The Unjustified Prohibition Against Bestiality:
Why the Laws in Opposition Can Find No Support in the Harm Principle

The Jurisprudence of Bestiality

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This work explores the moral status of laws prohibiting bestiality and whether they are justified in practice or justifiable in theory. Part I of the paper introduces us to bestiality by first testing our moral intuitions regarding the act. Through a list of 10 examples we are asked to consider whether we find some acts morally wrong, and therefore prohibitable by law. Next, the paper explores the current state of the law. It considers possible definitions of bestiality from the Church, secular law, and legal scholars. Each definition is criticized as overly broad, vague, and in at least one case, too narrow. Instead, a new definition of bestiality is proposed which better comports with our moral intuitions and eliminates some problems associated with the prior definitions.

Part II of the paper challenges the justification of laws prohibiting bestiality. Through the Harm Principle, it explores whether such laws are justifiable by preventing Harm to Others, Harm to Self, Offense to Others, or through Moral Legalism. They are not. In order

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to make the laws justified, it would require we rewrite the statutes to comport with the preferable definition of bestiality discovered in Part I of the paper and justify those laws by elevating the status of animals in this country. This creates a problem, however, because elevating animal rights in order to enforce anti-bestiality statutes would be inconsistent with our current commercialization of animals.

PART I – AN INTRODUCTION TO BESTIALITY

At the onset of any philosophical inquiry it is important to define the terms involved. In the case of bestiality, this seemingly simple task is not so simple. Over the last several centuries, religious figures, the secular state, and legal scholars have attempted to define bestiality. They were successful only in presenting a universally vague description of bestiality. Since its inception, the Christian Church has prohibited bestiality. Considered part of sodomy, the Church sought to prohibit deviate sexual behavior.[1] This included "unnatural" sexual acts such as masturbation, homosexuality, and bestiality.[2] The Church failed to draw meaningful distinctions between permissible and impermissible sexual acts; for as the saying goes, "the devil is in the details." Unfortunately, secular law offered no further help. One of the first secular states to prohibit bestiality was under the reign of Henry VIII.[3] Sex with an animal was outlawed as the "detestable and abominable Vice of Buggery committed with mankind or beast."[4] Nearly five

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[1] JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 213-214 (Univ. of Chicago Press 1987).
[2] *Id.* at 207.
[3] Graham Parker, *Is a Duck an Animal?: An Exploration of Bestiality as a Crime*, 7 CRIM. JUST. HIST.: AN INT'L ANN. 95, 101-102 (1986).
[4] *Id.* at 102 (citing 25 Henry VIII (1533), c.6).

hundred years later these outdated terms like buggery, abominable, detestable, and deviate sexual acts or intercourse, still exist in state law today.[5]

Judges are forced to interpret these terms and typically do so broadly in order to enforce their particular morals or the perceived morals of the legislature. Sadly, legal scholars have often been sheepish when it comes to serious jurisprudential review of bestiality. Those scholars who have devoted their energies to defining bestiality typically have been animal rights activists, but even within their community, there is little consensus whether bestiality is necessarily "interspecies sexual assault," or whether it is possible that animals may enjoy certain sexual acts with people, and whether that distinction should make a difference.[6]

Before proceeding further it is essential to obtain some sense of what types of behavior classify as bestiality. Consider the ten examples below and ask yourself whether the behavior meets your understanding of bestiality and whether you believe the behavior is wrong.

1. A is a single adult female who allows her male dog to sleep with her in bed. There is no genital contact between the dog and A, but the dog occasionally licks A's face and lips.

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[5] ALA. CODE § 13A-6-63 (1975); MASS. GEN. LAWS ANN. 272 § 34 (2000); N.D. CENT. CODE 12.1-20-12 (1973); S.C. CODE ANN. § 16-15-120 (1976).

[6] *See generally*, Piers Beirne, *Peter Singer's "Heavy Petting" and the Politics of Animal Sexual Assault*, 10 CRITICAL CRIMINOLOGY 43 (2001).

2. Deena is a trained chimpanzee who strips for money at parties.[7]

3. B is a small child who sleeps regularly with her dog. She sucks the dog's nipples because she had seen the dog's puppies behave in this manner.[8]

4. Farmer manually stimulates his bull in order to collect its semen so he can artificially inseminate his cow.

5. A is an adult female who rubs honey on her genitals and allows flies and other insects to eat it off, because the tickling from the insects' legs and mouth causes A much stimulation.

6. C is an adolescent male under 18 who penetrates various farm animals to gain experience for future acts with people.

7. A is a single adult female who willingly engages in reciprocal oral sex and vaginal penetration with a male dog because she enjoys it and believes her dog enjoys it as well. The dog is not bound or forced during the acts.

8. Same as 7 but the dog is bound and forced.

9. D is an adult male who pays A to engage in oral and vaginal sex with a dog and D films it.

10. D is an adult male who penetrates a duck, killing the creature in the process.

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[7] *See* Carol J. Adams, *Deena: The World's Only Stripping Chimp*, 3 ANIMALS' VOICE MAG. 1, 72 (1990).

[8] *See* Piers Beirne, *Rethinking Bestiality: Towards a Concept of Interspecies Sexual Assault*, 1 THEORETICAL CRIMINOLOGY 317, 327 (1997).

Among this list, there are some examples that we feel are plainly wrong, while others are not. Many would split the list in half where the bottom half are worse than the top half. There may be some disagreement about our moral intuitions in example 5, for instance, but most would likely agree about the rest. This process of testing our detached beliefs provides a good starting point for what constitutes appropriate behavior, but on its own, it is not sufficient justification to pass laws. In many hard cases people might disagree about whether the behavior is bestiality and whether it should be prohibited. To proceed, a definition that comports with our detached beliefs is necessary to allow us to distinguish between the various examples. Here is one suggestion:

> Bestiality is sexual contact between human and non-human animals for the purpose of human sexual gratification.

Applying this definition to the above list reveals that examples 1, 2, and 3, are not Bestiality.[9] Examples 1 and 2 do not qualify, because there is no sexual contact. In example 1, A is not engaging in sexual contact when the contact does not involve the sexual organs of either participant. In example 2, Deena is not being touched or touching anybody in a sexual way. We can question the behavior of those people who would want to watch a chimpanzee strip, but under the suggested definition we cannot say they committed Bestiality. In example 3, B does have the requisite sexual contact, but her act is not Bestiality because it is not for the purpose of sexual gratification.

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[9] When the word Bestiality is capitalized, it specifically refers to the suggested definition of bestiality opposed to the Church definition or a statute-based definition.

Example 4 is the classic case of non-bestiality that does include contact between a person and the genitals of an animal. Criminologist, Piers Beirne, who defines bestiality as "interspecies sexual assault" also finds that example 4 is not bestiality because there is no sexual assault taking place.[10] Likewise the Church and secular law do not prohibit it, and few among us find the behavior wrong when it is a common and well accepted practice in animal husbandry and has been used for the preservation of numerous species.

Example 5 is a bizarre case but not entirely fantasy. In fact, this sort of behavior is labeled *formicophilia* and it includes sexual acts involving ants, snails, frogs, and other small creatures.[11] Under the suggested definition, it is Bestiality when it involves sexual contact between a human and non-human animal for sexual gratification. There is little consensus as to whether insects are non-human animals, so whether this is the type of behavior we as a society ought to prohibit remains unseen.

Example 6 is the most common case of bestiality. It is what Beirne calls "adolescent sexual experimentation."[12] This is the type of conduct that the Church and secular law sought to prohibit, and it fits well into the suggested definition.

