

## **For the Love of Dog: On the Legal Prohibition of Zoophilia in Canada and the United States**

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### **Abstract**

Laws prohibiting zoophilia, human sexual interaction with non-human animals, are present in many countries including Canada and the United States of America.. Current antizooophilia laws from these two countries are examined to determine if they can be justified. Comparisons are drawn between criminal cases in which convictions for zoophilia have been obtained, and commonly-accepted animal management practices. By showing that some of the practices approved of by organizations such as the the American Kennel Club are similar to, or more invasive than, acts for which criminal convictions for zoophilia have been secured, the author seeks to establish that laws that condemn zoophilia while permitting these practices are logically incoherent and are therefore inherently unjust. Having established that antizooophilia laws in both Canada and the US infringe upon fundamental individual freedoms guaranteed in each country's respective constitution, the author explores whether such infringements are necessary to promote peace, order and good governance in a free and democratic society. Arguments favouring the prohibition of zoophilia, ranging from the medical to the religious, are examined, with particular attention being paid to the "gateway offence" hypothesis which suggests that zoophilia leads to more serious criminal offences against humans. The paper concludes with an analysis of the legal position of zoophilia within Sweden, a country with a strong animal welfare tradition but in which human sexual interaction with animals is legal. This provides a counterpoint to the prohibitionist stance taken in Canada and the US, and demonstrates that animal welfare, the personal liberty of zoophiles and the need of the state to promote order and social harmony need not necessarily be opposed to one another.

**Key Words:** Zoophilia, bestiality, animals, law, morality, rights, equality, due process, liberty, harm.

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### **1. Justice and the Right to Due Process**

The practice of zoophilia<sup>1</sup>, or sexual interactions between humans and animals for the physical and emotional gratification of the human

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involved, has been part of the human relationship with the animals for as long as humans have kept animals domestically. According to Miletski, "It is apparent and important to acknowledge that man has engaged in bestiality since the dawn of civilization, in almost every culture and place in the world..."<sup>2</sup> Despite this, the practise is in many countries and cultures, including Canada and the United States of America, proscribed by both law and societal morality.

The Constitutions of both Canada and the US guarantee, among the the legal rights of the citizen, the right to due process. The 5th and 14th Amendments to the US Constitution prevent the federal and state governments, respectively, from "depriv[ing] any person of life, liberty, or property, without due process of law"<sup>3</sup>; a similar guarantee appears in article seven of the *Canadian Charter of Rights and Freedoms*, which states that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>4</sup> According to the American Law Library, the right to due process entails

a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty or property. Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary or capricious .<sup>5</sup>

Laws prohibiting zoophilia are in fact all three. They are unreasonable inasmuch as they prohibit human sexual interaction with animals purposed on the sexual pleasure of the human participant, but allow the sexual exploitation of animals for financial gain; they are arbitrary inasmuch as the vague common-law wording that most North American statutes employ, such as "bestiality," "carnal knowledge," and "unnatural act" fail to adequately define the essential elements of the offences they proscribe, and are thus open to differing interpretations by different judges; and they are capricious inasmuch as the latitude these laws allow for interpretation can lead to two persons accused of the same offence, conducted in a substantively similar manner, to receive different answers from the court regarding their guilt or innocence.

### 2. **Zoophilia and the Right to Procedural Due Process**

Devlin argued that it was not the purpose of the criminal law to guide the actions of the members of society, but rather to set outer limits on what actions are permitted, writing, "The criminal law is not a statement of

how people ought to behave; it is a statement of what will happen to them if they misbehave; good citizens are not expected to come within reach of it or set their sites by it, and every enactment should be framed accordingly."<sup>6</sup> However, the Supreme Court of Canada, in the case of *R. v. Canadian Pacific Ltd.* (1995)<sup>7</sup>, states: "The principles of fundamental justice require that laws provide the basis for coherent judicial interpretation and sufficiently delineate an area of risk," and that "a law is unconstitutionally vague if it is so lacking in precision it does not give sufficient guidance for legal debate."

The Canadian statute under which zoophilia is prohibited, together with many of its American counterparts, suffer from exactly this sort of unconstitutional vagueness, employing indefinite common-law terminology such as "bestiality" (Canada); "unnatural carnal copulation" (Louisiana), "abominable and detestable crime against nature" (Massachusetts, Michigan, Mississippi, Oklahoma, Rhode Island); "abominable crime of buggery with a beast" (South Carolina); and "carnal knowledge" with an animal (Minnesota, Virginia)<sup>8</sup>. Inadequacy in definition is often compounded by a lack of adequate precedent case law from which judges may deduce these necessary elements. This invites *ad hoc* application of the law on a case by case basis.

The prejudicial effect of such imprecision in law on the rights of the individual can be seen in two Canadian cases involving charges of bestiality. In *R. v. Ruvinsky* (1997)<sup>9</sup>, Justice Omatsu in trying to determine if "'bestiality' include[s] digital anal penetration by a human of a dog and the licking of a human male's genitals by a dog" writes:

"Bestiality" is not defined in the Criminal Code. According to Crankshaw's Criminal Code, "There are no Canadian decisions which define 'buggery', or 'bestiality' or even cite the English definitions." The Canadian case law for this offence is limited. The only published decision for this offence that has been brought to my attention is the decision of Cashman, J. (BC County Court) in *R. v. Triller* 55 C.C.C. (2d) 411 (1980)...

