

How to Criminalize Incest

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Since the beginning of this century, there has been a growing interest in the moral and constitutional status of laws prohibiting incest. Inspired by new recognition in the U.S., Europe, and elsewhere of the right to engage in private, consensual, adult *homosexual* conduct, commentators and litigants have argued that there ought to be an analogous right to engage in private, consensual, adult *incestuous* conduct.¹ To date, most courts in the U.S. and in Europe have been resistant to such a claim,² but at least among liberal-minded scholars there is a growing consensus that current prohibitions on consensual adult incest are, if nothing else, ripe for reconsideration.

Most of this recent literature has viewed incest prohibitions through the lens of constitutional and human rights law. It typically asks, if the right to engage in private homosexual conduct is protected by the Substantive Due Process clause of the Fourteenth Amendment or by Article 8 of the European Convention on Human Rights, why shouldn't the right to engage in private incestuous conduct be protected as well? Moreover, it asks, if the

¹ The leading U.S. case is *Lawrence v. Texas*, 539 U.S. 558 (2003). The seminal European case is *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) ¶ 52. The scholarly literature includes Dan Markel, et al., *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (Oxford, 2009); John Steutel and Ben Spiecker, Incest, in Alan Soble (ed.), *Sex from Plato to Paglia: A Philosophical Encyclopedia* (Greenwood, 2006), vol. 1, p.487; Vera Bergelson, Vice is Nice But Incest is Best: The Problem of a Moral Taboo, 7 *Criminal Law and Philosophy* 43 (2013); Courtney Megan Cahill, Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo, 99 *Northwestern L. Rev.* 1543 (2005); Courtney Megan Cahill, The Oedipus Hex: Regulating Family After Marriage Equality, 49 *U. California, Davis L. Rev.* 183 (2015); Sherry Colb, Is it Arbitrary to Distinguish Incest from Homosexuality?, *Verdict* (Sept. 17, 2014), <https://verdict.justia.com/2014/09/17/arbitrary-distinguish-incest-homosexuality>; Tatjana Hörnle, Consensual Adult Incest: A Sex Offense?, 17 *New Criminal L. Rev.* 76 (2014); Brett McDonnell, Is Incest Next?, 10 *Cardozo Women's L.J.* 337 (2004); Peter Singer, Should Adult Sibling Incest be a Crime?, *Project Syndicate* (Oct. 8, 2014), <https://www.project-syndicate.org/commentary/should-adult-sibling-incest-be-a-crime-by-peter-singer-2014-10>; James A. Roffee, No Consensus on Incest? Criminalisation and Compatibility with the European Convention on Human Rights, 14 *Human Rights Law Review* 541 (2014); Emily Silverman, The Criminalization of Incest in the United States of America (Max Planck Institute for Foreign and International Criminal Law, 2015); Johan Tralau, Incest and Liberal Neutrality, 21 *J. Political Philosophy* 87 (2013); Y. Carson Zhou, The Incest Horrible: Delimiting the *Lawrence v. Texas* Right to Sexual Autonomy, 23 *Michigan J. Gender & Law* 187 (2016); Note, Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family," 119 *Harvard L. Rev.* 2464 (2006).

² See *Lowe v. Swanson*, 639 F. Supp. 857 (N.D. Ohio, 2009); *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005); *People v. Scott*, 157 Cal. App. 4th (2007); *State v. Freeman*, 801 N.E. 2d 906 (Ohio Ct. App. 2003); *Beard v. State*, 2005 WL 1334378 (Tenn. Crim. App. June 7, 2005). See also *Stübing v. Germany*, European Court of Human Rights, Merits and Just Satisfaction (Application no. 43547/08), 2012. [But see 2014 decision by the German Ethics Counsel, viewing laws prohibiting adult incest as violative of the European Convention on Human Rights; John M. case (Conn. Law).]

Constitution protects the right to same-sex marriage, shouldn't it also protect the right to incestuous marriage.³

The work of criminal law theorists regarding incest has mostly paralleled that of their constitutional law colleagues, though with an important distinction. Rather than ask if incest laws violate the Constitution or the ECHR, the criminal law scholars have asked if such laws can be justified as a matter of moral, political, or legal theory (whether in accordance with the liberal harm principle or some alternative principle of criminalization). Like the human rights scholars, the criminal law theorists have focused primarily on the permissibility of legislation prohibiting putatively consensual incest between adults, paying relatively little attention to incest involving juveniles, or to how the two kinds of incest are related. And they have tended to look at adult incest as presenting a binary choice, between criminalization and decriminalization, while mostly ignoring the possibility that such laws might be “tailored” to maximize the right of persons to engage in truly consensual sex while simultaneously minimizing the dangers of coercion that some incestuous conduct presents.

In taking up these broader issues, I offer what can be thought of as a “normative reconstruction”⁴ of the law of incest, consisting of four parts: Part I looks at the concept of incest as a complex cultural taboo, one which has attracted the attention of a wide range of social scientists and theorists. Part II considers the striking multiplicity of ways in which incest has been dealt with across systems of criminal law, including the fact that a broad swath of “civilian” jurisdictions do not treat it as a crime at all. Part III asks whether and how incest involving juveniles should be criminalized, particularly in light of the fact that we already criminalize statutory rape between unrelated parties. Part IV asks whether and how incest involving only adults should be criminalized, paying special attention to the possibility that some putatively consensual incestuous acts will, on further examination, prove to be coerced or exploitative. Along the way, we consider a range of elsewhere-neglected questions about how the offense of incest should be defined – in terms of the specific type of sexual conduct prohibited, the manner in which the parties must be related, and whether they should have to be aware of the relation.

I. Incest as Taboo, Incest as Aversion

Before considering how incest is, or ought to be, dealt with in the law, it will be helpful to view it in a broader cultural context. Incest is a subject that has been of intense interest to anthropologists, sociologists, psychologists, theologians, moralists, dramatists, and others, and it is one that hardly lends itself to easy summary. But we can at least identify some of the key questions that have been raised. As we shall see below, many of the issues that surround the subject of incest-as-taboo will resurface in the discussion of incest-as-criminal-offense.

³ Although the European Court of Human Rights recognized the right to engage in homosexual conduct much earlier than the U.S. Supreme Court, it has not yet squarely recognized the right to same-sex marriage.

⁴ For an explanation of what is meant by that term, see Stuart P. Green, *Thirteen Ways to Steal a Bicycle* (HUP, 2012), at 52-54.