Examples 7 through 9 find less agreement. Beirne labels example 7 as "sexual fixation."[13] In order to satisfy his definition there must be an assault on the animal. Beirne assumes the assault because

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[10] *See* Beirne, *supra* note 8, at 327.
[11] MIDAS DEKKERS, DEAREST PET ON BESTIALITY 57 (Paul Vincent Translation, Verso 2000) (1992).
[12] *See* Beirne, *supra* note 8, at 328.
[13] *Id.*

of the animal's lack of capacity to consent to the sexual act, but other experts in the field disagree. For example, philosopher Peter Singer believes that not every sexual act with animals involves cruelty.[14] Similarly, biologist Midas Dekkers believes that dogs and gorillas are capable of enjoying sexual acts with people, and in some instances initiate sexual acts with people.[15] Church and secular law prohibits such acts, as abominable sexual acts that are "unnatural." Under the suggested definition, Example 7 is clearly Bestiality when the requisite contact and purpose are met. Example 7 contrasts with example 8 where there is unwavering agreement that this behavior is bestiality. Example 9 divides the scholars similarly to example 7, depending on whether the dog is enjoying himself. Filmed oral sex with a dog is clearly among the Church's unnatural sexual acts and the state eagerly prohibits this behavior. Under the suggested definition, it might appear at first glance not to be Bestiality when A is not engaging in the act for the purpose of her own sexual pleasure, but rather for money. However, the suggested definition of bestiality is not limited to A's sexual gratification, but prohibits bestiality whenever there is a purpose of sexual gratification. In this instance, the willing buyers of the pornography satisfy the purpose of human sexual gratification requirement. The filming of the act suggests that there is a market for it. If the same act was not filmed, then the burden would be on the participants to explain their actions. If they contend they were not

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[14] Peter Singer, *Heavy Petting*, http://www.nerve.com/Opinions/Singer/heavyPetting/ (last visited Mar. 7, 2010).

[15] *See* DEKKERS, *supra* note 11, at 64-65.

engaging in sexual contact for the purpose of deriving sexual gratification from it, then it would not be Bestiality.

Finally, it is undisputed that example 10 is bestiality. It is cruel to the animal (Beirne), an unnatural sexual act (Church), a deviate sexual behavior (state), and it involves sexual contact between a human and non-human for the purpose of human sexual gratification (the suggested definition). The purpose of example 10 is to stress the problem of poorly worded definitions of bestiality such as the "detestable act between man and beast." As early as 1812, this definitional problem has been evident, and had to be reinterpreted by courts to determine whether a duck would be a beast under the common law.[16]

To review, if our intuitions regarding bestiality are correct, then the suggested definition should prohibit examples 6-10, and exclude examples 1-4, which it does. The suggested definition is superior to the religious definition which is broadly defined and condemns many acts that the state has determined a right to privacy protects; it is preferable over the amorphous secular definitions that are often vague and reinterpreted by the will of the judiciary; and it is more exact than the academic definitions that turn on whether the animal takes pleasure in

[16] *See* Parker, *supra* note 3, at 105(In an 1812 English case, *Regina v. Mulready*, a fowl was not considered a beast, but in an unreported 1877 English case involving an unnatural act with a fowl, a fowl was considered an animal where "animal" had been substituted for "beast" under the act.); *see also* Murray v. State, 143 N.E.2d 290 (Ind. 1957) (holding a chicken is a beast for purposes of Indiana's statute prohibiting the abominable and detestable crime against nature with a beast).

the act, which is usually impossible to accurately determine. Having explored the scope of bestiality, we next turn to the current state of the law to see if it appropriately prohibits bestiality.

THE STATE OF THE LAW

Over the past two hundred years, the United States fluctuated between criminalizing and legalizing bestiality for various reasons. Puritan zeal condemned it during the Colonial Era, making the act punishable by ten years imprisonment of hard labor. The early twentieth century saw a period of increased tolerance, effectively decriminalizing the act by the end of World War II. In fact, it was more likely that an offending person would be arrested for breach of the peace or offending public order than for any formal bestiality charge.[17] This trend reached its apex by 1990 when no state had a law specifically opposing bestiality.[18] The tide reversed by 2001, when twenty-four states made bestiality a felony. The reason for this shift was an increase in religious fundamentalism, a rise in animal rights activism, and greater social control being exercised by state governments.[19] Following the landmark Supreme Court decision in *Lawrence v. Texas*,[20] states had a difficult time regulating sexual acts, so they sought to prohibit bestiality by adhering to the animal rights doctrine.

In the last two years, momentum has swung in favor of legislation prohibiting bestiality once again. This time, the impetus was in Enumclaw, Washington, where a farmer died of acute peritonitis due

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[17] Beirne, *supra* note 6, at 51-52.
[18] *Id.* at 52.
[19] *Id.*
[20] 539 U.S. 558 (2003).

to perforation of the colon after being penetrated by a horse.[21] In response to this tragedy, states like Washington justified bestiality laws with a combination of three reasons. The first reason was the obvious animal anti-cruelty justification.[22] The second and third reasons were more creative. Washington passed legislation in part because it wanted to protect its citizens from engaging in acts that could severely injure themselves, and because the state did not want to be considered a safe haven for these "immoral" activities.[23]

As the law stands now, twenty-three states have laws prohibiting bestiality and fifteen of these states list bestiality as a felony.[24] These laws fall into one of four categories:

I. Deviate Sexual Acts or Intercourse;[25]
II. Sodomy[26] or buggery;[27]
III. Crimes against nature;[28] or
IV. Bestiality or other animal sex prohibitions.[29]

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[21] *See* Jennifer Sullivan, *Videotapes Show Bestiality, Enumclaw Police Say*, THE SEATTLE TIMES, http://seattletimes.nwsource.com/html/localnews/2002384648_farm16m.html (last visited March 8, 2010).
[22] *Id.*
[23] 2005 Legis. Bill Hist. WA S.B. 6417 # 5
[24] See Appendix.
[25] ALA. CODE § 13A-6-63 (1975); N.D. CENT. CODE 12.1-20-12 (1973).
[26] KAN. STAT. ANN. § 21-3505 (1969); MISS. CODE ANN. § 97-29-59 (1930).
[27] S.C. CODE ANN. § 16-15-120 (1976).
[28] MASS. GEN. LAWS ANN. 272 § 34 (2000); MICH. STAT. ANN. § 750.158; 21 OKL. STAT. ANN. § 886 (1910); R.I. GEN. LAWS § 11-10-1 (1956); VA. CODE ANN. § 18.2-361 (1975).
[29] CAL. PENAL CODE § 286.5 (West 1975) (Sexually assaulting an animal); DEL. CODE ANN. TIT. 11 § 777 (1993) (Bestiality); GA. CODE ANN., § 16-6-6 (1833) (Bestiality);

The first three categories, deviate sexual acts, sodomy or buggery, and crimes against nature, are generally older statutes parsed in language dating back to common law. Buggery, for example, or *offensa cujus nominatio crimen est* dates back to the 14th century.[30] Originally, the term was synonymous with witches who fornicated with "the Devil, who came disguised as an animal."[31] In its earlier years, buggery was often punishable by death both for the person and the offending animal.[32] Sodomy and deviate sexual acts, on the other hand, were catch all categories designed to ban any kind of "unnatural form of sexual intercourse,"[33] and were applied to oral, anal, and homosexual acts.[34] The Model Penal Code prohibition against deviate sexual intercourse includes "sexual intercourse *per os* or *per anum* between human beings who are not husband and wife, and any form of

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IND. CODE 35-46-3-14 (2007) (Bestiality); IOWA CODE ANN. § 717C.1 (West 2001) (Bestiality); MINN. STAT. ANN. § 609.294 (West 1967); MO. REV. STAT. 566.111 (1991) (Unlawful Sex with an Animal); NEB. REV. STAT. § 28-1010 (1977) (Indecency with an animal); N.Y. PENAL LAW § 130.20 (McKinney1965) (Sexual misconduct); S.D. CODIFIED LAWS § 22-22-42 (2003) (Sexual Act with an Animal); UTAH CODE ANN. § 76-9-301.8 (1953) (Bestiality); WASH. REV. CODE § 16.52.205 (2006) (Animal cruelty); WIS. STAT. ANN. § 944.17 (West 1987).

