

Throwing the Dog a Bone: A Historical and Policy Critique of the Supreme Court’s Bestiality Ruling

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Case Commented On: *R v DLW*, [2016 SCC 22 \(CanLII\)](#)

In *R v DLW*, [2016 SCC 22](#) the Supreme Court of Canada split on whether the criminal offence of bestiality requires “penetration.” The majority judgment held that bestiality requires penetration and, on that basis, held that a dog licking a vagina is not bestiality. In contrast, the dissenting judgment held that bestiality does not require penetration and, accordingly, held that a dog licking a vagina is bestiality. In this post, we first summarize the factual and legislative background in *DLW* and the reasons of the majority and dissenting judgments. Second, we critique the majority judgment for: (1) its unpersuasive reliance on judicial deference; and (2) its overstated claim that “buggery” (the precursor to bestiality) had a clear meaning. Lastly, we critique both the majority and dissenting judgments for their reliance on: (1) imprecise sexual terms which fail to bring clarity to bestiality law; and (2) an unimaginative privileging of cisgender, procreative heterosexuality that perpetuates harmfully conservative understandings of human sexuality.

Background

Before discussing the majority and dissenting judgments in *DLW* and our concerns with respect to those judgments, we briefly discuss two areas of background, namely:

1. the facts in *DLW*; and
2. the bestiality offence’s history.

In particular, establishing these two pieces of background at the outset facilitates a tidy summary of the judgments since the facts (which do not involve penetration by or of an animal) and the bestiality provision’s history, are central to both judgments.

Facts

The facts in *DLW* relate to a step-father and his two step-daughters whom he sexually abused over the course of 10 years (at para 5).

This step-father’s sexual abuse gradually progressed in severity as his step-daughters grew in age:

1. 12 – Fondling: By the time they reached the age of 12, he sexually fondled them (at para 5).

2. 14 – Sex: By the time they reached the age of 14, he forced them to engage in oral sex and sexual intercourse, and encouraged them to perform sex acts with each other (at para 5).
3. 15/16 – Bestiality?: By the time the older step-daughter reached the age of 15 or 16, he attempted to make the family dog have intercourse with her, and when that failed, he spread peanut butter on her vagina for the dog to lick off (at paras 5–6).

Critically, the sexual activity between the family dog and the older step-daughter did not involve penetration. This absence of penetration was central to the split at the Supreme Court in respect of whether the act that transpired—a dog licking a vagina—qualifies as “bestiality”.

To be clear, whether the step-father was ultimately incarcerated did not depend on whether a dog licking a vagina constitutes bestiality. Indeed, the step-father was convicted for “numerous other sexual offences” against his step-daughters, and was sentenced to 14 years in prison for those offences. The bestiality conviction, which was the subject of the *DLW* appeal, only impacted whether the step-father was sentenced to a further 2 years in prison as a result of the sexual activity he orchestrated between the family dog and his oldest step-daughter (at para 5).

Bestiality Offence History

An instructive definition of bestiality has never been provided by any of the statutes that have prohibited it since its genesis as a criminal offence in 1869 (at para 128). Instead, those statutes have simply prohibited acts described by vague phrases relating to “buggery with an animal” or “bestiality”, neither of which explain whether penetration is a required element of the offence (see para 43).

As a consequence, despite multiple amendments the bestiality provision has failed to provide clarity with respect to bestiality’s definition. Rather, it began and remains a statutorily undefined sexual crime, involving some form of sexual activity between humans and animals.

Still, two historical amendments to the bestiality provision provide subtle insights into its meaning:

1. The “1955 Amendments” – Adding Bestiality: In 1955, the *Criminal Code* was amended, with the English version of the buggery provision changing from “buggery, either with a human being or with any other living creature” to “buggery or bestiality”, and the French version remaining unchanged and continuing to prohibit “sodomie” and “bestialité” (at paras 72–74).
2. The “1988 Amendments” – Separating/Expanding Bestiality: In 1988, the *Criminal Code* was amended again, separating buggery (now, anal intercourse) and bestiality into distinct provisions (*Criminal Code* sections [159](#) and [160](#), respectively), and expanding the scope of the bestiality provision by including as criminal offences compelling another to commit bestiality and committing bestiality in the presence of a child (at paras 102–03).