Justice Omatsu then notes that when a law is inadequately defined and lacks sufficiently robust jurisprudence, those adjudicating such cases must refer to a wide variety of extralegal references to determine what constitutes the essential elements of the offence. The breadth of the research done by any particular judge, and the weight which he grants each of the articles, definitions and precedents in adjudicating any given case, must necessarily colour his judgement. In *Ruvinsky*, Justice Omatsu decided that the acts committed by the accused did *not* in fact constitute acts of bestiality under Canadian law. However, in the case of *R. v. Black* (2007)<sup>10</sup> the accused was

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charged with, and plead guilty to, multiple crimes including one count of bestiality with a dog in which "the dog licked the accused's vagina and she attempted to stimulate the dog's penis," for she was sentenced to one year of prison concurrent with the sentences handed down for the other offences. In these two cases, in which the elements of the putative offences are substantially similar so far as they pertain to the offence of bestiality, i.e., oral-genital contact between a dog and a human and digital stimulation/penetration of a dog by a human for sexual purposes, one person was set free while the other was punished. Such contrary decisions violate the rights of accused persons to procedural due process and equality before the law and bring the whole administration of law into disrepute.<sup>11</sup>

Such miscarriages of justice can be further exacerbated by a judge's refusal to recognize that there are *any* essential elements to an offence, instead leaving it to the jurors in any particular case to decide for themselves what constitutes an offence. In *Dawes v. Texas* (2009)<sup>12</sup>, the appellant, appealing his convictions for possession of child pornography including images of bestiality, held in part that the trial judge had erred in his charge to the jury inasmuch as his charge did not contain a definition of "bestiality." Justice Mazzant, delivering the verdict of the Appeals Court, held that:

If a phrase, term or word is statutorily defined, the trial court must submit the statutory definition to the jury... Words that are not statutorily defined are to be given their common, ordinary, or usual meaning.  
...As a general rule, no specific instruction is required for such undefined words in the jury charge, and jurors may give them any meaning that is acceptable in "common parlance."...

However, as the cases of *Ruvinsky* and *Black* demonstrate even judges, whose profession is the technical study of law, can arrive at opposing decisions as to what legally constitutes an offence of bestiality. Allowing each individual juror the right to make such determinations is to invite legal mayhem in the adjudication of such cases and to destroy the right of those who stand accused to procedural due process.

### **3. Zoophilia and the Right to Substantive Due Process**

Laws prohibiting zoophilia also violate the right to *substantive* due process inasmuch as the laws themselves or the courts that apply them go beyond the facts in any particular case and pass judgement on the personal and private motives of the individual. "Passing judgement on the motives of the individual" in this context does not mean determining whether the accused intended to commit the act, that is, whether the person at the time of

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the putative offence understood the consequences of the act in question and was thus able to form the necessary mental intent, or *men rea*, to commit the act. This is a fundamentally important part of the adjudication process. Injustice arises when the law, or the courts, go beyond this basic requirement and give legal weight to the accused's motivations for committing an act in the determination of whether an act is an offence. Consider the crime of murder: A person accused of murder, and found at trial to have, by whatever means, deliberately and directly caused the death of another person, is guilty of murder. A medical practitioner motivated by the desire to prevent suffering who deliberately ends the life of a patient suffering from a terminal illness is no more or less guilty of murder, before the law, than a spouse who kills his or her partner for the sake of personal enrichment. The specific *mens rea* required for an accused to be found guilty of murder is that the accused *intended to* kill another human. *Why* the act was committed, whether out of compassion or for personal gain, is irrelevant for the purposes of determining the guilt or innocence of the accused, though it may serve to help to guide the court in the determination of an appropriate sentence.

Laws proscribing zoophilia are unjust inasmuch as this consideration of *why* is given paramount legal weight. They seek to punish those who engage in sexual contact with animals for their own sexual gratification, ignoring the fact that animals are regularly subjected to sexual interference for commercial purposes through such procedures as manual and electronic semen collection and artificial insemination (AI).<sup>13</sup> Some of the methods used in these procedures are extremely invasive. AI in the mare involves penetrating the vagina with the arm to guide the insemination tube through the cervix and into the uterus<sup>14</sup>; in the cow, the procedure involves the penetration of both the vagina and the rectum with the arms to allow for the insemination tube to be guided through the cervix and into the uterus<sup>15</sup>; and one method of AI in dogs, approved of by American Kennel Club and routinely used in older bitches, consists of a surgical procedure in which the an incision is made in the abdomen, the uterus is manually manipulated, and the semen directly injected into each uterine horn.<sup>16</sup> Each of these acts involves sexual interference with the animal carried out for the benefit of the human owner rather than for the direct and necessary therapeutic benefit of the animal involved, yet is untouched by the law. Zoophiles have been legally punished for much less invasive acts. *Black* is one such case, the American case of *Kansas v Coman*(2009)<sup>17</sup> another. In *Coman* the accused plead guilty to no more than having "tongue-kissed" and "digitally penetrated" a female Rottweiler but was sentenced to the harshest sentence permitted under Kansas state law, six months in prison and registration as a sexual offender. The law in punishing those who engage in acts of zoophilia without harming the animals involved while permitting the widespread commercial sexual exploitation of animals is unjust and violates the zoophile's right to

substantive due process. It makes criminal a manner of conscience as opposed to a matter of physical fact. The right to substantive due process renders unconstitutional all laws prohibiting zoophilia, regardless of how rigidly the "offence" is defined.