[30] EDWARD PAYSON EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 147 (1906).

[31] *See* Parker, *supra* note 3, at 99.

[32] *See* EVANS, *supra* note 30, at 147, 151-2. If the sentence was not capital punishment, then the offender would be required to compensate the owner of the animal. If the act was not fully consummated, then the offender would be banished from the land, and the offending animal kept out of sight to ensure it would not tempt others.

[33] *See* Parker, *supra* note 3, at 101-102

[34] *Id*. at 100.

sexual intercourse with an animal."[35] The problem with these terms is that they were vaguely defined and overly broad. After the Supreme Court decided *Lawrence v. Texas*, many state supreme courts either repealed these statutes or declared them unconstitutional.[36]

Statutes explicitly prohibiting "bestiality" are more recent. These statutes avoided the *Lawrence* problem.[37] Among these statutes, Utah's law against bestiality is closest to the suggested definition. The Utah law states, "[a] person commits the crime of bestiality if the actor engages in any sexual activity with an animal with the intent of sexual gratification of the actor."[38] The statute goes on to define the terms "animal" and "sexual activity."[39] The statute is different from the suggested definition of Bestiality in only one respect. While the Utah statute limits the intent of sexual gratification to the human participant, the suggested definition does not. Recall example 9 above which illustrated the problem of such a narrow definition. Absent another statute specifically condemning the creation, sale, and distribution of bestial pornography, Utah's law would be too narrow to prohibit the acts. Presumably, A engaged in the acts for the purpose of the viewer's sexual gratification, and not her own. Notwithstanding this minor criticism, Utah's statute is much better defined than many of its companion state statutes that rely on undefined archaic language. Poorly defined statutes are usually ripe for judicial review, however, in

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[35] MODEL PENAL CODE §213.0 (2001) Definitions.
[36] *See e.g.* ME. REV. STAT. ANN. TIT. 17 § 1001 (1975), *repealed* 2006.
[37] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[38] UTAH CODE ANN. § 76-9-301.8 (1953).
[39] *Id.*

the case of bestiality, courts have shown little initiative and offered little contribution.

Judicial opinions pertaining to bestiality are sparse. One might, therefore, conclude that acts of bestiality are relatively infrequent. This could not be further from the truth. According to world renowned biologist and sexologist Arthur Kinsey, as much as 50% of adolescent males living in rural communities in the 1940s engaged in acts of bestiality.[40] Rather than frequency of occurrence, the more likely reason for sparse case law is that prosecutors have been more inclined to bring charges under public indecency, breach of the peace, indecent exposure, or cruelty to animals, rather than under a formal bestiality statute.[41] Notwithstanding this obstacle, three opinions emerge as the leading guidance for this area of law.

A 1957 Indiana Supreme Court case was the inspiration for example 10, where a person penetrated a duck, killing it in the process.[42] This case considered the question of whether a chicken was a beast under the Indiana statute prohibiting the "abominable and detestable crime against nature with mankind or beast."[43] Murray, the defendant, was charged with committing the "detestable crime" with a chicken, and argued that a chicken was not a "beast" under the statute.[44] Absent any controlling precedent, the Court was free to interpret the statute as it saw fit. Rather then relying on legislative

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[40] *See* DEKKERS, *supra* note 11, at 133. Even if Kinsey's statistic is exaggerated, it still suggests a prevalent existence of the act.
[41] Beirne, *supra* note 8, at 323.
[42] Murray v. State, 143 N.E.2d 290 (Ind. 1957).
[43] *Id.* at 292.
[44] *Id.* at 291–2.

history, the Court referred to Webster's Dictionary and found three entries for "beast":

> 1. Any living creature, an animal.
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> 2. Any four-footed animal, as distinguished from birds, reptiles, fishes, and insects.
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> 3. An animal distinct from man.[45]

Clearly, Murray's act with a chicken would not have been a violation under the second definition, but the Court inferred that the legislature must have had the first or third definitions in mind and affirmed Murray's conviction.[46] Broad interpretation of legislative intent by state courts was common in order to convict "immoral" actors.

The most famous example of broad interpretation of the legislature's intent occurred in *State v. Bonynge*.[47] This case involved a defendant who filmed four women engaging in sexual acts with a dog. On appeal both parties stipulated that the women depicted in the films were adults, and the defendant admitted that he masturbated the dog prior to filming in order for the women to perform.[48] Minnesota's crimes against nature statute provides that an individual who "carnally knows" an animal is guilty of bestiality.[49] Appellant challenged the

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[45] *Id.* at 292.
[46] *Id.* at 292-3.
[47] 450 N.W.2d. 331 (Minn. Ct. App. 1990).
[48] *Id.* at 334. Bonynge was appealing under the theory of insufficient evidence for conviction on one count of bestiality in regards to his act with the dog, and four counts of aiding and abetting bestiality.
[49] *See* MINN. STAT. ANN. § 609.294 (West 1967).

meaning of the term "carnal knowledge," claiming it was limited to acts occurring between a male and female person and did not include acts between persons and animals.[50] The court interpreted the meaning of carnal knowledge in light of the legislature's intent to prohibit crimes against nature.[51] The court reasoned that "[c]ertainly this bestial type of depraved conduct is proscribed by the legislature and by all standards of common decency."[52] In short, Bonynge's appeal was lost before it started, so long as the court was willing to read its own morality into the legislative intent.

Among the convictions and affirmations, one case's holding differs. *People v. Carrier* is unique in this area of law because the Michigan Court of Appeals reversed a bestiality conviction, finding that one of the necessary elements had not been proven.[53] This case involved a dispute over the control and possession of an automobile. Over a period of a few hours, the male victim was bound, beaten, sexually assaulted, threatened at gunpoint and forced to engage in sexual acts with the defendant's German shepherd.[54] The defendant was charged with a number of crimes including aiding and abetting in the commission of a crime against nature. The Michigan Court of Appeals was faced with the task of interpreting Michigan's crimes against nature statute. Finding that the statute prohibited sodomy and bestiality, the Court found that bestiality is a "sexual connection

[50] *Bonynge*, 450 N.W.2d. at 337.
[51] *Id.* at 338.
[52] *Id.*
[53] 254 N.W.2d 35, 38 (Mich. Ct. App. 1977).
[54] *Id.* at 36–37.

between a man or a woman and an animal."[55] The Court held that the trial court erred in its jury instruction, failing to instruct the jury as to penetration, "an essential element of the completed offense."[56] Consequently, the Court was left with no choice but to reverse and remand.[57] *Carrier* highlights the importance of clear statutory language. Relying on a common definition of bestiality would avoid the problems seen in these three cases.