(Collectively, the “Key Amendments”.)

With the facts from *DLW* and history of the bestiality offence established, the Supreme Court judgment may now be discussed with greater ease.

SUPREME COURT JUDGMENTS

The Supreme Court issued two judgments in *DLW*:

1. the majority judgment authored by Justice Cromwell and concurred in by Chief Justice McLachlin and Justices Moldaver, Karakatsanis, Côté, and Brown, which held that bestiality requires penetration (the “Majority”); and
2. the dissenting judgment authored by Justice Abella, which held that bestiality does not require penetration (the “Dissent”).

Majority: Bestiality Requires Penetration

The Majority held that bestiality requires penetration (at para 4). As a consequence, the Majority acquitted the step-father (of bestiality, not the other offences) because the sexual activity at issue—a dog licking his step-daughter’s vagina—did not involve penetration (at paras 123–24).

The Majority reached this conclusion relying on the principle that if a word has a well-understood legal meaning, it should be given that meaning when used in a statute (at para 20). In consequence, the Majority held that Parliament’s use of the word “bestiality” in the 1955 Amendments should be interpreted as matching bestiality’s historical meaning, which required penetration (at para 99).

Given the above logic, the Majority’s reasoning involved two inquiries:

1. The “Historical Inquiry”: whether bestiality historically required penetration before the Key Amendments; and
2. The “Contemporary Inquiry”: whether bestiality requires penetration today, after the Key Amendments.

With respect to the Historical Inquiry, the Majority held that the relevant statutes predating the Key Amendments all required penetration, namely:

1. the 1861 English *The Offences against the Person Act* (at paras 29–30); and
2. the 1892 Canadian *Criminal Code* (at para 47).

With respect to the Contemporary Inquiry, the Majority held that neither of the Key Amendments signalled the unambiguous intent needed to substantively modify criminal law (see paras 54–56) that Parliament sought to remove penetration as a requirement of bestiality. Specifically, the Majority held that:

1. The 1955 Amendments did not remove the penetration requirement. Arguably, the change to the English version of the *Criminal Code* (changing “buggery with an animal” to “bestiality”) could be interpreted, in isolation, as making substantive changes to the scope of bestiality. But the French version (“bestialité”) remained the same throughout,

demonstrating that no substantive revision could have been intended (at paras 79–80) and that the change to the English version alone was a “benign housekeeping” exercise merely seeking greater consistency between the English and French versions of the *Criminal Code* (at paras 95–96).

2. The 1988 Amendments also did not remove the penetration requirement. These amendments included a “virtually complete overhaul” of various sexual offences with no similar change to the bestiality provision. The only change to the bestiality provision involved expanding it to include compelling another to commit bestiality and committing bestiality in the presence of a child. The continued use of the word “bestiality” in these new provisions in no way signalled Parliamentary intent to remove penetration as a requirement of bestiality (at para 116).

By combining these two holdings—(1) bestiality historically requiring penetration; and (2) Parliament never changing that requirement—the Majority held that bestiality still requires penetration and, accordingly, acquitted the step-father of bestiality (at paras 123–24).

Dissent: Bestiality Does Not Require Penetration

The Dissent reached the opposite conclusion of the Majority, and held that bestiality does not require penetration (at para 127). As a consequence, the Dissent would have convicted the step-father (at para 153) because the sexual activity at issue—a dog licking his step-daughter’s vagina—need not involve penetration to qualify as bestiality.