#### **4. Can Laws Prohibiting Zoophilia be Justified?**

The fact that the majority of *presently existing* Canadian and American laws prohibiting zoophilia are unjust does not prove that *any* law prohibiting zoophilia must be so. Prudence requires that we examine the most commonly stated arguments in favour of such laws to ascertain if those arguments are sufficiently compelling and in keeping with the established fundamental principles of justice as to justify the existence of any such law.

Many legal philosophers, among them Aquinas<sup>18</sup>, Locke<sup>19</sup>, Mill<sup>20</sup>, Hegel<sup>21</sup>, and Fuller have held that the purpose of positive law is to protect the citizen and his or her property, and thus serves "to provide a sound and stable framework for the interaction of citizens with one another."<sup>22</sup> The majority of these authors similarly hold that "Morality and moral commands concern the will on its most private, subjective and particular side, and so cannot be a matter for positive legislation."<sup>23</sup> This opinion was affirmed at the national level in Canada on December 21st, 1967 when then Minister of Justice Pierre Elliot Trudeau introduced an omnibus bill which sought, among other proposals, to decriminalize homosexual acts conducted in private between consenting adults, stating that, "There is no place for the state in the bedrooms of the nation... What's done in private between adults does not concern the Criminal Code."<sup>24</sup> The United States Supreme Court affirmed this opinion with equal force in the case of *Lawrence v. Texas* (2003)<sup>25</sup>. In striking down the Texas state law prohibiting homosexual conduct between consenting adults, the majority opinion held that, "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."

If antizoophilia laws are to be defended as just, they must be founded on some important state interest, not merely religious edict or the prevailing moral attitudes of the public. If the law should serve primarily to protect the rights of individuals, then zoophilia, if it is to be punished by law, must violate the rights of some assignable individual, including the animals involved, or the interests of society as a whole.

#### **4a. Does Zoophilia Harm the Animals Involved?**

One argument given in favour of the legal prohibition on zoophilia is that such acts violate the rights of the animals involved. Bierne suggests that zoophilia should be classed as "interspecies rape" because: (1) it nearly always involves coercion; (2) often causes pain and death; and (3) that

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animals are unable to communicate consent in a form that humans can readily understand and cannot speak out about any abuse.<sup>26</sup>

One counter to this argument is that animals do not have legally recognized rights within our society. Although Bentham suggests that animals hold certain natural rights by virtue of their capacity to suffer<sup>27</sup>, the manner in which animals are actually treated in our society demonstrates that such rights are not recognized either *de facto* or *de jure*. Addressing the purported purposes of antizooophilia statutes, Daniels writes, "as for protecting animals because they cannot consent, the truth is that animals, particularly domesticated ones, don't consent to most of the things that happen to them."<sup>28</sup> As detailed above, animal sexual autonomy is regularly violated for human financial gain through procedures such as AI. Such procedures are probably more disturbing physically and psychologically than an act of zoophilia would be, yet the issue of consent on the part of the animal is never raised in the discussion of such procedures.<sup>29</sup> To confine the "right" of any animal to not be sexually violated strictly to acts of zoophilia is thus to make law based not on reason but on moral prejudice, and to breach the constitutional rights of zoophiles to due process and equality before the law.

While it may be legally sufficient, such reasoning is morally deficient inasmuch as it avoids addressing the impact of acts of zoophilia on the acknowledged *moral* rights of animals. Should the day Bentham speaks of arrive when animal rights *are* recognized by society and the law, an argument which speaks only to the zoophile's right to fair exercise of his property rights in the animals he owns will prove an insufficient legal justification for acts of zoophilia. Though limitations of length preclude a detailed analysis of the issue of consent in the context of zoophilia, the topic must be addressed at least cursorily.

Bierne states that consent to sexual relations requires that both parties must be conscious, fully informed and positive about their desires.<sup>30</sup> These requirements seriously warp the commonly-understood meaning of consent, which Oxford English Dictionary defines as "voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission."<sup>31</sup> Consent thus does not require a *positive desire* on the part of the individual giving consent; rather it is a voluntary but *passive acquiescence* in the will of another. Humans often engage in sex for reasons other than a positive desire to engage in sex, including altruism (wanting to make a partner feel good), insecurity (mate-guarding) and goal-seeking (attainment of resources or social status).<sup>32</sup> No one would suggest that a human engaging in sex with another human for any reason besides personal physical desire is necessarily engaging in a non-consensual or coerced act. Animals might also choose to engage in sexual behaviour for similar indirect reasons without being somehow forced into the act. The requirement that

both parties be fully-informed is equally questionable, given that humans often engage in risky sexual behaviour with strangers, which must necessarily be uninformed to some extent. The conditions which Bierne imposes on consent are therefore not only unnecessarily anthropocentric, as Beetz points out, but can not even be applied to a good deal of human sexual behaviour.