Let us begin with the idea of “taboo” generally. The term was first used in English in 1777 by the British explorer James Cook, borrowing the Polynesian word for “prohibited,” “forbidden,” “unclean,” or “cursed.”⁵ It is generally used today to refer to practices that generate strong social disgust or abhorrence. Widely-observed taboos apply to conduct relating to sex (e.g., incest, bestiality, necrophilia, pedophilia), death and dying (suicide, necrophilia, cannibalism, and grave desecration), food and diet (cannibalism, eating foods that fail to comply with religious dietary laws), and excretion and other bodily functions (public defecation, urination, and flatulence, and the social discussion of such matters).

Anthropologists and other social scientists have devoted much effort to determining exactly why and how certain behaviors have come to be regarded as taboo. Many taboos can find support in religious texts and traditions: this is especially true of those relating to sex and diet. Other taboos, such as those involving various bodily functions, reproduction, and corpse desecration, seem to have (or have once had) a rationale based, at least in part, on promoting health or hygiene.

Hardest to assess is the relationship between taboos and morality. Some taboo behaviors can be explained on moral grounds that are independent of religious belief. For example, there are compelling moral rationales for the taboos on pedophilia and racism, which can stand alone without reference to any religious text. Other taboos would be hard to explain without reference to their religious origins. This is true with respect to certain dietary restrictions, as well as restrictions on previously disfavored forms of sex, such as homosexuality. Other forms of conduct, even if not morally wrong independent of their violating religious law, become viewed as immoral (at least within the relevant communities) *in virtue of* their being prohibited by a taboo – here, again, we can include various dietary taboos.⁶

Simply because behavior is widely viewed as morally wrong does not, of course, mean that it will be subject to a taboo: for example, we would not normally speak of a “taboo” on stealing, taking bribes, tax evasion, or lying. To be taboo, there seems to be a requirement that such behavior be regarded as unclean or disgusting. Thus, to label a behavior as taboo often involves not merely a moral judgment, but an aesthetic one too. Moreover, while some taboo behavior is illegal and criminal (e.g., grave desecration, pedophilia, public defecation), much is not (e.g., expressing racist views, talking about bodily functions, using profanity).

The recognition of taboos varies, of course, over time and across cultures. Conduct that was once viewed as taboo in Western culture, such as interracial or interreligious sex and marriage, is no longer generally regarded as such. And conduct that is now often regarded as taboo, including slavery, racism, hebephilia, and perhaps use of alcohol and drugs by pregnant mothers, has obviously not always been so.

⁵ *Oxford English Dictionary*.

⁶ Such taboos thus bear an interesting similarity to *mala prohibita* offenses. See generally Stuart P. Green, The Conceptual Utility of *Malum Prohibitum*, 55 *Dialogue: the Canadian Philosophical Review* 33-43 (2016).

The taboo on incest is a particularly complex one. It has been observed, in some form, in virtually every society across history.⁷ Freud regarded it as one of two universal taboos (along with patricide) on which all civilizations are based.⁸ In the mid-20th century, anthropologist George Murdock studied 250 societies and found evidence of an incest taboo of one sort or another in all of them (though throughout history there have been exceptions; for example, marriage between brothers and sisters was common within the royal families of ancient Egypt).⁹

Despite, or perhaps because of, its universality, the incest taboo has meant different things in different cultures at different historical periods.¹⁰ Sometimes, the incest taboo has referred exclusively to marriage between close relatives; at other times, it has included sexual relations (whether marital or not), ranging from intercourse, to other forms of penetration, to “lesser” forms of sexual contact. And there has been considerable variation with respect to the nature of the prohibited relation – for example, about whether sex counts as incestuous if it involves cousins, or parties that are related by marriage or adoption instead of blood.

There is also an even more fundamental ambiguity that surrounds the concept of incest. As we shall see below, many American jurisdictions have a single such offense that criminalizes, without distinction, both cases in which adults have sex with juveniles and those in which they

⁷ For a helpful summary of the history, see Jonathan H. Turner and Alexandra Maryanski, *Incest: Origins of the Taboo* (Paradigm, 2005), 3-25.

⁸ Sigmund Freud, *Totem and Taboo* (Routledge, trans. 1950). Freud was famously dubious of his female patients’ accounts of incestuous behavior perpetrated on them by their fathers, viewing their revelations either as fantasies rooted in the patients’ unconscious desire to have sex with their fathers or as evidence of their having seduced their fathers. Since the 1970s, feminist scholars and others have sharply criticized Freud’s account, arguing that incest is far more common than he acknowledged, and offering an alternative account rooted in society’s definition of masculinity as a dominant aggressive force and femininity as a passive, submissive force. See generally Lena Domnelli, Father-Daughter Incest: Patriarchy’s Shameful Secret, 16 *Critical Social Policy* 8 (1986); Vikki Bell, *Interrogating Incest: Feminism, Foucault, and the Law* (Routledge, 1993); Janice L. Doane, *Telling Incest: Narratives of Dangerous Remembering from Stein to Sapphire* (University of Michigan Press, 2001).

⁹ George Peter Murdock, *Social Structure* (Macmillan, 1947) p.13. For a discussion of incest in Egyptian royal families, see David Dobbs, The Risks and Rewards of Royal Incest, *National Geographic* (Sept. 2010).

¹⁰ Even within the Hebrew Bible, there is inconsistency in how incest is regarded. On the one hand, there are, in Leviticus and again in Deuteronomy two explicit lists of sexual relations that are “forbidden,” including relations between a man and a variety of relatives. See Leviticus 18:8-18, 20:11-21; Deuteronomy 27:2. Although there is no specific penalty associated with such relations, any child that issues from such a union is to be considered a *mamzer*, or “bastard.” Elsewhere, however, the Bible is less categorical in its prohibition of incest. Like other ancient cultures, the Hebrews tended to prefer endogamous marriages to exogamous ones, and a cousin was thus considered to be the ideal mate. It is thus no surprise that the Bible contains numerous apparently favorable references to relationships, both marital and non-marital, that would not be permitted under many modern regimes. These include relationships involving not only pre-Sinai figures such as Abraham (who married his half-sister, Sarah) and Cain (who married a woman who was presumably either his sister or his mother), but also post-Sinai figures such as David’s son Amnon (who married his half-sister, Tamar). Moreover, Jewish law also includes a “stunning exception to the stringent prohibitions against sexual relations with relatives.” See David M. Greenstein, Between Siblings, in Martin S. Cohen and Michael Katz (eds.), *The Observant Life* (Rabbinical Assembly, 2012), 693, 702. Ordinarily, a brother is forbidden to marry a woman who has previously been his brother’s wife. However, if the man dies childless, his brother is required to take the widow as his wife, and the widow is obliged to marry her late husband’s brother – a practice known as Levirate Marriage.