The Dissent disagreed with the Majority about both of the key inquiries mentioned above. With respect to the Historical Inquiry, the Dissent held that it was “far from clear,” particularly given the scarcity of cases dealing with bestiality, that penetration was required before the Key Amendments (at paras 134–35). Specifically, the Dissent noted that while penetration between a human and animal may have been sufficient to prove bestiality, it is unclear that penetration was necessary to prove bestiality (at para 135).

With respect to the Contemporary Inquiry, the Dissent held that, after the Key Amendments, penetration was not required for bestiality (at para 127). The Dissent admitted that “a good case can be made” for the Majority’s interpretation that bestiality retained penetration as a requirement following the Key Amendments (at para 126)—that is, assuming that penetration was ever a requirement (at paras 134–35). However, the Dissent had “a great deal of difficulty” accepting that Parliament “forgot to bring the offence out of the Middle Ages” and retained the penetration requirement (at para 126). Specifically, the Dissent held that:

1. If bestiality historically required penetration, the 1955 Amendments removed that requirement. First, by separating bestiality and buggery the 1955 Amendments permitted bestiality to abandon constituent elements—like penetration—related to buggery (at para 136). Similarly, the Dissent held that changing the English version from only prohibiting “buggery” to prohibiting “bestiality and buggery” shows that Parliament intended the two terms to have distinct meanings with possibly only buggery requiring penetration (at para 143; emphasis in original). Second, the 1955 Amendments enhanced protections for animals under the *Criminal Code*, reflecting an increased recognition of animal welfare, and further signalling Parliament’s intent to approach the bestiality offence more broadly (at para 141). In particular, the 1955 Amendments broadened the scope of the animal cruelty offence from “cattle, poultry, dog, domestic animal or bird, or wild animal or bird

in captivity” to all birds and animals (at paras 140 and 142). The Dissent reasoned that it would be inconsistent for Parliament to expand the animal cruelty offence to include all birds and animals, but to limit the bestiality offence to those animals whose anatomy permitted penetration (at para 142).

2. If bestiality historically required penetration, the 1988 Amendments confirmed Parliament’s intent—initially signalled in the 1955 Amendments—to remove the penetration requirement from bestiality. First, the 1988 Amendments placed “buggery” and “bestiality” into separate provisions, confirming Parliament’s intent to treat them as two separate offences (at para 144), such that bestiality no longer had to share buggery’s penetration requirement. Second, the 1988 Amendments expanded the bestiality offence in a manner inconsistent with retaining the penetration requirement. For example, the bestiality offence was expanded to include committing bestiality in the presence of a child, and it would be absurd to think that Parliament sought to prevent children from being exposed to sexual activity with animals only when that sexual activity involves penetration (at paras 146–47). Third, the 1988 Amendments introduced multiple new offences directed at protecting minors from sexual abuse that were also inconsistent with retaining the penetration requirement for bestiality. For example, the new sexual exploitation offence did not require penetration, making it “anomalous” to require penetration when such exploitation happens to involve an animal (at para 148).

COMMENTARY

Lisa Silver posted a [doctrinal commentary](#) on the Supreme Court’s divide with respect to statutory interpretation. In this post, we will instead provide commentary on other aspects of the judgments, namely:

1. The Majority’s unpersuasive reliance on judicial deference as the basis for a narrow interpretation of bestiality; and
2. Various flaws in the Court’s interpretation of sexual terminology that reflect a series of erroneous and harmful ideas about the nature of sexuality and sexual practice.

Judicial Restraint: How Is “Interpreting” Bestiality Different from “Expanding” It?