Preference-testing research has shown that animals can form and act on individual preferences.<sup>33</sup> Research has also demonstrated that domestic animals, even "docile" ones such as cattle, are capable of demonstrating an aversion response to handling, and to human handlers, they find unpleasant<sup>34</sup>; and that "the 'price' an animal is prepared to pay to attain or to escape a situation is an index of how the animal 'feels' about that situation."<sup>35</sup> Preference utilitarianism holds that violation of an individual's preferences is a violation of that individual's moral rights. If an animal demonstrates an unwillingness to engage in sexual contact with a human when so approached and is forced to do so, such contact is a violation of the animal's preferences and will likely cause an aversive psychological state (fear or stress). The causing of such a negative state in the absence of any justification save personal gratification (physical *or* financial) is a violation of the animal's moral rights. If an animal actively seeks out sexual interaction with a human, displays behaviours associated with sexual receptiveness and gives no counter indications when approached sexually by a human, or permits a human to engage in sexual activity without showing signs of aversion, in the absence of any physical coercion, then the animal can be said to be a consenting party to the act inasmuch as they are demonstrating active desire, permission or compliance. Beetz states that "such acts can be carried out without obvious force, and even with the animal as a seemingly willing participant," and cites numerous studies including one by Bierne which found that "some animals, such as dogs, seem to enjoy the attention provided by the sexual interaction with a human."<sup>36</sup> Ford and Beach<sup>37</sup> and Dekkers<sup>38</sup> have indicated that animals are also capable of actively seeking out such contact. Even if the animal consents to such contact for reasons other than positive sexual desire such contact is unlikely to lead to an aversive state. Such contact does not violate a communicated preference of the animal to abstain from such acts and *may* be in accord with the animal's desires, and is thus not a violation of the animal's moral rights. Since acts of zoophilia need not necessarily violate the moral rights of animals, prohibiting zoophilia on the basis that some zoophiles rape animals is no more morally and legally justifiable than banning all pet ownership on the basis that some people neglect or physically abuse their pets.

#### **4b. Does Zoophilia Harm the Interests of Society?**

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If zoophilia cannot reasonably be criminalized on the basis that it must always be an unacceptable violation of the animals involved, the only rational basis remaining on which such laws might be justified is that zoophilia injures the common welfare of society. Such a violation might take a number of forms. Zoophilia might: (1) Pose a risk to society through the potential for the introduction of animal diseases into the human population; (2) be physically risky or harmful to the zoophile himself, (3) threaten the moral foundation of society; (4) be linked to interpersonal violence, i.e.: zoophiles are at a higher risk to carry out physical and sexual offences against other people, and (5) lead to the violation of the legal rights of other members of society.

Addressing the first two of these points very succinctly, Daniels writes:

If the vital interest is human safety, then anti-bestiality laws do infringe upon autonomy interests. Presumably, an adult should be able to weigh the risks of colon perforation against the joys of horse sex and act accordingly. This leaves the possible interest in disease control, perhaps the most valid reason for regulating bestiality. However, the law can't prohibit all human contact with animals -- that would eliminate the ranching industry and the possibility of pet ownership. So the diseases to be controlled would have to be sexually transmitted ones. Assuming that there is a risk of such diseases being transmitted between species, there are still two problems. The first is how to justify regulating the animal lover who practices safe sex. The second is how to justify banning sex with animals while still allowing humans who have an STD to have consensual sex, when the risk of spreading disease is so much greater."<sup>39</sup>

The argument that zoophilia is morally disruptive or damaging to society is raised by Devlin with respect to homosexuality in his criticism of the Wolfenden Report, which recommended that homosexuality be decriminalized in Britain. Arguing for the continuation of the criminal prohibition on sodomy, he writes:

[The law] does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the

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morality of the individual any more than it can ignore his loyalty; it flourishes on both and without either it dies.<sup>40</sup>

"The community of ideas, political and moral" upon which Canadian and American societies are based, however, are those which are enshrined in those two countries' respective constitutions. In the drafting process the authors of those documents sought not impose an external morality upon those they represented, but rather to represent the true moral and political desires and interests of the people. The "community of ideas, political and moral" become constitutional law for these two countries therefore includes a wide range of personal rights which have been deemed necessary for the preservation of the autonomy and thus the dignity of the individual citizen. These rights include the right to the free exercise of religion and conscience (which must also include the right to *not* be legally bound by the religious principles of others), and the rights to equality before the law and due process. Although the right to sexual self-determination is not *specifically* guaranteed as a fundamental right in the constitutions of Canada and the United States, it arises as a natural consequence of those rights that are considered fundamental to the autonomy of the individual. As Justice Kennedy noted in *Lawrence*, quoting from the court's earlier decision of *Planned Parenthood of Southeastern Pa. v. Casey* (1992):

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.

Similarly, in the Canadian case of *R. v. Sharpe* (1999)<sup>41</sup>, Justice Southin rejected the right of Christian morality to bind the criminal law and thus limit the sphere of personal liberty, writing, "Although the law of Canada was rooted in its religious heritage, the words 'the supremacy of God' in the preamble to the *Charter* had become a dead letter, and the court could not breath life into them for the purpose of interpreting the provisions of *Charter*."

It has also been argued that zoophilia should not be legally permitted because of the possible link between the abuse of animals and interpersonal violence.<sup>42</sup> This argument raises two separate points: Is there

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sufficient evidence of such a link; and would the existence of such a link provide sufficient legal grounds for the prohibition of zoophilia?

Although publication of a paper in a peer-reviewed scholarly journal is the touchstone of academic credibility, it is possible for authors to publish papers containing obvious methodological flaws. Paul Cameron and his associates have published a large number of papers in which they claim that their data proves, among other findings, that homosexuality is "as harmful as drug abuse, prostitution or smoking"<sup>43</sup>; that homosexuals and bisexuals more frequently engage in activities such as the deliberate infecting of sexual partners, shoplifting and tax cheating<sup>44</sup>; and that homosexuals in positions of trust over children, such as teachers or foster parents, are significantly more likely to sexually assault children in their care.<sup>45,46</sup> The sheer volume of published papers by the Cameron group together with the fact that each of these papers went through the standard peer-review mechanism, would seem to prove the truth of the assertions contained in these papers. However, the methodologies they employ both in the collection of data and the analysis of that data have been shown to be seriously flawed in various ways, including the drawing of general conclusions from non-representative sample, using data obtained from surveys with an unacceptably high rate of refusal, and drawing inferences from their data based on subjective value judgments. Commenting on a paper by Cameron et al.<sup>47</sup> regarding the attitudes of the American public towards homosexuals serving in the armed forces, Boor writes:

These authors' national sample is clearly is not representative of the United States population... Furthermore, 52.5% of their potential respondents refused to be interviewed. The median age of the rejectors was 55 yr., whereas that of the respondents was only 34 yr., indicating that respondents and rejectors represented very different populations. Finally, data were obtained from only 842 (20.25%) of the 4,158 potential respondents in their Dallas sample. It seems unlikely that these authors' data accurately portray societal attitudes towards homosexuals.<sup>48</sup>

Replying to the rejoinder by Cameron et al. rejecting this criticism, Boor continues:

[T]he Camerons do not distinguish between inferences from data that can be subjected to scientific verification and those that are determined by subjective value judgments. Scientists should present their findings in an objective,

dispassionate manner in scientific publications, and they should employ other forums if they wish to comment on the controversial social implications of their findings.<sup>49</sup>

Studies suggesting zoophilia might be a "gateway" to interpersonal violence tend to suffer from similar structural failings and preconceptions on the part of the researchers. Many studies are limited to small samples of atypical individuals (prisoners, psychiatric patients, etc.), combine sexual contact with animals and the violent abuse in a single category, or define animal abuse so vaguely or selectively that it can take on any meaning that suits the researcher. According to Beetz:

Animal abuse can occur in very different forms, ranging from active maltreatment, which includes bestiality (Vermeulen and Odendall 1993), to passive neglect or commercial exploitation. As with child abuse, emotional, physical, and sexual abuse of animals can be distinguished (Ascione 2003). In general, animal abuse can be defined as 'socially unacceptable behaviour that intentionally causes an animal pain or distress and may result in an animal's death' (Ascione 1993).<sup>50</sup>

This description is not only vague but also contradictory. Animal abuse includes commercial exploitation, but only if it is socially unacceptable. Animal abuse includes passive neglect, but only where that neglect is intended to cause pain or distress. (This is a logical impossibility. Given that intent implies action, it is impossible for 'passive' neglect to be directly intended to cause pain and distress.) Beetz also includes bestiality in the class of acts which constitute intentional animal cruelty, although she later acknowledges that such acts need not be harmful or violent in nature<sup>51</sup>. This sort of confusion regarding what exactly is being studied calls into question any conclusions that such studies may draw and makes comparisons between studies nearly impossible.

The complexity of human behavior makes it extremely difficult if not impossible to assign a specific cause to a given effect. While it might be desirable to think that a statically significant link involving two events indicates causality, the inability to control for all the variables in the behavior of individuals makes such a determination practically impossible. According to Loos:

Correlations provide valuable assistance in identifying and isolating hypotheses that might be worthy of study in other ways, but they are of little *direct* value in research. The

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reason is, a presumed cause might be just a *sufficient*, rather than a *necessary* condition. It might be just a cause rather than *the* cause, or *they might not be directly related at all*. Several difficulties with the correlational reasoning make it impossible to verify cause and effect conclusions.<sup>52</sup>

According to Beetz, "neither casual or chronological relations" between animal abuse and interpersonal violence have been conclusively demonstrated.<sup>53</sup> If such a link has not been established in the broader case of animal abuse involving a specific intent to inflict harm on the animal, then it certainly has not been established in the case of zoophilia which is often carried out without physical coercion.

Prohibiting zoophilia on the basis that there *might* or somehow *should* be a casual correlation between zoophilia and interpersonal violence is unjust and violates the zoophiles' rights to procedural due process. Even if there was a direct casual relationship between zoophilia and interpersonal violence, it is extremely unlikely that the relationship would be so straightforward as to state that every zoophile is also an assaulter of humans. Whatever the percentage correlation that was proven, it would only indicate that a certain percentage of zoophiles are *likely* to commit a violent act against another human. Prohibiting zoophilia on this basis amounts to social profiling based on sexual orientation. It assumes that all zoophiles are equally likely to commit violent crimes, and further amounts to mass preventive detention inasmuch as it deprives them of an essential liberty (the right to engage in a private sexual activity) without first proving them guilty of the act (interpersonal violence) for which that liberty has been denied them.<sup>54</sup> Such punishment is a violation of the rights of all zoophiles to due process and is a legally and morally inappropriate imposition of the state in the sphere of private affairs.

The final, and only compelling, argument for the criminalization of zoophilia, is that zoophiles tend to violate the personal and property rights of other members of the community. As Mill rightly points out, "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion."<sup>55</sup> The zoophile, while he should legally and morally be permitted to conduct his private affairs as he best sees fit, does *not* have any legal or moral right to impose his lifestyle on the rest of society. The moment his private conduct interferes with the rights of the other members of the community - including the commission of an act of zoophilia in a public place or trespassing for the purpose of committing an act of zoophilia ("fence-hopping") - he has willfully committed a serious offense against another person for which he can justly be punished. Laws which prohibit

acts of zoophilia only when such acts are committed in public or in the presence of a third party who might be "alarmed" at the act (Arizona, Texas) are justified.<sup>56</sup> Those portions of the Canadian statute which prohibit the compelling of anyone else to commit such acts, and the commission of such acts in the presence of a child or incitement of a child to commit such acts, are equally sound. While the initial and all-encompassing prohibition of zoophilia is the latter is unjust, these secondary provisions, in as much as they protect the legal rights of others without infringing in any serious way upon the legitimate right of the zoophile to engage in such acts in private, are an entirely just use of the power of the state.

