUSION

This Article has assessed whether typical justifications for prohibiting bestiality withstand critical scrutiny. Premised on theories of consent, impermissible use, public health, or misperceptions regarding sexual orientation, the arguments all display an internal inconsistency that renders them unavailing. The rationales, if taken seriously, would render many ‘innocuous’ uses impermissible, while irrationally attempting to maintain that sex is somehow different.

Yet, intuitively at least, sex *is* different. If instead coercion were the criterion for justifying the regulation of *all* sex, the law might be rendered more internally coherent and bestiality proscribed, without also calling into question a wide range of activity that is not yet thought to be nor has ever been considered universally condemnable.

Undoubtedly, the desire to criminalize Abel and Eloise’s illicit liaisons might not come from irrational hatred or fear of deviance, but may instead come from an earnest desire to protect the animal. As a sentient being, the animal is entitled to our concern, and we should seek to avoid her needless suffering. A respect for the animal, however, might also require that we give equal concern to her ability to seek pleasure. While there is no dignity in making any sentient being suffer, denying the existence of capacities the being plainly has is even less dignified.¹⁵⁸ Sentience is surely a helpful concept, but not if it is irrationally limited to prohibiting suffering and does not encompass protecting the possibility of pleasure.

the basis of the contextual approach, such laws would need to comport with due process and would need to satisfy the traditional void-for-vagueness analysis.

¹⁵⁸ See R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1398–99 (1995) (discussing the idea of dignity generally, as well as the conflicts between consent and dignity as legal values).