have sex with other adults – this, despite the significant moral, psychological, and sociological differences between the two kinds of act. The first kind of conduct violates two taboos: one on having sex with family members and a separate one on pedophilia, hebephilia, or ephebophilia. The second kind of conduct violates only the incest taboo itself.¹¹ As for the general public, my best guess is that, when most people hear the term “incest,” they do not make a clear distinction between the adult and juvenile varieties. Instead, I suspect that there is something of a spillover effect at work here: part of the animus felt towards adult incest may reflect a kind of displaced animus toward incest involving juveniles.¹²

There are at least two reasons why the line between adult and juvenile incest is less clear than one might expect. First, as will be discussed further below, it appears that some putatively consensual incestuous relationships between adults begin while one or both of the parties is still a juvenile. In such cases, the coerciveness of the earlier stage of the relationship colors the latter; the subordinate party remains vulnerable and dependent even after reaching adulthood. Second, it is important to recognize that the norms concerning juvenile sexuality have evolved: Until modern times, children were often betrothed even before reaching puberty. Sexual relations between adults and children were criminalized under English law as early as 1576, but the age of consent was, from a modern perspective, extraordinarily low – typically, ten years of age.¹³ It was not until the late nineteenth century that the law of statutory rape went through a major transformation, with the age of consent continuing to rise significantly until well into the twentieth century. Thus, it appears that what we would clearly regard as juvenile incest today would not have been recognized as such in earlier times.

An additional problem presented by the incest taboo concerns the relationship it bears to the apparently “natural” aversion that most people feel toward the act. This is a topic that has

¹¹ It is worth noting that the psychiatric community’s approach is more nuanced. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) makes reference to incest only in connection with pedophilic disorder, and has no separate category for adult incest.

¹² It is unclear whether famous research done by social psychologist Jonathan Haidt would support my speculation, or contradict it. See Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psychological Review* 814 (2001). Haidt’s study asked respondents for their moral judgment of a scenario that involved an (adult) brother and sister who have sex on a single occasion. The scenario was carefully constructed to involve no harm or risk of harm. It specified that the couple used two forms of contraception (and therefore had virtually no chance of conceiving a child with birth defects), that the act improved their relationship (thereby foreclosing the possibility that either would be emotionally harmed), and that they agreed to keep the act secret (thereby preventing the possibility that their act would have a negative impact on others). Yet, despite these limitations, even after being reminded of these facts, most respondents stuck to their intuition that the act was wrong. Eventually, many people said something like, “I don’t know, I can’t explain it, I just know it’s wrong” (a response that Haidt termed “dumbfounding”).

¹³ Stat. 18 Elizabeth (1576). For a useful history, see Carolyn Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* (SUNY Press, 2004). See also Dorothy Scott and Shirley Swain, *Confronting Cruelty: Historical Perspectives on Child Protection in Australia* (Melbourne University Press, 2002), 71, quoted in Belinda Carpenter, et al. “Harm, Responsibility, Age, and Consent,” 17 *New Criminal Law Review* 23, 27 (2014). [See Bienen on history.]

generated intense interest from generations of social scientists, including such luminaries as Durkheim, Levi-Strauss, and Malinowski.¹⁴

As first described by the anthropologist Edvard Westermarck in 1891, the vast majority of humans feel an intense aversion to the idea of having sex with close family members with whom they have grown up in a family setting (even if they are not related by blood).¹⁵ Later researchers have found compelling empirical evidence of what has come to be known as the Westermarck Effect. For example, in a famous study conducted in Israel in the 1980s, anthropologist Joseph Shepher collected data on the marriage choices of 1,500 men and women raised on kibbutz, where children (typically unrelated by blood) were brought up together in “peer groups,” as if they were siblings. Shepher found not a single marriage among pairs that were in the same peer group before the age of six.¹⁶

In one sense, incest avoidance is surprising. People are often attracted to, and mate with, others who are like them, in terms of attractiveness, intelligence, body type, life experience, class, race, ethnicity, and religion; and members of one’s own family typically satisfy those criteria. Moreover, as Steven Pinker has observed, “[w]e clearly perceive the sexual attractiveness of family members, and even take pleasure in looking at them. But the affection and appreciation of beauty doesn’t translate into a desire to copulate, though if the same emotions had been elicited by a nonrelative, the urge might be irresistible.”¹⁷

So we know that incest evokes a strong aversion in most people, and that it is prohibited by a cultural taboo. What is less clear is the direction of the causal relationship: is the aversion felt because of the taboo, or does the taboo exist because of the aversion? Some varieties of aversion, it seems, are learned: parents teach their children to resist the inclination to lie, cheat, steal, settle disputes with their fists, excrete in public, walk around naked, burp, and fart. If the parents are successful in acculturating their children, the children begin to develop a kind of “learned aversion” to such conduct. There are other kinds of behaviors, however, in which most people seem to have no inclination to engage in the first place, regardless of any moral instruction or social stigma. For example, the aversions that most people feel to necrophilia, bestiality, pedophilia, suicide, and cannibalism seem to exist “naturally,” prior to, and independent, of any taboo.

In the case of incest, little, if any, parental instruction is required to make children averse. Indeed, as Pinker has pointed out, parents often “try to socialize their children to be more affectionate with each other (‘Go ahead – kiss your sister!), not less.”¹⁸ (It’s true that parents

¹⁴ See Emile Durkheim, *Incest: The Nature and Origin of the Taboo* (Lyle Stuart, 1963 [1898]); Claude Levi-Strauss, *The Elementary Structures of Kinship* (Beacon Press, 1967); Bronislaw Malinowski, *Sex and Repression in Savage Society* (Routledge, 1927).

¹⁵ Edvard Westermarck, *The History of Human Marriage* (Macmillan [1891], 5th ed., 1921).

¹⁶ Joseph Sheper, *Incest: A Biosocial Review* (New York: Academic Press, 1983).