##### **5. The Swedish Example**

Following a trend of steadily decreasing severity of the punishment imposed for zoophilia throughout the latter half of the 19th and the first half of the 20th century, from the death penalty through decreasing periods of incarceration with hard labor to simple imprisonment, the criminal sanctions on such acts were lifted entirely (along with sanctions on homosexuality) in 1944. Zoophilia, once regarded as heresy and a species of witchcraft, was gradually regarded less as a dangerous sin in the religious sake and more as a sign of personal moral degeneracy to which other acts such as excessive masturbation contributed. The extent to which the medical profession dealt with the practice, it was regarded as a symptom of imbecility. It was simply the behavior of idiots or country simpletons, rather than a dangerous psychopathy that needed to be controlled or punished, and the Swedish parliament felt that it was thus an activity upon which the state need not waste valuable time and resources.<sup>57</sup>

There have over the years been several attempts to pressure the Swedish government into passing new laws criminalizing zoophilia. In 2005, nationwide attention was given to a surge of "horse-ripping" attacks in which mares were sadistically assaulted, with the assailants slashing the mares' hindquarters and brutally forcing foreign objects into their vaginas leading to internal injuries. In the wake of the attacks and the public outcry that resulted, in 2005 the government asked the Swedish Animal Welfare Agency (SAWA) conducted an investigation into the attacks and the adequacy of current Swedish law to protect animals from such brutality. The report written by SAWA indicated that while a tightening up of animal welfare legislation was necessary to protect animals from such abuses, there was no need to ban zoophilia *per se*.<sup>58</sup> Following another investigation at the behest of the government in 2006, SAWA decided to call for a ban on human sexual relations with animals<sup>59</sup>, but the government ignored the recommendation. In 2008, following an equally widely publicized expose on a "zoophilia ring" in Sweden, in which the members "meet regularly in locations around the country to have sex with animals", the government was again pressured to

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outlaw the practice. The government's response to this pressure was as audacious as it was pragmatic. The Swedish Minister of Agriculture, Eskil Erlandsson, known for his outspoken attitude, was quoted as giving two examples that served to underline the difficulty that government would face were it to draft such a law: "It is, and should it be, legal to spread something on the genitalia that might smell or taste nice to a dog, in order to allow the dog to lick off whatever is spread on the genitalia?" and "Should it be permitted to stroke a bitch's teats with love, or should it be classed as animal sexual abuse?"<sup>60</sup> While such language coming from a government official might seem shocking, these serve to highlight the difficulty in drafting a rational, legally defensible law prohibiting human sexual interaction with animal: Humans engage in a wide range of physical interactions with animals, many of which could *potentially* be regarded as sexual in nature. *Where can the line be drawn* between the permissible and the criminal, and *on what rational basis* can such a line be drawn? If such a determination is to be made *rationally*, a law prohibiting an act involving animals must be based on "discernible harm" caused to animals by the act. In neither example cited by the minister is the animal harmed, and thus neither act can justly be viewed as an offense that needs to be outlawed regardless of how "offensive" they might be deemed by society at large.

## 6. Conclusions

Laws restricting the private conduct of individuals in which "a person's conduct affects the interests of no person but himself, or need not affect them unless they like,"<sup>61</sup> unjustly constrain the legal and moral rights of such individuals. Laws which criminalize zoophilia based on societal abhorrence of such acts rather than any real harm caused by such acts are an unjust and unconstitutional infringement on individual liberty. Though it has been argued that such laws are necessary for the protection of both animals and the greater good of society, the reasons given to support such arguments are not compelling. If animal protection was the goal of such laws, it could be accomplished more effectively by strengthening laws that address the deliberate infliction of pain and suffering on animals as has been done in Sweden. Laws prohibiting zoophilia are enforced even in the absence of any discernible harm to the animal resulting from such acts. The argument that zoophilia needs to be criminalized because of a *possible* link between animal abuse in the wider sense, including acts of intentional cruelty, and violence against other humans, is equally deficient. Such a link is not only *unproven* but is very probably *unprovable* given the wide range of factors that affect human behaviour. Even if a link between zoophilia and interpersonal violence was established, it would only indicate that *some* zoophiles are likely to engage in violence against other people. It says nothing about the probability of any individual zoophile to engage in such acts. The

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criminalization of zoophilia on the basis of such a link is a form of social profiling based on sexual orientation and mass preventive detention, both of which are inexcusable forms of punishment in a modern democratic state.

### **Notes**

<sup>1</sup> "Zoophilia" is here employed in the medical or technical sense of the sexual interaction with animals purposed upon the sexual gratification of the human participant, though without any deliberate intent to inflict suffering on the animal involved, and is to be understood in this context throughout this paper. Likewise, the term "zoophile" is used to refer to persons engaging in acts of zoophilia in this narrower sense. These terms are also often used to denote relationships between humans and animals based on the mutual consent of, and leading to the mutual sexual satisfaction of, both the human and animal participants, and the persons who engage in such relationships. (Beetz 2005).

<sup>2</sup> H. Miletski, 'A history of bestiality', in *Bestiality and Zoophilia: Sexual Relations with Animals*, A. M. Beetz and A. L. Podberscek (eds), Berg, Oxford, 2005, p. 18

<sup>3</sup> *The Constitution of the United States of America*, Amendments, Articles Five and Fourteen, in *Great Books of the Western World*, M. J. Adler (ed. in chief), Vol. 40, Encyclopædia Britannica Inc., Toronto, 1993, p. 17-18.