The Majority’s reasoning is predicated on the principle that “changes to the scope of criminal liability must be made by Parliament” (at para 3). However, in our view, justifying a narrow interpretation of bestiality based on this principle is legally unpersuasive for two reasons:

1. Changes to the scope of criminal liability are inherent to the Court’s role of interpreting the *Criminal Code*, and accordingly, such changes are an unavoidable consequence of judicial interpretation. For example, in *R v JA*, [2011 SCC 28](#) the Court held that *de facto* consensual sexual activity constitutes sexual assault if one partner is deliberately unconscious (at para 3). By holding that an entire category of sexual activity which is consensual in fact is non-consensual in law, the Court, in effect, expanded the scope of criminal liability. If one were to respond that the Court did not “expand” criminal liability in *JA* but rather merely “interpreted” the meaning of consent, then Justice Abella’s holding that bestiality does not require penetration should similarly constitute a mere “interpretation” of the meaning of bestiality. Given the lack of clarity in the original terms in the law, all possible “interpretations” of the law will necessarily change its

scope.

2. The Court has admitted in previous cases to unilaterally expanding the scope of criminal liability, thus contradicting its claim in *DLW* that such changes are impermissible. Specifically, in *R v Jobidon*, [1991] 2 SCR 714 the Court held that, during a consensual fistfight, an accused cannot rely on the *Criminal Code* defence of consent if bodily harm is intended and caused (at 766; see also Professor Sankoff's [video blog on DLW](#) at 6:38–9:01). In our view, a coherent framework for how the philosophy of judicial restraint predictably limits the scope of legitimate judicial interpretation is lacking. Absent such a framework, judicial interpretations relying on judicial restraint are unpersuasive as they are functionally discretionary.

Sexual Terminology: The Court's Flawed Interpretation of Sexuality

In addition to the legal problems with the Court's standards of "interpretation," there are a number of significant issues with their interpretations themselves. In our view, the judgments of the Court (*i.e.* both the Majority and Dissent) inadequately interpret sexual terminology in three ways:

1. Persisting current ambiguity: The terms used by the Court to clarify the ambiguity of the term "bestiality"—"penetration" and "sexual intercourse"—retain much of the ambiguity of the original term, and fail to achieve the Court's goal of outlining predictable boundaries of "bestiality."
2. Disregarded historical ambiguity: We agree with the Dissent that the terms "sodomy," "buggery," and "carnal knowledge" on which the Majority's definition of "bestiality" depends do not have the historically specific definition that the Majority attributes to them, and are instead tied to sets of sexual mores which change not only over time but among people.
3. Difficulty of specifying forms of sexual expression: The Court claims to conduct an objective analysis of sexual terminology, but its analysis actually reflects a conservative philosophy that validates the naturalness of certain forms of sexuality over others. In consequence, the Court implicitly legislates sexual mores and, in turn, codifies conservative sexual norms about gender roles and propriety that police the behaviour and expression of Canadians without recourse to any demonstrable harm.

1. What is "Penetration?": Persisting Current Ambiguity

The Court seeks to clarify the ambiguity of "bestiality" by limiting the set of potential acts it indicates to those involving "penetration" (and, interchangeably, "sexual intercourse"). Both the Majority and the Dissent simply assume that "penetration" and "sexual intercourse" themselves have well-understood legal meanings. Both opinions concur, no doubt to the surprise of many women, that penetration is "physically impossible" for "more than half the population" (see para 27 of the Majority and para 149 of the Dissent)—presumably the female half, who by this logic (and to [Freud's posthumous glee](#)) seem to have no physical attributes beyond the absence of a penis. The biggest problem with such a specification is its limited imagination with respect to the potential diversity of meanings that "penetration" and "sexual intercourse" make available to enterprising Canadians. Many possible cross-species sex acts are either not definitively accounted for by the judgment or accounted for in ways the Court is unlikely to have intended.

As a result, the Court merely defers the ambiguity created by the term “bestiality” to new terms that share its lack of clarity. To correct for the ambiguity generated by the substitution of one set of euphemisms for another, the next few paragraphs do not contain any euphemisms.