¹⁷ See Steven Pinker, *How the Mind Works* (Norton, 1997), at 457.

¹⁸ Id. at 455.

sometimes have to keep prepubertal children, including siblings, from engaging in sex play, but that behavior seems very different from real intercourse between mature siblings.) If this claim of innateness is right, it suggests that the taboo on incest is more like the ban on necrophilia, bestiality, and cannibalism than like that on cheating, stealing, or exhibitionism.

Regardless of whether the aversion to incest is innate or learned, the fact remains that some small number of people are immune to it, and instead feel a desire to engage in sexual conduct with one or more close family members, at least in some circumstances. But this raises an even more perplexing question -- namely, why should we as society *care* if some adults do not experience aversion and instead wish to engage in putatively consensual incestuous conduct with other adults? Why subject people who engage in such conduct to social stigma and shame? What harm is the incest taboo meant to prevent? And why should antipathy to adult incest remain so strong even while the taboo on other forms of once-prohibited forms of sexuality, such as homosexuality, has waned?¹⁹

These questions have generated an immense outpouring of academic theorizing.²⁰ While it will not be possible to do that literature justice here, we can at least identify several basic contentions that appear again and again. One is that incest, at least in certain circumstances, creates a significant risk of birth defects. While the ancient societies that developed the original incest taboo obviously had no knowledge of the actual biological processes that make inbreeding so likely to produce genetic defects, they must have had some awareness of a basic correlation. A second commonly-offered rationale for prohibiting consensual adult incest is that the practice is destructive of family integrity -- that it causes, or exacerbates, rivalries and jealousies, and undermines the traditional allocation of roles, within the family structure. This is a tendency that would have been recognizable even in ancient societies where endogamous marriage, in one form or another, was encouraged. A third rationale is that adult incest, in some cases, will involve coercive or exploitative relationships in which more powerful members of a family (typically, parents and older siblings) use less powerful family members for their own sexual and psychological gratification. Whether and when any of these rationales is enough to support the criminalization of incest is a subject that will be addressed below. (There is also a fourth

¹⁹ Consider, for example, the reaction to a titillating 2015 *New York* magazine interview with an anonymous 18-year-old Minnesota resident who announced her plans to marry her long-estranged biological father and move to New Jersey, one of only a handful of states without a criminal prohibition on adult incest. Alexa Tsoulis-Reay, What It's Like to Date Your Dad, *New York* (Jan. 15, 2015), <http://nymag.com/scienceofus/2015/01/what-its-like-to-date-your-dad.html>. The article sparked what might be understood as a moral panic. Within days of the interview's publication, a bill was introduced in the New Jersey legislature which would make it crime, punishable by a prison term of three to five years, to marry or commit an act of sexual penetration with a blood relative, including a parent or child, brother or sister, half-sibling, uncle, aunt, nephew or niece. See Louis Hochman, Incest Outrage: Bill Would Ban Sex Between Related Adults in N.J., *NJ.com* (Jan. 21, 2015), http://www.nj.com/news/index.ssf/2015/01/incest_outrage_bill_would_ban_sex_between_related.html. The bill has not yet been enacted into law.

²⁰ See generally Arthur Wolf and William H. Durham (eds.), *Inbreeding, Incest, and the Incest Taboo: The State of Knowledge at the Turn of the Century* (Stanford U. Press, 2004); Alexandra Maryanski, *Incest: Origins of the Taboo* (Paradigm Publishers, 2005); Arthur Wolf, *Incest Avoidance and the Incest Taboo: Two Aspects of Human Nature* (Stanford Briefs, 2014); Debra Lieberman and Adam Smith, It's all Relative: Sexual Aversions and Moral Judgments Regarding Sex Among Siblings, 21 *Current Directions in Psychological Science* 243 (2012).

rationale for the incest taboo which, though quite significant from a sociological or anthropological perspective, does not seem particularly relevant to the modern criminalization debate – namely, that the taboo encourages the development of alliances with other social groups, and thereby serves to prevent conflict.)

II. How Incest is Treated in Criminal Law

Western legal systems are deeply divided over whether and how to criminalize incest. Indeed, there are few forms of sexual behavior that reflect as much variation in how they are regulated.²¹ Such variety may seem surprising in light of the apparent universality of the basic taboo. In this section, we begin by considering five basic approaches Western jurisdictions take to criminalizing, or not criminalizing, incest. We then take a more detailed look at how incest is defined across U.S. jurisdictions.

A. Criminalizing Incest Across Legal Systems

Surveying a wide range of legal systems, we can identify five approaches to incest that the criminal law currently takes. It can:

(1) Criminalize, in the same provision and without distinguishing between them, incest involving adults and juveniles and incest involving only consenting adults. Under this approach, all parties to the incestuous union are potentially liable, including the juveniles having sex with adults. This is the prevailing approach in most U.S. states, under the original Model Penal Code, Germany, and most of Scandinavia.²²

(2) Criminalize both incest involving only adults and incest involving adults and juveniles, but distinguish the way in which such offenses are defined, treating the latter as the more serious offense, and holding only the adult liable. This is the approach under the U.K. Sexual Offences Act 2003 as well as under Kansas, Louisiana, and South Dakota law.²³

²¹ One notable exception is prostitution. For a discussion, see Stuart Green, What Counts as Prostitution?, 4 *Bergen Journal of Criminal Law and Criminal Justice* 65 (2016).

²² For a helpful overview of the U.S. incest statutes, see Silverman, Criminalization of Incest, at 23. Also helpful, though now somewhat dated, are Leigh B. Bienen, Defining Incest, 92 *Northwestern L. Rev.* 1501 (1998); Richard Posner and Katharine B. Silbaugh, *A Guide to America's Sex Laws* (U. Chicago Press, 1996). Under Model Penal Code 230.2, “a person is guilty of incest . . . if he knowingly . . . has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood].” See also German Criminal Code (StGB) §173; Sweden Brottsbalken, kap. 6, §7.

²³ Section 25 of the Sexual Offences Act 2003 is titled “sexual activity with a child family member.” The offender must “intentionally touch” in a “sexual” way a victim who is under age 18 and related to the offender in the manner described in Section 27. Section 64 is titled “sex with an adult relative.” This section applies to those who are over 18 or over 16 (depending on the circumstances), engage in sexual penetration, and are related in the manner described); Louisiana Rev. Stat. §14:89(A)(2) (crime against nature consists of sexual intercourse between consanguineously related persons, with knowledge of relationship); §14:89.1(A)(2)(a) (aggravated crime against nature consists of sexual intercourse with a person under eighteen years who is known to the offender to be related to the offender).