In contrast to the United States which typically has relied on vaguely worded statutes broadly interpreted by the judiciary to condemn the convicted for periods up to twenty years,[58] the international community has used specifically worded statutes carrying much smaller penalties, and in many instances, no prohibitions at all. For example, Great Britain makes it a crime to "sexually penetrate or to be sexually penetrated by an animal."[59] The statute imposes a two-year maximum penalty. Germany, Sweden, and Denmark have entirely abandoned criminalizing bestiality. Instead these nations rely on regulation through ancillary statutes such as animal cruelty (if indeed the animal actually suffers), trespassing, damage to property, or offensive sexual acts in public.[60]

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[55] *Id.* at 38.
[56] *Id.*
[57] *Id.* at 39.
[58] *See* MASS. GEN. LAWS ANN. 272 § 34 (2000); R.I. GEN. LAWS § 11-10-1 (1956).
[59] Andrea Beetz, *Bestiality/Zoophilia: A Scarcely Investigated Phenomenon Between Crime, Paraphilia, and Love*, 4 J. FORENSIC PSYCHOL. PRAC. 2, 1, 7 (2004).
[60] *See id.* at 5-7.

With little agreement both nationally and internationally, the question remains whether there is a sufficient justification to prohibit bestiality.

PART II – POSSIBLE JUSTIFICATIONS FOR LAWS PROHIBITING BESTIALITY

Criminal prohibitions are restrictions on liberty that must be justified. Through a prohibition, citizens of a state no longer have the freedom to engage in certain behavior. At one extreme, complete freedom would result in anarchy where murders, rapes, and other harms go unpunished. At the other extreme lies authoritarianism, where simple freedoms are subject to control and revocation at the whim of a leader or group of leaders. We are constantly in search of the correct balance between liberty and order. One method to guide our decision making is to balance the harm imposed by the prohibition against the harm absent the prohibition. Exactly what kind of harm we should seek to prohibit and who is the correct subject for our protection lies at the center of this puzzle.

The prevention of harm to others is the most widely accepted justification for legal prohibitions. Preventing offenses to others is a less popular alternative. A third possible justification is to prevent harm to the actor. Finally, some jurisprudential scholars argue that it can be legitimate to pass laws to regulate morals. For reasons to be explained, I contend that only the first possibility, the Harm Principle, can be adequately defended, and laws prohibiting bestiality fail to find support under this justification. The other justifications are inadequate because, either they do not apply to bestiality or they are flawed in theory.

PREVENTING HARM TO OTHERS

Preventing harm to others is a sufficient justification for imposing criminal prohibitions[61], but it cannot be appropriately applied to bestiality when animals are not considered "others." It would be morally inconsistent for society to afford animals protection against bestiality because of the harm it causes them, yet allow animals to be used for food, clothing, science, and entertainment, which all cause them death or harm.

Joel Feinberg defines the Harm Principle in the following way:

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.[62]

This liberal principle has found wide-spread support ever since it was made famous by political theorist John Stuart Mill. Mill believed "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."[63] He argued, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[64] Imbedded in these definitions are two important prerequisites for government interference. First, there must be some harm, and second, that harm must be to a person other than the actor. If these conditions are met,

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[61] JOEL FEINBERG, HARM TO OTHERS 11 (Oxford Univ. Press 1984).
[62] *Id.* at 26.
[63] JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).
[64] *Id.*

then the state would be justified in preventing the harm so long as the harm to the other outweighs the harm to the individual whose liberty is restricted.

Measuring harm requires a balancing of factors. The harm of the prohibition (the loss of liberty to those who may want to engage in certain prohibited acts) is balanced against the harm to the other person absent the prohibition (the loss of liberty to the victim because of the acts). In order to justify a criminal prohibition, it is not sufficient enough for the scale to tip slightly in favor of the law, because "collateral costs" associated with criminalizing an act weigh on the side of liberty. These costs include a strain on court facilities, time and money spent by police to enforce the law, added prison population, and possibility of an increase in organized crime.[65] The result is that if the balance favors liberty, then the restrictions must have enough benefits to outweigh these costs. There are a few categories of laws where the state's interest in protecting its citizens outweighs the liberty interest of those prohibited by the state. These include harms against persons (homicide, rape, assault, and battery), harms against others' property (burglary, larceny, and fraud), and harm to the public or society (counterfeiting, smuggling, and tax evasion).[66] In these instances, the laws preventing these activities are justified, because in the absence of such laws, the harms to the victims far outweigh the sum of the harms to the individuals whose liberty is restricted and the collateral costs of enforcing the laws.

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[65] FEINBERG, *supra* note 61 at 10.
[66] *Id.* at 10–11.

In order for the Harm Principle to justify prohibitions against bestiality, the law must function to protect others. In this context, the other would have to be the animal, because the human participant is the actor and not the other. It is not completely without reason to suggest that animals could be the other, since after all, animals can, in certain contexts, be considered victims. In fact, the etymology of the word "victim" dates back to the sacrificial slayings of animals, and currently is often meant to include any suffering of any kind from any source.[67] Nevertheless, it is not clear whether victimhood is sufficient to consider an animal as an other. Even if we assume for the purposes of the argument that animals can be others, there are still two problems with justifying laws prohibiting bestiality; the first problem empirical and the second problem theoretical.

The first problem with justifying state restrictions on bestiality through the Harm Principle is that the majority of states are *not* justifying restrictions on bestiality through the Harm Principle. There are currently twenty-three states criminalizing bestiality.[68] Recall from Part I that each of these states restrict bestiality in one of four ways: deviant sexual acts, sodomy or buggery, crimes against nature, or bestiality (by name) or other animal rights protections. Of these four, only the latter two have any possibility of satisfying the Harm Principle. The former two we will consider later with regard to legal moralism.

Statutes prohibiting crimes against nature seem to suggest that the state's interest in the law is to preserve nature. Unfortunately, the name is misleading because the intent of the statute is to protect moral

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[67] *Id.* at 117.
[68] *See* Appendix.

decency and not nature. Crimes against nature are always described in statutes as “detestable” and “abominable,” words synonymous with buggery and sodomy. These descriptions are moral judgments dating back to the Bible rather than animal rights considerations. Therefore, states prohibiting bestiality under crimes against nature statutes are not justifiable under the Harm Principle, because these laws are not protecting others from harm. They are protecting moral decency.

The final category is divided between statutes labeled “bestiality” and those labeled animal cruelty. The “bestiality” statutes are simply a more precise application of the moral statutes. They make no reference to protecting animals for the sake of the animals, therefore, it follows they do not seek to protect others from harm. This leaves only four states with any reference to animal welfare in their statute. Three of these states’ statutes, California, Nebraska, and New York, are completely devoid of any readily identifiable rationale, and can be distinguished from “bestiality” statutes by name only. The remaining state’s statute, Washington, shows promise because it prohibits animal cruelty *per se*, and the statute defines cruelty through a range of animal protections that includes protection against bestiality. Specifically, Washington’s statute makes it a felony to knowingly engage in, aid, permit, or photograph sexual conduct with an animal.[69]

While other states have animal cruelty statutes, Washington is the only state that includes bestiality in its animal cruelty statute. Therefore, justifying restrictions against bestiality based on the Harm Principle, at least in practice, has failed for all but one state statute.

[69] WASH. REV. CODE § 16.52.205 (2006).

It is not enough to point out that states have traditionally based their laws on considerations other than animal welfare. It must be proven that animal welfare considerations (including the Washington statute) also fail the Harm Principle. A few scholars explicitly argue for restrictions on bestiality under the premise that animals are others who have the right not to be harmed. Much credit is owed to Peter Singer who sparked the interest in this topic in 2001 when he made the opposing claim that "sex with animals does not always involve cruelty."[70] Similar to the claim made by Midas Dekker, Singer was merely suggesting that some animals may enjoy certain sexual acts with humans, and therefore the acts may not necessarily be bad. Animal rights academics Tom Regan and Piers Beirne quickly responded to Singer's claim.[71]

Regan and Beirne essentially made the same argument against Singer. That argument can be summarized as follows:

P1. Sex without consent harms the non-consenting actor.