Throughout the Majority we are told that there are essentially two options for any given prospective penetrator: “vaginal” (sometimes “coital”) or “anal” (at paras 49, 89, and 91). While this seems specific enough, it is insufficient for defining bestiality. For instance, there is not a single bird, reptile, or amphibian that possesses either a vagina or an anus. Instead, these animals (and some mammals too) possess a single orifice called a cloaca. As it currently stands, the Supreme Court has seemingly ruled that Canada’s bestiality laws permit the penetration of ostriches, crocodiles, tortoises, two-toed amphiumas, and anything else without an anthropomorphic genital configuration.

If we assume that the Court intends for bestiality laws to prohibit sexual interaction between humans and more than just a small subset of vertebrates, we might reasonably amend this definition to include something like “any orifice fulfilling the general function of a vagina or an anus.” While this is better than the definition provided by the Court, its lopsided insistence on a gendered paradigm for penetration still leaves some legal grey areas for the enterprising penetrator. For instance, penetrative acts such as “sounding” (the penetration of a urethra) are genitally based but only ambiguously addressed by the ruling. Even if we assume that the Court means to prevent Canadians from penetrating golden moles, frogs, and parakeets (which is not obvious as the judgment stands), there are still unresolved questions that demand answers. Is it currently legal for Canadians to penetrate an elephant’s penis? Do we deem all intersex Canadians to have a vagina-for-legal-purposes, or are we fine with them being penetrated by as many willing animals as they can find? The fact is that the majority of potential penetrative acts involving animals simply do not fit within the missionary heterosexual paradigm that seems to limit the Court’s imagination.

Even more problematic than their heteronormative, anthropocentric fixation on vaginas and anuses, the Court fails to address what is being used to penetrate the vaginas and anuses in question. Presumably the Court assumes this is obvious, but there are, indeed, a wide range of potential means of penetration belying this assumption. At one point, and only one point, a translated French text informs us that there must be penetration “by the male organ” (at para 89). The bizarre conclusion flowing from this is that the Court is fine with Canadians engaging in brachioanal penetration (commonly known as “fisting”) with a donkey, or inserting an elongated clitoris into a rabbit’s vagina. Similarly, it would seem that a Canadian would be prohibited from inserting an entire garter snake into their rectum if and only if the snake was male and the person in question was therefore also, technically, being penetrated by a “male organ.”

While the Court never specifies, we can safely assume from the heteronormative paradigm active throughout the judgments that “male organ” refers to male genitals, but, even with this assumption, some ambiguity remains. Most animals, including humans, do not just have a single reproductive “male organ.” We are left wondering if it is, for instance, legal for a Canadian to “penetrate” a dog’s anus with their testicles as long as their penis remains outside. We imagine the Court would not convict a Canadian of bestiality for rubbing the tip of their penis between a cat’s labia, but how deeply must they penetrate the cat in order for it to count? Is foreskin sufficiently a part of the penis to count? The fact that the court imagines a kind of abstract [Lacanian phallus](#) as the single-use tool for all acts of penetration is an insufficient specification of the ranges of ways in which actual penises can be employed, the variety of sexual organs that males possess, and the variety of means of penetration at the disposal of each and every

Canadian, regardless of their genital endowments. If the Court means to replace non-specific, antiquated terminology in the *Criminal Code*, there is no point doing so by half-measures.

2. What Was “Buggery?”: Disregarded Historical Ambiguity

The claim that the Majority reflects the original intent of buggery laws is the main object of Justice Abella’s dissent, which gives a persuasive account of the capaciousness of historical understandings of “buggery,” “sodomy,” and “carnal knowledge”—which tended, broadly, to include all non-procreative sex acts. This is, interestingly, the same understanding of “sodomy” implicit in the Supreme Court of the United States’ rulings in *Bowers v Hardwick*, [478 US 186 \(1986\)](#), and *Lawrence v Texas*, [539 US 558 \(2003\)](#), both of which seem to interpret sodomy as including oral sex between gay men. In her dissent, Justice Abella also provides a good analysis of how best to interpret the distinct lack of actual case law for bestiality, which appears to have been prosecuted only a few times per century, and even then only opportunistically. In our view, the reasonable response to this lack of authorities is to err on the side of breadth rather than allowing a tiny number of examples to stand in for the totality of sexual experience envisioned by an offence whose ambiguity is “self-evident” (see para 138).