(3) Do not criminalize incest between consenting adults, but do criminalize incest between adults and juveniles. This is the approach followed in Michigan, Ohio, and New Jersey, in France since 2010, and under the recently proposed revision of the Model Penal Code sexual offense provisions.²⁴

(4) Do not criminalize incest as such, but treat an incestuous relationship as an aggravating circumstance for statutory rape (the approach apparently followed in Brazil).²⁵

(5) Criminalize statutory rape, but accord no criminal law significance to the fact that the offender and victim are related. This is the law in Rhode Island and in a wide range of “civilian” jurisdictions that follow the approach first used in the French Criminal Code of 1791 – jurisdictions that include Argentina, Belgium, Brazil, China, Côte d’Ivoire, Japan, the Netherlands, Portugal, Russia, South Korea, Spain, and Turkey (though, as indicated above, France itself reinstated a law making incest involving juveniles a crime in 2010).²⁶

We will talk more below about which of these regimes makes the most sense, but for now it is worth noting simply that this is an exceptionally wide range of variation in the way that a given form of sexual conduct is treated in the criminal law. If nothing else, it suggests that the norms regarding incest-as-crime are far from settled.

²⁴ French Penal Code Article 222-31-2 (incest defined as rape or sexual abuse on a minor by a relative or any other person having lawful or de facto authority over the victim”); Ohio Rev. Code Ann. §2907.03(A)(5); New Jersey Stat. Ann. §§2C:14-2(a) proposed MPC section 213.5(2) (actor guilty of incest if “he or she engages in an act of sexual penetration, and knows or recklessly disregards a risk that the other person is a child who, at the time of such act, is less than 18 years old, and the actor is a parent, foster parent, guardian, grandparent, aunt, or uncle of the child) and 213.7(2) (actor is guilty of incestuous sexual contact with a child if the actor engages in sexual contact with a child, and the actor knows or recklessly disregards a risk that the child is less than 18 years old and the actor is a parent, foster parent, guardian, grandparent, aunt, or uncle of the child”).

²⁵ Laws Regarding Incest, *Wikipedia*, https://en.wikipedia.org/wiki/Laws_regarding_incest#Brazil

²⁶ From an Anglo-American perspective, the civilian approach to incest, in particular, may seem surprising. Prior to its Revolution, France had criminalized adult incest, sodomy, and other consensual sexual offenses. When the revolutionary politicians of the National Constituent Assembly (1789-1791) set out to remake French government and society, their reforms included new criminal laws inspired by the progressive ideas of the 18th century Enlightenment. See Michael D. Sibalis, Napoleonic Code, *GLBTQ.com* (2004), http://www.glbtqarchive.com/ssh/napoleonic_code_S.pdf. It was not that the revolutionaries did not find such sexual conduct contemptible. They did; but they did not believe that private behavior of this sort should be subject to criminal sanctions. When Louis-Michel Le Peletier de Saint-Fargeau presented his newly drafted criminal code to the Assembly in 1791, he explained that it outlawed only “true crimes” and not “phony offenses,” “created by superstition.” *Id.* Essentially, he sought to secularize the criminal law. Consequently, incest, bestiality, and sodomy were all absent from the code, effectively decriminalized. And just as the Napoleonic Code of 1804 had tremendous influence on civilian jurisdictions with respect to matters of private law, so too did the 1791 French Penal Code influence how the civilian world approached matters of criminal law. It was not until two centuries later, in 2010, that the French Parliament, apparently out of concern with the problem of child abuse, reintroduced *inceste* as a crime, but only when juveniles were involved. Henry Samuel, France Makes Incest a Crime, *Daily Telegraph* (Jan. 28, 2010), <http://www.telegraph.co.uk/news/worldnews/europe/france/7085759/France-makes-incest-a-crime.html>

B. How Incest is Defined Under U.S. Law

Even among those jurisdictions, like those in the U.S., that do criminalize incest in some form, there is considerable variation in how the offense is defined. Here, we can identify five basic variables: (1) the kind of sexual conduct covered, (2) the nature of the familial relation, (3) whether the offender must know of the existence of a familial relation, (4) how the offense is classified, and (5) how the age of the parties affects liability.

Let us look first at how the sexual act is defined. The majority of incest statutes in the U.S., as well as in the Canadian Penal Code, prohibit “sexual intercourse” or an “act of sexual penetration” with a relative, but do not prohibit “lesser” sexual acts, such as oral sex.²⁷ A few state statutes also explicitly prohibit anal intercourse, sodomy, or “deviate sexual conduct,”²⁸ though some limit the offense to heterosexual relations.²⁹ A small handful of states take a potentially broader approach to defining the sexual act, making it a crime to have “sexual contact with” or “perform a sex act” with a relation.³⁰ Washington State treats sexual intercourse between relatives as “first degree incest,” while other (lesser) forms of sexual conduct are treated as “second degree incest.”³¹

There is also a good deal of variation regarding the nature of the family relationship between the parties. Virtually all incest statutes apply to sex between parents and their children and between siblings. But beyond that, they vary. A majority of U.S. statutes include sex involving uncles, aunts, nephews, and nieces.³² Slightly less than half the states criminalize sex between step-parents and their step-children. A handful of state statutes also apply to sexual relationships between first cousins, though several states, interestingly, expressly create an exemption for cousins to have sex or marry if they are beyond child-bearing age or at least one is sterile.³³ (If the parties are more closely related, the fact that one or more is sterile or bearing child-bearing age is of no consequence.)

²⁷ Canada Criminal Code s. 155(1). E.g., Georgia, Code Ann. §16-6-22; Hawaii Rev. Stat. §§707-741, 572-1; Mass. Gen Law ch. 272, §17.

²⁸ E.g., Kansas Stat. Ann. §21-3602; Arkansas Code Ann. §5-26-202.

²⁹ E.g., N.M. Stat. Ann. §30-10-3; Wisconsin Stat. Ann. §§944.06, 765.03; see also Emily Silverman, *The Criminalization of Incest in the United States of America*, at 23.