P2. Consent requires that both participants are:

i. Conscious;
ii. Fully informed; and
iii. Positive in their desires.

P3. Animals are incapable of saying "yes" or "no" to humans in forms that humans can readily understand.

P4. Animals cannot consent to sex. (2,3 modus tonens)

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[70] *See* Singer, *supra* note 14.

[71] *See* TOM REGAN, ANIMAL RIGHTS, HUMAN WRONGS: AN INTRODUCTION TO MORAL PHILOSOPHY 63–64 (Rowman & Littlefield Publishers 2003); Beirne, *supra* note 6, at 50–51.

Therefore: Sex with animals is harmful to the animal and that which is harmful should be prohibited.[72] (1,4 modus ponens)

To rebut Singer, both scholars draw the analogy between sex with animals and other forms of sex where one of the participants *cannot* consent. They admit that sex with children may not always involve cruelty, but that does not mean the act should be tolerated. The analogy suggests that if sex with a child is wrong because a child is incapable of consent, then sex with an animal is wrong because an animal is also incapable of consent.

Animals cannot consent, Beirne contends, "because they are incapable of saying yes or no to humans in a form that humans can readily understand."[73] There are at least two problems with this argument. The first problem is that animals can express their desires in many different ways that humans can understand. They can freely participate in certain acts and display certain species-specific archetypical and biological behavior consistent with excitement and happiness.[74] When engaging in interspecies sexual acts, animals can be as informed regarding that act as they would be for any same species sexual act. Children are capable of saying yes or no, but are given special protection because of the possible psychological harm that will likely occur if they engage in sexual acts at too early an age. There is insufficient data or argument to suggest that animals would undergo

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[72] REGAN, *supra* note 71, at 98.
[73] Beirne, *supra* note 6, at 50.
[74] Singer and Dekkers both refer to dogs who initiate sexual acts with humans by humping the leg of their owner. *See* Singer, *supra* note 14; DEKKERS, *supra* note 11, at 64.

the same psychological harm, therefore, they do not require our protection for this reason.

The second problem, the theoretical one, with the Regan/Beirne argument is that it overvalues animal consent. As a society and a species, we care about the liberty and harm of *others* in a way that does not transcend the species barrier. With very few exceptions, any rights afforded to animals are the property rights attributed to the animal's human owner. Traditionally, animals are not considered *others* so they do not have rights of their own. Without rights, there is no good reason to value animal consent, particularly above the liberty interests of people. Furthermore, it would be morally inconsistent of society to value animal consent with regard to sex but disregard animal consent with respect to animals used for food, science, clothing, and entertainment. While food and science might be justified by a balancing of interests where the human interests for food and scientific development outweigh the life interests of animals, such a justification cannot be established with regard to animals used for clothing and entertainment, because to hold otherwise would effectively devalue the weight of an animal's interest into non-existence.

Beirne argues a separate "Harm to Others" justification for prohibiting bestiality. He contends that bestiality is wrong because "it is a form of sexual violence linked to other forms of violence, particularly in the family."[75] If he is correct, this would be a sufficient justification under the Harm Principle, because the state's interest in the protection of future human sexual assault victims would arguably

[75] Beirne, *supra* note 6, at 52.

outweigh the liberty interest of zoophiles.[76] This argument is flawed, however, because it is too attenuated and it is not supported by sufficient data. Beirne is making an inferential leap when he concludes that unrestricted zoophiles will have no choice but to expand their sexual lusts onto people. As a point of contention, I believe that most people, zoophiles or not, are free actors capable of choosing their sexual partners whether they be animal, human, or vegetable, and the sexual acts with one such partner will not necessarily lead to sexual acts with another. Additionally, at least according to one study, Beirne is wrong as a factual matter. Andrea Beetz refers to a study that tracked a group of 750 convicted Australian zoophiles over 14 years.[77] Of the group, 87% were never convicted again of a sexual offense, and the remaining 13% were convicted a second time for either bestiality or a different sexual offense.[78] It is not clear what percentage of the 13% committed a sexual offense other than bestiality, but even without this information it appears that Beirne's fears of progressive sexual misconduct are unsupported.

In sum, the Harm Principle fails as a justification for bestiality. Animals are not others. Even if they were, states are not seeking to protect animals through bestiality statutes. To do so would be morally inconsistent, when animals are used for food, science, clothing, and

[76] Zoophiles are those people who engage in sex with animals. The term is broad enough to apply to any person who romantically loves an animal, but I use it in this paper with a narrower meaning, limited to those persons who engage in acts of bestiality. *See* Beetz, *supra* note 59, at 9.
[77] *Id.* at 8.
[78] *Id.*

entertainment. Additionally, no credible evidence exists suggesting that sex with animals necessarily leads to other sexual crimes.

PREVENTING HARM TO SELF

A second possible justification for laws prohibiting bestiality is to prevent harm to the actor. This principle, entitled Legal Paternalism suggests that "[i]t is always a good reason in support of a prohibition that is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself."[79] Unlike the Harm Principle, Legal Paternalism does not seek to protect an innocent other, but rather the actor herself. States can essentially pass two types of paternalistic laws, those requiring certain behavior and those prohibiting it.[80] The former type includes seatbelt laws while the latter type includes prohibitions against narcotics and fireworks.[81] Laws prohibiting bestiality fall into this latter type.

In order to justify laws prohibiting bestiality through Legal Paternalism, it must be proven that Legal Paternalism is a valid principle and that such laws appropriately apply. Under the balancing test, a state would be justified in prohibiting an act for the safety of the actor only if the harm to the actor outweighed the harm of restricting his liberty interest. In order to correctly balance the relative harms, the state must consider a number of variables. These variables include the risk of harm to the actor, the amount of harm to the actor, and whether the actor has assumed that risk. If the state accurately weighs the relative harms and is compelled to prohibit an act, then it ought to do

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[79] FEINBERG, *supra* note 61, at 26-27.
[80] JOEL FEINBERG, HARM TO SELF 8 (Oxford Univ. Press 1986).
[81] *Id.*

so in the least restrictive way possible to achieve its goal. To illustrate, consider the narcotics example. If a person takes drugs, the risk and the severity of the harm will depend on the type of drug. Certain drugs carry more risks and more severe harms than others. For a state to properly prohibit the drug, it must have determined that the risk of harm to the person outweighed the harm from depriving that person's liberty. After making this determination, the state ought to use the least restrictive means possible to achieve its goal. Outlawing dangerous narcotics would achieve the goal of protecting the actor in the least restrictive way, but banning all pharmaceuticals, dangerous and otherwise, would not.

Assumption of risk is another consideration. In order to fully assume the risk of harm, an actor cannot be mistaken about his conduct or be mistaken about the risks of his conduct. If, for example, an actor believes he is lighting an ordinary cigarette, when really it is laced with cyanide, we would not think twice about interfering with her smoking. Also, if an actor chooses to smoke under the mistaken belief that smoking will cure her asthma, the state would have an interest in restricting her. In such a case, Mill would argue that a state should be limited to educate or persuade the person not to smoke because of the actual risks, but not to restrict the person from smoking by criminal penalty. [82] There is no easy solution to this debate, so rather than

[82] *Id.* at 3 ("He cannot be rightfully compelled to do or forbear because it will be better for him to do so . . . These are good reasons for remonstrating with him . . . but not for compelling him or visiting him with any evil in case he do otherwise.")

choosing sides I will explain why bestiality laws cannot be applied under this principle.