In addition to the Dissent’s historical analysis, many of the Majority’s own authorities appear to only demonstrate that “penetration” is sufficient for bestiality, not necessary, as it asserts (see Dissent, at para 135). For example, the Majority’s most prominent recurring example is an 1828 statute specifying “that ‘actual Emission of Seed’ was not an essential element of the offence, and further that ‘carnal Knowledge’ would be ‘deemed complete upon Proof of Penetration only’” (at para 28). However, contrary to the Majority’s interpretation (which holds that the “only” at the end of the quote implies that penetration is necessary), in our view, the “only” is more sensibly interpreted as ‘without the additional need to prove ejaculation.’ Indeed, that is precisely the clarification made by specifying that ‘actual Emission of Seed’ is not a required element of the offence. Rather than supporting the relatively strong claim that penetration alone counts as “carnal knowledge,” the statute is making the much weaker, common sense claim that penetration is sufficient to constitute carnal knowledge, regardless of whether ejaculation occurs.

That sodomy would be defined through certain ‘sufficient’ examples rather than ‘necessary’ requirements is consistent with the nature of sodomy as an offence, which is inherently elastic and, by design, less exhaustive than we typically expect modern legal statutes to be. Indeed, people have been confused about the meaning of sodomy from the start. Samuel Pepys, a seventeenth-century English Member of Parliament, famously wrote in his diary “blessed be God, I do not to this day know what is the meaning of this sin, nor which is the agent, nor which the patient” (Pepys, Samuel. *The Diary of Samuel Pepys*. Ed. Robert Latham and William Matthews. Volume 4. London, 1971 at 209–10). If a prominent Member of Parliament during the era of the law’s most stringent enforcement had no idea what it meant, it seems doubtful that the term actually possessed the universal common meaning the Majority asserts.

In sum, it is likely that sodomy and buggery lacked the universal clarity claimed by the Majority. As the Dissent observes, sodomy and buggery “emerged in full moral force from the Church’s hegemonic jurisdiction over sexual offences and its abhorrence for non-procreative sexual acts, which were condemned as being ‘unnatural’” (at para 132). In other words, the origins of sodomy were based on a moral proscription of certain forms of sexuality associated with broad ecclesiastical categories of sin like Lust rather than specific sets of acts. Sodomy was a category used to mark all illicit sexual practices, and was indexed against a wildly variable set of mores. Even during the sixteenth century, puritan reformers would have understood sodomy as

something vastly different from catholic monarchs such as Mary I, who actually repealed Henry VIII's 1533 statute after her coronation in 1553. Legal historian William Eskridge writes that "the vagueness of the crime against nature, and its central role in this normative regime, rendered it elastic and mobile, so that it might include other non-procreative sexual activities" (Eskridge, William N., Jr. *Dishonorable Passions: Sodomy Laws in America 1861–2003*. New York: Viking, 2008 at 2). Similarly, historian Jonathan Goldberg sums up the scholarly consensus in writing that "sodomy [...] identifies neither persons nor acts with any coherence or specificity. This is one reason why the term can be mobilized—precisely because it is incapable of exact definition" (Goldberg, Jonathan. "Sodomy in the New World: Anthropologies Old and New." *Social Text* 29 (1991) at 46). Accordingly, sodomy does not, and has not, ever just meant "penetration" for the simple reason that it has always been a paradigmatically vague term. In their historical use, "sodomy" and "buggery" mark the relation of any given act to a prevailing set of attitudes toward sexuality in general. As a consequence, they are not, and have never been, consistent over time in the way that would support the definition advanced by the Majority.