³⁰ E.g., Michigan Comp. Laws Ann. §§750.520b, 750.520c; Iowa Code Ann. §709.4. England and Wales take a significantly different approach. If neither of the parties is a juvenile, then penetrative sex is required (s.64), but if one of the parties is a juvenile, then any “intentional touching” of a “sexual” nature is covered (s.25) – a much broader class of conduct.

³¹ Wash. Rev. Code Ann. § 9A.64.020.

³² Among those that do not are Illinois, Kentucky, Montana, Washing, and Wyoming.

³³ Zhou at 197, note 45. Only nine states criminalize sex between first- cousins. See, e.g., Mich. Comp. Laws Ann. §750.520b; South Dakota Codified Laws Ann. §22-22-19.1. See also Arizona Rev. Stat. section 25-101 (cousins may marry if one is 65 or older); Wis. Stat. Ann. Section 765.03 (cousins may marry if woman is 55 or older).

Another way in which the statutes differ is with respect to the origins of the relationship. The majority approach is to prohibit sex only between blood, biological, or consanguineous relatives.³⁴ A few statutes specify that the relationship can be “whole,” or “half-blood.”³⁵ Many specify that the relationship can be “without regard to legitimacy.”³⁶ A significant minority extend the laws to non-blood relatives, including relatives by marriage or adoption.³⁷

Incest statutes also differ with respect to the requirement of mens rea. Under the common law approach, it was enough that the defendant commit the actus reus of having sex with someone to whom he is related; he need not be aware of the relation.³⁸ Following the original Model Penal Code recommendation, a majority of states now require that the offender know of the prohibited relationship.³⁹ In those states, a figure such as Oedipus (who was unaware that his wife, Jocasta, was also his mother) would thus have had a defense to charges of incest.

Yet another way in which U.S. incest statutes differ is with respect to classification. The traditional approach was to classify incest as an offense “against morality or decency.”⁴⁰ Other states, and the Model Penal Code, treated it as an offense “against the family” or “affecting marital relationships.”⁴¹ The more modern method is to classify incest simply as a “sexual offense” or offense involving a violation of “sexual autonomy,” as in the proposed revision to the Model Penal Code.⁴² A few states do not use the term “incest” at all, referring instead to “sexual relations within the family” or between “persons prohibited to marry.”⁴³

Finally -- and, from a moral perspective, most significantly -- statutes differ in how they deal with the age of the parties. As noted above, the majority of U.S. incest statutes do not distinguish between cases involving juveniles and those involving only adults. Nor do they

³⁴ E.g., Kan. Stat. § 21-3601.

³⁵ E.g. Oregon Rev. Stat. §163.525.

³⁶ E.g. Kentucky Rev. Stat. Ann. §530.020.

³⁷ E.g., Alabama Stat. §13A-13-3. Twenty states include adoptive relatives within their incest legislation, while the balance do not. Zhou at 197 no. 45. The English Sexual Offences Act 2003 includes a complex scheme of relationships. The act is prohibited if one of the parties is the other’s “parent, grandparent, brother, sister, half-brother, half-sister, aunt or uncle,” or a “foster parent.” [s. 27(2)]. The act is also prohibited if they “live or have lived in the same household” or if one is “regularly involved in caring for, training, supervising or being in sole charge of” the other, and “one of them is or has been the other’s step-parent[,]. . . cousin[,]. . . stepbrother or stepsister, or . . . the parent or present or former foster parent.” [27(4)]

³⁸ See Bienen, at 1533. For examples of such statutes, see Alaska Rev. Stat. §11.41.450, California Penal Code §285.

³⁹ Silverman, at 21. E.g., Conn. 53a-191, Alabama 13A-13-3.

⁴⁰ Silverman at 16.

⁴¹ MPC Section 230.2.

⁴² proposed revision to MPC.

⁴³ E.g., 720 Illinois Comp. Stat. 5/11-11; Vermont Stat. title 13, section 205.

distinguish, for purposes of liability, between the adult “predator” and juvenile “prey.” Thus, under the typical U.S. statute, a parent having sex with a juvenile child, the juvenile child herself, two adult siblings having sex with each other, and two juvenile siblings having sex with each other would all be potentially liable to the same degree. In Britain, by contrast, the statutes treat juvenile incest and adult incest as entirely separate offenses, contained in separate provisions of the Sexual Offences Act 2003, defined differently, and subject to different penalties.⁴⁴

III. A Rationale for the Law of Juvenile Incest

Under what circumstances is it justifiable to subject incest to criminal sanctions? To answer that question, we first need to have an idea of when it is justifiable to subject *any* conduct to criminal sanctions. That is, we need a theory of criminalization. But that, of course, is a highly complex and controversial matter, and no place more so than in the realm of the sexual offenses. Rather than try to devise or defend a foundational theory of criminalization, I shall simply *assume* a version of the liberal, civil libertarian stance, one that is influenced by the work of J.S. Mill, H.L.A. Hart, and especially Joel Feinberg -- a stance that reflects a strong presumption in favor of personal liberty, liberal neutrality, and against government interference in citizens’ private affairs.⁴⁵ In adopting this approach, I shall be doing so to the exclusion of leading alternative approaches, such as legal moralism, paternalism, and queer theory (though, near the end of the paper, I shall consider what might be characterized as a “quasi-feminist” approach to criminalizing adult incest).

Under the approach I shall be following, criminal sanctions can be justified only when they will efficiently prevent harm (or possibly “offense” – more on that later) to others (or possibly self). According to Feinberg, “harm” should be understood as comprising a significant “setback to interests.”⁴⁶ Typically, this occurs through the infringement of some tangible aspect of *V*’s “welfare interests,” whether in life, bodily integrity and function, freedom of movement, shelter, sustenance, or the opportunity to form relationships with other people. Acts that set back interests of this sort – including killing, raping, battering, and stealing -- are considered “harmful.”

A corollary of the harm principle is sometimes referred to as the the “wrong principle.”⁴⁷ Not only must conduct cause or threaten harm, it must also be wrongful, typically in the sense that it violates another’s rights. Sometimes, the requirement of wrongfulness is satisfied by the lack of consent to some action; rape is an obvious example. Other times, it is supplied by a lack of justification. For example, it is not murder to kill a human being when it is justifiable to do so, as when the killer acts in self-defense. Such acts, though constituting an obvious setback to a

⁴⁴ Sexual Offences Act, ss. 25, 27.