Laws prohibiting bestiality are not justified through Legal Paternalism, either in practice or in theory. Recall from Part I that state laws prohibiting bestiality are typically based on preventing immorality. States prohibit the act out of concern for decency and morals rather than preventing harm to the actor. Remember however, that Washington, the sole exception, passed its statute in 2006 partly in response to the death of one of its citizens who was engaging in bestiality with a horse. This scenario fits the legal paternalism framework, because the state is prohibiting an activity that can seriously harm the actor. However, two points can be made in contention. First of all, the facts of the Enumclaw case are extremely rare.[83] The investigating Police Commander, Eric Sortland, was shocked by this occurrence stating, "[i]n the rare, rare case this happens, it's the person doing the animal."[84] Since the risk of harm to the zoophile is so low, the balance must be struck in favor of liberty. The second point is that the bestiality statutes are not the least restrictive means to achieve the goal of protection. All of the state laws banning bestiality ban any sexual contact between man and animal without regard to whether the human is the giver or the receiver. Washington, for example, bans a litany of sexual contact with animals, few of which pose any health concerns to the human participants.[85] If a state felt compelled to pass a

[83] Most bestiality involves men penetrating animals or women receiving oral stimulation. *See generally* DEKKERS, *supra* note 11.
[84] Sullivan, *supra* note 21.
[85] *See* WASH. REV. CODE § 16.52.205 (2006).

bestiality law to protect the welfare of its citizens it ought to restrict that law to cases of bestiality where there is some risk of harm to the actor.

There is one other possible paternalistic motive for banning bestiality. States could justify the prohibition, although none have, in order to prevent the spread of disease from animal to man. This fear, if rational, would be an appropriate paternalistic concern. I contend, however, that this fear is not rational and the risk of disease is so minimal that states are not justified in the prohibition. Today, few if any cases of bestiality involve animals that are not domesticated. The days of hunting through the forest to find an appropriate “mate” have passed. Since the animals are domesticated, the owners have an interest in keeping the animal healthy and knowing the condition of the animal. It would be a strange case indeed for an animal owner to choose to fornicate with his sick livestock or pet. Such a strange case that the risk of harm is outweighed by the collateral costs of enacting such a law.

In sum, Legal Paternalism may be a justifiable theory, but states are not justified in prohibiting bestiality through this theory. In all but a few cases, bestiality does not pose a risk of harm to the actor, and in those rare instances where it is harmful to the actor, the law is unjustified because it is too broad in its scope, prohibiting acts that do not involve such a risk. Additionally, a statute that is narrowly defined so that it prohibits only those cases of bestiality that could cause harm to the actor, would be unjustified when their collateral costs would outweigh their benefit.

PREVENTING OFFENSE TO OTHERS

A third possibility for justifying laws prohibiting bestiality is the Offense Principle. This Principle suggests that it is good for states to pass laws in order to protect people from unpleasant mental states wrongfully imposed on them from knowledge of the occurrence of certain loathsome behavior.[86] The classic examples are the desecration of religious symbols and human remains. Whether this Principle has any validity turns on the nature of the offense. In order for a person to be offended, he must suffer a disliked mental state, attribute that mental state to the wrongful conduct of another, and resent the other for his role in causing him to be in that mental state.[87] Once an offense has been established, in order for a state to prohibit that offense, it must balance the harm of the offense against the harm of the prohibition. Factors weighing on the side of the offense include the seriousness of the offense – intensity, duration, and extent, the ease of avoidance, the assumption of risk of the offended, and a proper discounting of the offended's abnormal susceptibilities.[88] Factors weighing on the side of the harm from loss of liberty include an extended list of collateral costs. In addition to the costs associated with passing any law, regulating offenses to others results in a long list of undesirable "side effects." These side effects include encouraging busybodies, eavesdroppers, and informers, elevating police investigation, hindering privacy, leading to arbitrary selective

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[86] JOEL FEINBERG, OFFENSE TO OTHERS 68 (Oxford Univ. Press 1985).
[87] *Id.* at 2.
[88] *Id.* at 34-35.

enforcement, leveraging blackmailers, and the problem of minimal deterrence when such laws could only carry minimal penalties.[89] The result of so many additional costs is that a state will only be justified in regulating offenses to others in very extreme circumstances.[90] Finally, to justify such regulation, the controlling statute must be narrowly tailored to achieve its goals.

Feinberg considers the offense of bestiality explicitly in his book. In a series of examples, he asks the reader to pretend he is on a crowded bus and judge his reaction to different examples of possibly offensive behavior. In "Story 23" the reader is to consider his reaction to the following:

> A passenger with a dog takes an aisle seat at your side. He or she keeps the dog calm at first by petting it in a familiar and normal way, but then petting gives way to hugging, and gradually goes beyond the merely affectionate to the unmistakably erotic, culminating finally with oral contact with the canine genitals.[91]

Feinberg classifies this type of offense as "disgust" because it passes the "yuk" test.[92] However, to pass legislation prohibiting offensive behavior, the behavior must be more than "yucky". The offense must outweigh the harm of the prohibition. Feinberg's example of bestiality seems to satisfy the offense requirement and the balancing requirement. First, there is an offense. The innocent bus passenger has suffered a disliked mental state. That mental state is attributed to the wrongful conduct of another, and the offended resents the zoophile

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[89] *Id.* at 66-67.
[90] *Id.* ("profound offense")
[91] FEINBERG, *supra* note 86, at 12.
[92] *Id.* at 20, 124.

for causing him to endure that mental state. Second, the balance swings in favor of prohibition when the innocent passenger is greatly offended and the harm to the zoophile by restricting his public act of bestiality is not very great. Therefore, states are justified in prohibiting this type of bestiality. However, our analysis cannot stop here. Recall that the Offense Principle requires states to narrowly tailor their laws to achieve their goals.

State statutes prohibiting bestiality on the basis of offense to others are unjustified because they are unduly broad. Many states have laws which prohibit sexual acts in public. But many of these sexual acts are not prohibited in private. This is especially true after the Supreme Court found a right to privacy in homosexual acts in *Lawrence v. Texas*. Problematically, statutes prohibiting bestiality do so both in public and in private. Assuming a person is not forced to watch, private acts of bestiality are not directly offensive to anybody.[93] They may however be indirectly offensive. An indirect offense derives from the "bare knowledge" that such activities occur without punishment. However, offense through bare knowledge is not sufficient to warrant prohibition when the offended party is not a victim to any offensive act and his rights are not being violated.[94] These types of indirect offenses fail the second offense to others requirement. The offended party cannot rightfully attribute his disliked mental state to the conduct of another, when the offended is the person creating the offensive image.

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[93] *Id.* at 93-94.

[94] *Id.* at 69, 94 (Feinberg believes it would be offense to a personally related party of the victim, and otherwise, offense through bare knowledge could be justifiable on grounds of legal moralism.).

Since the statutes are not narrowly tailored to protect against the offense to others, they cannot be justified under the Offense Principle.

PREVENTING IMMORALITY

Legal Moralism is different than our other theories of justification, because it does not rely on harm or offense to anyone. Instead it seeks to justify itself through dogmatic adherence to religious texts and thousands of years of tradition. I contend that unjustified sources and years of oppression do not amount to a legal justification sufficient to restrict a person's liberty. The burden therefore rests with the state to prove why governing morality is justifiable. That burden has not been met.

The oldest and most relied upon opponent to bestiality has been the Church. For thousands of years Christianity has condemned bestiality as immoral, unnatural, and harmful to the traditional way of life.