<sup>4</sup> *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44 En. Canada Act 1982 (U.K.), c. 11 Am. Constitution Amendment Proclamation, 1983, SI/84-102, Schedule B, Part I - Canadian Charter of Rights and Freedoms, s. 7

<sup>5</sup> 'Due Process of Law - Substantive Due Process, Procedural Due Process, Further Readings', *Law Library - American Law and Legal Information*, Last Updated 2010, Retrieved March 11, 2010, <http://law.jrank.org/pages/6315/Due-Process-Law.html>

<sup>6</sup> P. Devlin, "Morals and the Criminal Law" (1965), in *Law and Morality: Readings in Legal Philosophy*, D. Dyzenhaus and A. Ripstein (eds), University of Toronto Press, 1996, pp. 292-3.

<sup>7</sup> *R. v. Canadian Pacific Ltd.*, 41 C.R. (4th) 147 at 153, 99 C.C.C. (3d) 97 at 103 (S.C.C.)

<sup>8</sup> R. A. Posner and K. B. Silbaugh, *A Guide to America's Sex Laws*, University of Chicago Press, Chicago, 1996, pp. 207-212

<sup>9</sup> *R. v. Ruvinsky*, 39 W.C.B. (2d) 380; 1998 CLB 2296

<sup>10</sup> *R. v. Black*, 73 W.C.B. (2d) 701; 2007 CLB 820, 296 Sask. R. (3d) 289, 2007 SKPC 46

<sup>11</sup> While it may be argued that in *Black*, the accused plead guilty and thus it was not incumbent upon the judge to decide whether the elements specified in the charge constituted an offence, in allowing the guilty plea to stand and sentencing the accused for an offence of bestiality on that basis, the judge was complicit in introducing further unnecessary confusion into the future adjudication of such cases.

<sup>12</sup> *Dawes v. Texas*, 2009 Tex. App. LEXIS 2114

<sup>13</sup> A. M. Beetz, 'Bestiality and zoophilia: Associations with violence and sex offending', in *Bestiality and Zoophilia: Sexual Relations with Animals*, A. M. Beetz and A. L. Podberscek (eds), Berg, Oxford, 2005, p. 62, 64

<sup>14</sup> J. Mottershead, 'The Artificial Insemination Process', Equine-Reproduction.com, Last updated June 27, 1999, Retrieved January 15, 2010, <http://www.equine-reproduction.com/articles/insemination.htm>

<sup>15</sup> Mottershead, 1999

<sup>16</sup> R. Van Hutchinson, 'Methods of Artificial Insemination and Their Usage', American Kennel Club, Last updated 2010, Retrieved March 2, 2010, [http://www.akc.org/vetoutreach/headlinenews\\_13.cfm](http://www.akc.org/vetoutreach/headlinenews_13.cfm)

<sup>17</sup> *Kansas v Coman*, 42 Kan. App. 2d 592; 214 P.3d 1198; 2009 Kan. App. LEXIS 823

<sup>18</sup> St. Thomas Aquinas, *Summa Theologica*, Part IIa, QQ. XC, XCVI, in *Great Books of the Western World*, M. J. Adler (ed. in chief), Vol. 40, Encyclopædia Britannica Inc., Toronto, 1993, pp. 206-208, 230-235.

<sup>19</sup> J. Locke, 'Of the Ends of Political Society and Government', ¶ 123, *Concerning Civil Government, Second Essay*, in *Great Books of the Western World*, M. J. Adler (ed. in chief), Vol. 33, Encyclopædia Britannica Inc., Toronto, 1993, p. 53

<sup>20</sup> J. S. Mill, 'Of the Limits to the Authority of Society Over the Individual', *On Liberty*, in *Great Books of the Western World*, M. J. Adler (ed. in chief), Vol. 40, Encyclopædia Britannica Inc., Toronto, 1993, pp. 302-303.

<sup>21</sup> G. W. F. Hegel, *Philosophy of Right*, Third Part: Ethical Life, ¶ 157, in *Great Books of the Western World*, M. J. Adler (ed. in chief), Vol. 43, Encyclopædia Britannica Inc., Toronto, 1993, p. 60

<sup>22</sup> L. L. Fuller, 'The Morality of Law' (1969), in *Law and Morality: Readings in Legal Philosophy*, D. Dyzenhaus and A. Ripstein (eds), University of Toronto Press, 1996, pp. 77

<sup>23</sup> Hegel, op. cit., ¶ 213, p. 74

<sup>24</sup> CBC Digital Archives, 'Trudeau's Omnibus Bill: Challenging Canadian Taboos', Canadian Broadcasting Corporation, 2009, Retrieved March 18, 2010, [http://archives.cbc.ca/politics/rights\\_freedoms/topics/538/](http://archives.cbc.ca/politics/rights_freedoms/topics/538/)

<sup>25</sup> *John Geddes Lawrence and Tyron Garner v. Texas*, 539 U.S. 558; 123 S.Ct. 2472; 156 L.Ed. 2d. 508; 2003 U.S. LEXIS 5013; 71 U.S.L.W. 4574; 2003 Cal. Daily Op. Service 5559; 2003 Daily Journal DAR 7036; 16 Fla. L. Weekly Fed. S 47

<sup>26</sup> Beetz, op. cit., p. 62

<sup>27</sup> "The day may come when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny... The question is not, can they *reason*? nor, can they *talk*? but, can they