⁴⁵ The seminal works are John Stuart Mill, *On Liberty* (Dover, 2002 reprint ed.); H.L.A. Hart, *Law, Liberty and Morality* (OUP, 1963); Joel Feinberg, *The Limits of the Criminal Law: Harm to Others* (OUP, 1984). For a more recent statement, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP, 2008).

⁴⁶ Joel Feinberg, *Harm to Others*, at 37-8.

⁴⁷ See generally Green, *Thirteen Ways to Steal a Bicycle*, at ____.

victim's interests, nevertheless lack the requisite element of wrongfulness. Under the traditional liberal approach, harmfulness and wrongfulness constitute necessary, but not sufficient, conditions for criminalization; other factors would also have to be satisfied before criminal sanctions could be fully justified.

So, does incest satisfy the harm and wrong principles? To answer that question, we need to distinguish, at least initially, between incest involving adults and juveniles (discussed in this part) and incest involving only adults (discussed in the next part). (I leave to the side cases of incest between juveniles.)

Before we can consider whether and how the fact that an adult and juvenile *are related* should affect the analysis, however, we first need to consider why it should be a crime for an adult to have sex with a minor who is *not* related to him – that is, we need to consider the rationale for criminalizing the standard case of statutory rape. Virtually all legal systems agree that adults who have sex with juveniles should be subject to criminal sanctions, but explaining exactly why that is so is more difficult than it might at first appear. The traditional understanding of statutory rape is that, like people who are unconscious, severely intoxicated, or intellectually disabled, juveniles are “incapable” of consenting. Non-consent, and the violation of sexual autonomy that follows from it, is therefore presumed.⁴⁸ I have argued elsewhere, however, that this understanding is problematic, and that a better understanding of the strict liability rule in statutory rape would rest on something other than cognitive incapacity.⁴⁹ I have suggested that a more plausible justification for statutory rape would rest on the notion that when adults have sex with juveniles, there is, in virtue of their age difference, such a significant potential for exploitation and resulting harm that such conduct should be categorically banned.

Fortunately, this question need not be resolved definitively here. Regardless of the precise nature of wrongs and harms involved in statutory rape, we can still ask if there is any significant moral difference between cases in which an adult and child are related and those in which they are not. In particular, we can ask if the fact that they are related makes the act any more wrongful or harmful.

A reasonable argument could be made that, other things being equal, it is typically even more wrongful and harmful for an adult to have sex with a related juvenile than it is for him to have sex with one who is unrelated. Often, the adult will have a special duty of care to the related juvenile. Parents, in particular, have a duty to look out for their minor children's best interests and to protect them from harm. When parents (and perhaps stepparents) have sex with juvenile children, they invariably engage in a gross violation of such duties. (Whether other adult relatives, such as grandparents, aunts and uncles, siblings, and cousins, have similar duties is less clear.) Moreover, the harms done to related juveniles are even worse than those done to unrelated ones. As criminologists Stephen and Ronald Holmes have explained, “[a] child sexually abused by a relative is different from one abused by a stranger. The incest victim cannot run away and

⁴⁸ See, e.g., *In re M.V.* 225 Cal.App.4th 1495, 1522–2 (2014); *State v. Collins*, 508 S.E.2 390, 394 (Ga. 1998).

⁴⁹ See Stuart P. Green, *Lies, Rape, and Statutory Rape*, in Austin Sarat (ed.), *Law and Lies: Deception and Truth-Telling in the American Legal System* (Cambridge University Press, 2015).

go home for help and comfort.”⁵⁰ Researchers have found that juvenile incest victims suffer both short-term and long-term effects, including eating disorders, vomiting, alcohol abuse, suicidal thoughts, and self-mutilation.⁵¹ As the child advances into adulthood, other effects include amnesia, frigidity, promiscuity, and participation in sex work.

Assuming that the wrongs and harms of statutory rape of a closely related juvenile really are greater than the wrongs and harms of statutory rape of an unrelated juvenile, it would seem to follow that the former act should be punished more severely. That leaves the question, though, whether such conduct should constitute an entirely separate offense, called “incest,” or whether it should simply be treated as an aggravated form of statutory rape.

The question raised is one of fair labeling -- the idea that, as Andrew Ashworth has put, “widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences should be divided and labeled so as to represent fairly the nature and magnitude of the law-breaking.”⁵² How we choose to label and classify offenses sends important signals about why we are criminalizing the conduct, and the priority of wrongs and harms it entails.

By labeling the offense “statutory rape of a family member,” we seem to be signaling that the principal wrong is violating a young person’s sexual autonomy, which in turn is aggravated by the secondary wrong of doing so with a family member. By contrast, when we label the offense “incest with a juvenile,” we are signaling that the principal wrong is having sex with a family member, which is aggravated by the fact that the family member is a juvenile.

In my view, the first label, “statutory rape of a family member,” reflects the proper prioritization. It sends an accurate signal that the primary wrong or harm in such cases is the sexual exploitation of a young person. The alternative, of criminalizing sex with a related juvenile as “incest,” leaves the “tail” of breaching a familial duty wagging the “dog” of exploiting a child. To emphasize what is properly the principal wrong, I would therefore make sex with a related juvenile an aggravated form of statutory rape, rather than a form of incest (the approach that seems to be followed in Brazil).⁵³ Moreover, I would follow a similar approach in cases of sexual molestation of juveniles by teachers, clergy, doctors, scout leaders, and others charged with their care. Rather than treat them as freestanding “abuse of position” offenses, I would label each as an aggravated form of statutory rape.

⁵⁰ Stephen T. Holmes and Ronald M. Holmes, *Sex Crimes: Patterns and Behavior* (Sage Publications, 3d ed. 2009), pp. 102-03.

⁵¹ See generally Katreena Scott, Violence Against Children in Families, in Rosemary Gartner and Bill McCarthy, *The Oxford Handbook of Gender, Sex, and Crime* (OUP, 2014), pp. 378, 384-86. For a helpful summary, see Sheldon Travin, Psychiatric Aspects of Incest Involving Juveniles, in Richard Rosner and Harold I Schwartz (eds.), *Juvenile Psychiatry and the Law* (Plenum Press, 1989), 85.

⁵² This formulation comes from Andrew Ashworth, *Principles of Criminal Law* (Oxford, 6th ed. 2009), 78-80. I have dealt with the principle of fair labeling at length elsewhere. See generally Green, *Thirteen Ways to Steal a Bicycle*, at ____.