> Neither shalt thou lie with any beast to defile thyself therewith: neither shall any woman stand before a beast to lie down thereto; it is confusion.[95]
>
> And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and the beast: they shall surely be put to death: their blood shall be upon them.[96]
>
> Cursed be he who lieth with any manner of beast.[97]

Religious leaders have had the role of interpreting these verses through Christian moral literature called penitentials.[98] These penitentials

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[95] Leviticus 18:23 (King James).
[96] Leviticus 20:15-16 (King James).
[97] Deuteronomy 27:21 (King James).

shaped Catholic sexual doctrine between the 6th and 11th centuries. They often grouped bestiality among a class of sex sins including fornication before marriage, adultery, and masturbation. While the Bible specifically called for death to the bestial sinner, the early penitentials were more lenient because people lived in very rural communities filled with domesticated animals, providing lots of temptation.[99] The common punishments during this era included public begging for forgiveness, prolonged and severe fasting, sexual abstention, and public whipping.[100] The later penitentials linked bestiality to acts of sodomy including oral and anal sex.[101] The punishment for these sins was more severe. The animals were usually burned to death so as not to tempt any other people.[102] The offending persons were typically banned from the Church, and some offenders were required to go barefoot for the rest of their lives.[103]

As explained in Part I, secular law has justified prohibitions on bestiality by relying on religious sentiment. The state has typically borrowed the language of the Church criminalizing sodomy and unnatural sexual acts. One problem with a religious justification is that

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98 BRUNDAGE, *supra* note 1, at 152.
99 *Id.* at 168.
100 *Id.* at 153.
101 *Id* at 213.
102 *Id.* at 400.
103 BRUNDAGE, *supra* note 1, at 213-214. For a more modern example of the offending animal being punished in order to prevent it from tempting others, *see* ZOO (THINKFilm LLC 2007). Zoo is a documentary made in response to the Enumclaw, Washington, bestiality death. The film explains that Enumclaw animal services seized the offending horse and castrated it, to prevent future harms to others.

it is always arbitrary. There are many passages in the Bible that the state no longer follows. For example, slavery was regarded as a legitimate institution.[104] Or in Genesis 3:16, God declared that men should rule over women.[105] If the state chooses to enforce the Bible in one regard, but not another, the burden is on the state to explain why. But, the state will not be able to meet this burden, because in a secular society the law cannot rely on unjustified religious doctrines when its citizens are entitled to disbelieve those doctrines.[106] The moral view of the majority may not always comport with the teachings of the Bible and in many instances there are people who disagree with the morality of the majority. A valid defense of Moral Legalism will require legal argument above and beyond adherence to dogmatism.

Sir Patrick Devlin suggests that feelings of intolerance, indignation, and disgust are sufficient justification for criminal law.[107] There are a few problems with Devlin's theory. First, morals are often difficult to identify and are often in a state of flux. Second, enforcing morals leads to selective prosecution. Third, the collateral costs of enforcing morals outweigh the gains from the prohibition.

H.L.A. Hart explains social morals are vague and hard to identify in the tough cases. [108] Morals change, which leads to due process concerns when people cannot accurately gauge the state of the law. Consider for example the German laws regarding bestiality. In 1969,

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[104] *See* Deuteronomy 15:12-14; Ephesians 6:5-9; Colossians 4:1 (King James)

[105] Genesis 3:16 (King James)

[106] PATRICK DEVLIN, MORALS AND THE CRIMINAL LAW 273 (Oxford Univ. Press 1965).

[107] *See id.* at 17.

[108] H.L.A. HART, IMMORALITY AND TREASON 162 (The Listener 1959).

Germany legalized bestiality finding that morals change over time and should not be the basis of penal law. It argued that bestiality humiliates the person rather than society, or mankind, in general.[109]

Regulating morals leads to the problem of selective enforcement. Police officers and prosecutors are responsible for bringing criminals to justice, but in the case of moral crimes, there is a risk that these officials will only charge those people they do not like, for whatever inappropriate reason.

The collateral costs of preventing immorality outweigh its gains. These costs include the loss of liberty associated with the prohibition and the loss of privacy required for enforcement. In order for police to regulate moral conduct, they would be required to regulate that conduct both in public and in private. Unless society is willing to surrender its right to privacy, such Legal Moralism is ultimately unenforceable. Consider, for example, France which does not have laws prohibiting bestiality, because it was thought preferable "in the interest of public morals, to throw a veil over those turpitudes with a difficult investigation, which, on being given publicity, would only cause scandal."[110] In sum, Legal Moralism is a departure from the Harm Principle and cannot be the justification for criminal laws when its harms outweigh its gains.

CONCLUSION

Laws prohibiting bestiality are poorly defined, inconsistent, and unjustified. In Part I, Bestiality was defined as sexual contact between human and non-human animals for human sexual gratification. We

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[109] Beetz, *supra* note 59, at 6.

[110] *See* Parker, *supra* note 3, at 104.

found that this definition comported with our detached view of what types of behavior constitute bestiality. Next, we learned that half of the states in the U.S. prohibit bestiality as deviant sexual acts, sodomy or buggery, crimes against nature, or bestiality by name, or through other animal sex prohibitions. The first three types have religious origins and the latter type is concerned with animal welfare. Of the twenty-four states prohibiting bestiality, only Washington does so explicitly for animal rights concerns. The statutes themselves are riddled with vague terms that are reinterpreted by the judiciary. The courts, in the few instances they have heard a bestiality case, have read their own morals and the morals of the legislature directly into the statute. The result has been the perpetuation of inappropriately grounded and vaguely defined prohibitions against bestiality.

In Part II, we considered four possible justifications for laws prohibiting bestiality, and the Harm Principle served as an adequate standard for criminalization. States are justified in preventing harm against others so long as the balance tips sufficiently in favor of criminalization. Bestiality could not be justified under this theory, however, when animals are not "others." In practice, animals have nearly no rights of their own and will continue to have no rights so long as they are used for food, science, clothing, and entertainment. Next, we considered the possibility that criminalization can be justified under Legal Paternalism. Preventing harm to self is persuasive in theory, but could not be readily applied to bestiality in practice or experiment. As a matter of fact, states simply do not prohibit bestiality for the safety of their citizens. Even if they did, they would be required to narrow the law to prohibit only the dangerous forms of bestiality, which they fail to

do. Third, under the Offense Principle we acknowledged that states could restrict public acts of bestiality the same way they restrict other displays of public sex. However, states could not restrict private acts of bestiality through the Offense Principle when there is no direct offense to its citizens who are not witnessing the act. Finally, we dismissed Legal Moralism as an illegitimate principle of justification when it is based on vague shifting morals, that are selectively enforced and sufficiently outweighed by their collateral costs.

The laws prohibiting bestiality as they stand today are not justified. Their very existence undermines the legitimacy of our legal system. To be justifiable, I suggest rewriting the statutes in clear, precise language geared toward preserving animal rights. But before we can justify legislating animal rights we must agree as a society that animals do have rights and interests, and then stop subjugating those rights in unjustifiable ways.

APPENDIX: STATE STATUTES PROHIBITING BESTIALITY

The following is an up to date list of the laws of the 50 states with regard to bestiality. Any statutes prohibiting bestiality solely because the acts a) involve minors; b) are done in public view; or c) involve the commercial sale, creation, or dissemination of recordings of these acts are excluded.

Alabama
ALA. CODE § 13A-6-63 (1975) Deviate Sexual Intercourse; sodomy
A person commits the crime of sodomy in the first degree if: He engages in deviate sexual intercourse with another person by forcible compulsion… The statute defines deviant sexual intercourse as any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another. This section is broad enough in its terms to embrace all unnatural carnal copulations, whether with man or beast.

Alaska
No statute.

Arizona
No statute.

Arkansas
Bestiality statute declared unconstitutional by state supreme court in 2002.
Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).

California
CAL. PENAL CODE § 286.5 (West 1975) Sexually assaulting an animal; misdemeanor
Any person who sexually assaults any animal for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor.