- suffer?" (Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, 2nd, 1823, Chap. 17, footnote)
- <sup>28</sup> N. Daniels, 'Substantive Due Process and the Problem of Horse Sex', *Washington State Bar Association Bar News*, Volume 60, No. 11 (November), 2007
- <sup>29</sup> Beetz, op. cit., p. 64
- <sup>30</sup> Beetz, op. cit., p. 61
- <sup>31</sup> 'Consent', in Vol. I of *The Compact Edition of the Oxford English Dictionary*, Oxford University Press, Toronto, 1971, p. 523.
- <sup>32</sup> C. M. Meston and D. M. Buss, 'Why people have sex', *Archives of Sexual Behaviour*, Vol. 36, 2007, p. 477
- <sup>33</sup> D. Fraser, 'Preference and motivational testing to improve animal well-being', *Laboratory Animals*, Vol. 25, No. 1, 1996, pp. 27-31
- <sup>34</sup> A. M. de Passillé, J. Rushen, J. Ladewig and C. Pethrick, 'Dairy Calves Discrimination of People Based on Previous Handling', *Journal of Animal Science*, Vol. 74, 1996, p. 969
- <sup>35</sup> M. S. Dawkins, 'From an animal's point of view: Motivation, fitness and animal welfare', *Behavioural and Brain Sciences*, Vol. 13, 1990, p. 1
- <sup>36</sup> Beetz, op. cit., p. 60
- <sup>37</sup> C. S. Ford and F. A. Beach, *Patterns of Sexual Behaviour*, Harper & Row and Hoeber Medical Division, 1951, pp. 145-152.
- <sup>38</sup> M. Dekkers, *Dearest Pet: On Bestiality*, P. Vincent (trans.), Verso, New York, 1994, p. 126
- <sup>39</sup> Daniels, op. cit.
- <sup>40</sup> Devlin, op. cit., p. 295
- <sup>41</sup> *R. v. Sharpe*, 136 C.C.C. (3d) 97; 1999 CLB 202; [1999] B.C.J No. 1555; 19 TLWD 1912-001; 1999 BCCA 416; 25 C.R. (5th) 215; 69 B.C.L.R. (3d) 234; 207 W.A.C. 76; 43 W.C.B. (2d) 117; [2000] 1 W.W.R 241; 175 D.L.R. (4th) 1, 65 C.R.R. (2d) 18, 127 B.C.A.C. 76
- <sup>42</sup> Beetz, op. cit., p. 66
- <sup>43</sup> P. Cameron, T. Landes, and K. Cameron, 'Homosexual sex as harmful as drug abuse, prostitution or smoking', *Psychological Reports*, Vol. 96, No. 3 pt 2, 2005, p. 915
- <sup>44</sup> P. Cameron, K. Cameron, K. Proctor, 'Effect of homosexuality upon public health and social order', *Psychological Reports*, Vol. 64, 1989, p. 1167
- <sup>45</sup> P. Cameron, 'Are over a third of foster parent molestations homosexual?', *Psychological Reports*, Vol. 96, No. 2, April 2005, p. 275
- <sup>46</sup> P. Cameron, 'Child molestations by homosexual foster parents: Illinois, 1997-2002', *Psychological Reports*, Vol. 96, No. 1, February 2005, p. 227
- <sup>47</sup> P. Cameron, K. Cameron, K. Proctor, 'Homosexuals in the armed forces', *Psychological Reports*, Vol. 62, 1988, pp. 211-219
- <sup>48</sup> M. Boor, 'Homosexuals in the armed forces: A reply to Cameron, Cameron and Proctor', *Psychological Reports*, Vol. 62, 1988, pp. 488
- <sup>49</sup> M. Boor, 'Homosexuals in the armed forces: A rejoinder to the reply by Cameron and Cameron', *Psychological Reports*, Vol. 62, 1988, pp. 602
- <sup>50</sup> Beetz, op. cit., p. 50
- <sup>51</sup> Beetz, op. cit., p. 60
- <sup>52</sup> F. M. Loos, *Research Foundations for Psychology and the Behavioural Sciences*, Harper Collins College Publishers, New York, 1995, p. 180
- <sup>53</sup> Beetz, op. cit., p. 51
- <sup>54</sup> "What is a 'detained person'? One UN document, the *Body of Principles for the Protection of All Persons under any form of Detention* defines it as: 'any person deprived of personal liberty except as a result of conviction of an offence.'" from A. Anderson, 'Preventative Detention in Pre-and Post Apartheid South Africa: From a Dark Past to a Brighter Future', International Society for the Reform of Criminal Law, 22nd International Conference, Dublin, Ireland, 2008
- <sup>55</sup> Mill, op. cit., p. 303
- <sup>56</sup> Possner and Silbaugh, op. cit.
- <sup>57</sup> J. Rydström, *Sinners and Citizens: Bestiality and Homosexuality in Sweden, 1880-1950*, The University of Chicago Press, Chicago, 2003, pp. 203-210.
- <sup>58</sup> The Local, 'Sweden highlights bestiality problem', Published April 29, 2005, Retrieved March 3, 2010, <http://www.thelocal.se/article?ID=1357>
- <sup>59</sup> P. O'Mahony, 'Agency calls for animal sex ban', The Local, Published January 24, 2007, Retrieved March 3, 2010, <http://www.thelocal.se/6190/20070124>
- <sup>60</sup> 'Swedish bestiality ring exposed', The Local, Published November 11, 2008, Retrieved March 3, 2010, <http://www.thelocal.se/15610/20081111>
- <sup>61</sup> Mill, op. cit., p. 303