3. What is "Sex?": Difficulty of Specifying Forms of Sexual Expression

The Court purports to objectively delineate the scope of prohibited sexual activity with animals. But, to the contrary, this claim to objectivity masks a conservative sexual rhetoric that does not take into account the myriad ways that sexuality is actually experienced. The only neutral or objective definition of sex, a purely biological one such as "acts resulting in reproduction," would exclude all forms bestiality entirely. Like pornography, the designation of "bestiality" requires subjective evaluation; you know it when you see it.

The Majority's claim to articulate a "well-understood legal meaning" for bestiality relies on at least five related assumptions (at para 48):

1. that the Court both can and does know what Henry VIII, noted bigamist and religious zealot, was picturing (probably the appropriation of church assets by prosecuting monks, actually) when he banned sodomy in 1533 (at para 27);
2. that they know what members of the British Parliament were picturing in 1828 when they used the term "carnal Knowledge" (at para 28);
3. that they know what "any lawyer who was asked in 1892" was picturing when they said "buggery" (at para 48);
4. that they know what everyone pictures today when they hear the terms "penetration" or "sexual intercourse" (see above, they do not); and
5. that all of these actors are picturing the same thing.

As we have demonstrated, none of these assumptions hold. There is no single definition of any of these terms for the Majority to parse in a way that preserves its assumed mandate "not to change the elements of crimes in ways that seem to them to better suit the circumstances of a particular case" (at para 3). Sexual terminology always depends on the circumstances of particular cases. The ambiguity surrounding the term "bestiality" is not simply a consequence of Henry VIII forgetting to be more specific in laying out his sodomy statutes. Rather, such ambiguity is inherent to the issue of legislating sexuality in general.

The Court’s assumption that greater clarity is achieved by substituting “bestiality” with “intercourse” stems from the idea that sex is a certain, specifiable thing rather than an attitude that may or may not be associated with a given act. You cannot know precisely which acts constituted sex because it is different for everybody, and social ideas about what constitutes sexuality change over time. Some things we do with our genitals are not sexual, and we do some sexual things without using our genitals at all. Cleaning a house can be sexual, and digitally penetrating an anus can be nonsexual. There is no specifiable set of acts that are always sex to all people, including coitus.

Every time you interpret a sexual term you are making a judgment about the domain of possible activities that it encompasses. Failing to specify the precise boundaries of what that judgment includes—especially when you assume that these boundaries are obvious—reinforces harmful cultural hierarchies of gendered and sexual expression in which the fictions of a natural, normative, cisgender heterosexuality are institutionalized and perpetuated. We recognize that, for greater certainty, the law must strive for as much clarity and predictability as possible. But pretending that terms like “penetration” and “intercourse” achieve that clarity is not the means to do so, and admitting the subjectivity inherent to sexual terms does not undermine the Court’s objective of striving for clarity in the criminal law. Rather, it introduces the nuance necessary to adequately explore law’s intersection with sexual expression.

Insisting on the intelligibility of a term like “sexual intercourse” reinforces the pernicious conservative notion that non-procreative sexuality, such as homosexuality, is a “deviation” from the eternal, natural truth of procreative heterosexuality. These are the same attitudes that lead to views like homosexuality being a newfangled “lifestyle” that sexual perverts cooked up in the late 60’s and the rest of society is now obliged to tolerate. To be clear, tangible harm follows from the perpetuation of dismissive attitudes towards “alternative” sexual practices and orientations (especially when those attitudes are disseminated from Canada’s highest court). For example, this same attitude is present in the shockingly homophobic Republican party [platform](#), which, among other things, expresses support for the idea that gay people might be “converted” back to an original, natural heterosexuality, from which homosexuality is really just a kind of misdirection. Similarly, the harmful insistence on [specifying gender](#) on [government identification](#), the opposition to commonsense protections of [transgender rights](#), and the increasingly vitriolic [arguments](#) over [segregated washrooms](#), all stem from such an insistence on the reality of a sexual order that is purportedly destabilized by what are perceived to be “new” forms of sexual expression and identity.