Colorado
No statute.

Connecticut
No statute.

Delaware

DEL. CODE ANN. TIT. 11 § 777 (1993) Bestiality

A person is guilty of the felony of bestiality when the person intentionally engages in any sexual act involving sexual contact, penetration or intercourse with the genitalia of an animal or intentionally causes another person to engage in any such sexual act with an animal for purposes of sexual gratification.

Florida

No statute.

Georgia

GA. CODE ANN., § 16-6-6 (1833)

(a) A person commits the offense of bestiality when he performs or submits to any sexual act with an animal involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(b) A person convicted of the offense of bestiality shall be punished by imprisonment for not less than one nor more than five years.

Hawaii

No statute.

Idaho

IDAHO CODE ANN. § 18-1505B (2005) Sexual abuse and exploitation of a vulnerable adult

It is a felony for any person, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of such person, a vulnerable adult or a third party, to involve a vulnerable adult in any act of bestiality.

IDAHO CODE ANN. § 18-6605 (1972) Crime against nature--Punishment

Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.

Illinois

No statute.

Indiana

IND. CODE 35-46-3-14 (2007) Bestiality

Sec. 14. A person who knowingly or intentionally performs an act involving:

(1) a sex organ of a person and the mouth or anus of an animal;

(2) a sex organ of an animal and the mouth or anus of a person;

(3) any penetration of the human female sex organ by an animal's sex organ; or

(4) any penetration of an animal's sex organ by the human male sex organ;
commits bestiality, a Class D felony.

Iowa
IOWA CODE ANN. § 717C.1 (West 2001) Bestiality
A person who performs a sex act with an animal is guilty of an aggravated misdemeanor.

Kansas
KAN. STAT. ANN. § 21-3505 (1969) Criminal Sodomy; KAN. STAT. ANN. § 21-3501 (1969) Definitions
Oral or anal copulation or sexual intercourse between a person and an animal is a misdemeanor.

Kentucky
No statute.

Louisiana
State's crime against nature statute declared unconstitutional in 2005. *See Louisiana Electorate of Gays and Lesbians, Inc. v. Connick*, 902 So.2d 1090 (La. App. 2005).

Maine
ME. REV. STAT. ANN. tit. 17 § 1001 (1975) Repealed.
State's crime against nature statute was repealed in 2006.

Maryland
MD. CODE ANN., Art. 27, §554 Repealed.
The State's perverted sexual practices act was repealed in 2002.

Massachusetts
MASS. GEN. LAWS ANN. 272 § 34 (2000) Crime against nature
Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years.

Michigan
MICH. STAT. ANN. § 750.158
Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Minnesota
MINN. STAT. ANN. § 609.294 (West 1967)
Whoever carnally knows a dead body or an animal or bird is guilty of bestiality, which is a misdemeanor. If knowingly done in the presence of another the person may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000 or both.

Mississippi
MISS. CODE ANN. § 97-29-59 (1930) Sodomy
Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years.

Missouri
MO. REV. STAT. 566.111 (1991) Unlawful Sex with an Animal
1. A person commits the crime of unlawful sex with an animal if that person engages in sexual conduct with an animal or engages in sexual conduct with an animal for commercial or recreational purposes.
2. Unlawful sex with an animal is a class A misdemeanor unless the defendant has previously been convicted under this section, in which case the crime is a class D felony.

Montana
The State's Deviant Sexual Conduct statute prohibiting bestiality was declared unconstitutional by the state in 1997. *See Gryczan v. State*, 942 P.2d 112, 113 (Mont. 1997).

Nebraska
NEB. REV. STAT. § 28-1010 (1977) Indecency with an animal; penalty; NEB. REV. STAT. § 28-318 (1977) Terms, defined.
A person commits indecency with an animal when such person subjects an animal to sexual penetration. Sexual penetration includes sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen. Indecency with an animal is a Class III misdemeanor.

Nevada

No statute.

New Hampshire
No statute.

New Jersey
No statute.

New Mexico
No statute.

New York
N.Y. PENAL LAW § 130.20 (McKinney1965) Sexual misconduct
A person is guilty of a misdemeanor when:
He or she engages in sexual conduct with an animal.

North Carolina
The State's crimes against nature statute was declared unconstitutional by the state supreme court in 2005. *See State v. Whiteley*, 616 S.E.2d 576, 577 (N.C. App. 2005).

North Dakota
N.D. CENT. CODE 12.1-20-12 (1973) Deviant Sexual Act; N.D. CENT. CODE 12.1-20-02 (1973) Definitions
A person who performs a deviate sexual act with the intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor. "Deviate sexual act" means any form of sexual contact with an animal, bird, or dead person.

Ohio
No statute.

Oklahoma
21 OKL. STAT. ANN. § 886 (1910) Crime Against Nature
Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the custody of the Department of Corrections not exceeding ten (10) years.

Oregon
No statute.

Pennsylvania

18 PA. CONS. STAT. ANN. § 3124 Repealed.
The State's Deviate sexual intercourse statute was repealed in 1995.

Rhode Island
R.I. GEN. LAWS § 11-10-1 (1956) Abominable and Detestable Crime Against Nature
Every person who shall be convicted of the abominable and detestable crime against nature, with any beast, shall be imprisoned not exceeding twenty (20) years nor less than seven (7) years.

South Carolina
S.C. CODE ANN. § 16-15-120 (1976) Buggery.
Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be guilty of felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

South Dakota
S.D. CODIFIED LAWS § 22-22-42 (2003) Bestiality--Acts constituting--Commission a felony
It is a felony for any person, for the purpose of that person's sexual gratification, to:
(1) Engage in a sexual act with an animal; or
(2) Coerce any other person to engage in a sexual act with an animal; or
(3) Use any part of the person's body or an object to sexually stimulate an animal; or
(4) Videotape a person engaging in a sexual act with an animal; or
(5) Kill or physically abuse an animal.

Tennessee
No statute.

Texas
No statute.

Utah
UTAH CODE ANN. § 76-9-301.8 (1953) Bestiality
(1) A person commits the crime of bestiality if the actor engages in any sexual activity with an animal with the intent of sexual gratification of the actor.
(2) For purposes of this section only:
(a) "Animal" means any live, nonhuman vertebrate creature, including fowl.
(b) "Sexual activity" means physical sexual contact:
(i) between the actor and the animal involving the genitals of the actor and the genitals of the animal;

(ii) the genitals of the actor or the animal and the mouth or anus of the actor or the animal; or
(iii) through the actor's use of an object in contact with the genitals or anus of the animal.

(3) A crime of bestiality is a class B misdemeanor.

Vermont
No statute.

Virginia
VA. CODE ANN. § 18.2-361 (1975) Crimes against nature; penalty
If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony.

Washington
WASH. REV. CODE § 16.52.205 (2006) Animal cruelty in the first degree
A person is guilty of animal cruelty in the first degree when he or she:
(a) Knowingly engages in any sexual conduct or sexual contact with an animal;
(b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal;
(c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control;
(d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual conduct or sexual contact with an animal for a commercial or recreational purpose; or
(e) Knowingly photographs or films, for purposes of sexual gratification, a person engaged in a sexual act or sexual contact with an animal.
(4) Animal cruelty in the first degree is a class C felony.

West Virginia
No statute.

Wisconsin
WIS. STAT. ANN. § 944.17 (West 1987)
Whoever does any of the following is guilty of a Class A misdemeanor: Commits an act of sexual gratification involving his or her sex organ and the sex organ, mouth or anus of an animal. Commits an act of sexual gratification involving his or her sex organ, mouth or anus and the sex organ of an animal.

Wyoming
No statute.