Absent the sorts of concrete notions of harm around which we build laws like sexual harassment laws, animal abuse laws, and child abuse laws, it seems strange to be attempting to legislate sexuality at all. If, as the majority alleges, “there were (and still are) other provisions in the *Criminal Code* which may serve to protect children (and others) from sexual activity that does not necessarily involve penetration” (at para 116), then surely we also have laws to protect these same actors from sexual activity that does involve penetration. If it is redundant in one instance, then it is unclear why it is not redundant in the other. Though no one was arguing to strike down bestiality laws in this case, so far as we can see, there is no reason to uphold sexual prohibitions divorced from harm other than the belief in a transparent and legible sexuality that, frankly, does not exist. Even further, though it is beyond the scope of this post, we would argue that any law limiting sexual expression without a foundation in tangible harm unnecessarily restricts sexual liberty and relies on the outdated and pernicious notion that an orderly society can only be achieved through prohibitions that, in origin and substance, impose conservative sexual limitations on fulfilling expressions of sexual autonomy.

CONCLUSION

Despite the Court's recent ruling in *DLW*, bestiality law in Canada remains at least partially inscrutable. Although we now know that Man's Best Friend (with benefits) may legally lick genitals, we remain uncertain about how far our relationships can legally develop with some of Man's Other Good Friends, like emus and pythons. In the end, "Bestiality" retains the imprecision of expressions like "[Netflix & Chill](#)"—little more than a euphemism that captures an undefined set of acts.

The judicial deference that the Majority bases its decision on is flawed. That deference, in this context, depends on the pretence that sexual terms have readily objective, transhistorical meanings. In other words, the Court's ability to limit its role to ascertaining Parliamentary intent depends on the terms Parliament uses to express this intent remaining stable across time and among people. In this case, the Majority was so confident about buggery's established meaning—both through time and among people—that it: (1) makes the surprising claim that "any lawyer who was asked in 1892 whether the offence of buggery with an animal required penetration would have replied in the affirmative" (at para 48); and (2) holds that this understanding of buggery persisted for decades and was retained by Parliament in 1955. However, as we have shown, these stabilities are absent with buggery. Without those stabilities, the Court cannot adhere to its own principles of statutory interpretation.

Further, the Court's reasoning reinforces the pernicious belief in the supremacy of "traditional" sexual identities. In particular, the Court's assumption that "penetration" and "intercourse" are clear objective terms reflects conservative sexual attitudes which prioritize procreative, heterosexual, and cisgender understandings of sexuality. While we recognize the historical limitations placed on the Court when ruling on such a "centuries old" offence (at para 126), its understanding of sexuality need not be "centuries old" as well. Indeed, if it recognizes the limited intelligibility of one set of terms, why cling to another, equally limited vocabulary?

Ultimately, we hope that when the Court next explores bestiality (and other sexual offences), it acknowledges the complexities of these offences' histories, while advancing an understanding of sexuality that is inclusive of diverse sexual practices, and recognizes the "evolving social landscape" always necessarily informing contemporary sexual practice (at para 127). We do not claim that the Court need necessarily adopt a maximally inclusive understanding of sexuality whenever it delineates the scope of criminal law. Rather, we claim that accurately deferring to Parliament, even when interpreting potentially conservative legislation, requires a more nuanced understanding of the elasticity of sexual terminology and sexuality in general. That such an understanding would have been helpful here is amply attested to by the absurdity of the scenarios the judgment fails to account for, as well as the incredulity of media coverage about the judgment (see for example, "[Most animal sex acts not against Canada's bestiality law: court](#)"; "[Most bestiality is legal, declares Canada's Supreme Court](#)"; and "[Canada's Ridiculous Ruling That Oral Sex with Animals Is Legal Shows Need for New Bestiality Laws](#)").

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