⁵³ See note ____ above.

Treating sex with a related juvenile as an aggravated form of statutory rape, rather than as a freestanding offense, would also allow us to avoid the possibility of unfair double punishment. The adult who has sex with a juvenile is subject to prosecution for statutory rape whether or not the juvenile is related. If he is also prosecuted on a separate charge of “incest,” he faces the potential of being punished twice for the same conduct. By prosecuting him solely for aggravated statutory rape instead, an unjust result would be avoided.

In the event we decide to follow the aggravated statutory rape approach, three additional issues would remain to be considered: The first is, how should the sexual act be defined? Most statutory rape provisions in the U.S. require that the offender engage in sexual penetration, rather than other (lesser) sexual acts. I am skeptical that that narrow approach makes sense: it seems to me that a juvenile who is subjected to lesser sexual acts is still being exploited. But, however the sexual act is defined in cases involving non-related juvenile victims, I can think of no rationale for a *different* rule when the victim is a member of the offender’s own family.

Second, under the aggravated statutory rape approach, precisely *which* familial relations should be regarded as relevant aggravators? Clearly, being a parent of the victim should be one. We commonly speak of parents as having a position of trust vis-à-vis their children, and our statutes and case law impose special duties on them in many circumstances. The law regarding the duties of other relatives, however, is less clear. Sometimes grandparents, uncles, aunts, and older siblings have special duties to children in their families, and sometimes they don’t. A legislature would have to decide how widely the familial net should be thrown.

Third, must *D* know that *V* is related to him to be guilty of aggravated statutory rape? In the context of normal-grade (non-incestuous) statutory rape, a mistake regarding the victim’s *age* normally is no defense. This rule is controversial,⁵⁴ but even if we were to accept it, would we also have to accept the rule that ignorance of *familial relation* should be no defense to juvenile incest? Not necessarily. The policy concerns that underlie the rule of strict liability with respect to mistakes of age would rarely apply in the case of mistakes regarding family relation. The reason we disallow mistakes regarding the victim’s age as a defense, it is said, is that we want to encourage adults to take the utmost caution when there is any doubt that their sexual partner might be under-age. In the case of juvenile incest, it is hard to imagine that an offender having sex with an underage family member would be unaware of the victim’s relation. In the highly unusual case in which the offender was genuinely unaware that his victim is a family member, it is hard to see how he would deserve additional, aggravated liability beyond his basic liability for statutory rape.

IV. A Rationale for the Law of Putatively Consensual Adult Incest

Having considered the law concerning incest with a juvenile, we now turn to the law of incest between adults. As noted, it is this form of incest legislation that has attracted by far the most attention from scholars and courts. Here, there is no chance of redundancy. Assuming that the act is (at least putatively) consensual, that it is not done for pay, does not involve sado-

⁵⁴ Green, Lies, Rape, and Statutory Rape, at ____.

masochism, and is not performed in a public place, there would be no other offense label under which to criminalize it. Thus, we need to ask, straight on, whether consensual adult incest should be a crime. And, if we decide that it should be, then we need to ask exactly how it should be defined, classified, and graded.

In this section, we consider four possible rationales for criminalizing adult incest -- that: (1) it evokes disgust and thereby causes “offense” to others; (2) it creates a significant risk of birth defects; (3) it confounds well-established family roles and contributes to family conflict; and (4) the putatively consensual nature of such conduct is often illusory, and tends to mask deep structural inequalities in family life, especially in those cases in which the incestuous relationship began while one or both of the parties was still a juvenile.

A. Infringing the Prima Facie Right to Choose One’s (Willing) Sexual Partners

Before we consider the possible rationales for criminalizing adult incest, it is important to acknowledge what is at stake here. To prohibit adults from engaging in putatively consensual sex with other (willing) adults to whom they are related is to impose a significant restriction on their exercise of sexual autonomy. Elsewhere, I have described sexual autonomy as consisting of a “bundle” of rights organized around the idea of securing for its possessor various forms of sexual self-determination, including, crucially, the prima facie right to choose one’s (willing) sexual partners.⁵⁵ Prohibiting people from engaging in sex with other adults to whom they are related clearly infringes on that prima facie right, and, if such laws are permitted to stand, they will require justification.

How significant an infringement on sexual autonomy would a categorical ban on adult incestuous relationships be? Sherry Colb has sought to compare the burdens imposed by a ban on adult incestuous marriage with those imposed by a ban on homosexual marriage.⁵⁶ Although she is speaking specifically about marriage, her point seems relevant to homosexual and incestuous sexual conduct more generally.

Colb regards bans on incestuous marriage as more defensible than bans on same sex marriage. As she puts it, “a [same-sex marriage] prohibition effectively prohibits gay men and lesbians from marrying any member of the entire population of potentially desirable partners. The same likely cannot be said of a man who would, absent the incest laws, be inclined to fall in love with his first cousin.”⁵⁷ “To my knowledge,” she says, “people do not generally have an exclusively incestuous ‘sexual orientation.’” Prohibited from having a relationship with a close relative, she seems to be saying, such people can still find desirable partners elsewhere.

I agree with Colb that, given the choice between prohibiting all homosexual sex and prohibiting all incestuous sex, we should certainly choose the latter, if for no reason other than that there are many more people whose sexual lives would be severely disrupted by the first. But why should we have to make such a choice in the first place? If *X* and *Y* are in love with each

⁵⁵ Green, Lies, Rape, and Statutory Rape, at ____.

⁵⁶ See Colb, Is it Arbitrary to Distinguish Incest from Homosexuality, at ____.

⁵⁷ Colb, at 3.

other and they are siblings, and the state prohibits siblings from having sex, then it follows that both *X* and *Y* will be prohibited from having sex with precisely the person they wish to have it with. Colb says that a person who is prohibited from having a relationship with a close relative can still find desirable partners elsewhere. But sexual attraction is not normally a fungible good. If *X* and *Y* are the particular objects of each other's affection, it is little consolation to tell them that they should renounce each other on the grounds that there are "other [non-related] fish in the sea." This is not to suggest that the prima facie right to have consensual sex with a willing, related partner of one's choosing is necessarily indefeasible. It is simply to say that, before prohibiting such conduct, we need a fairly compelling rationale for doing so.

B. Avoiding Offense

As noted previously, the classical liberal approach requires that, before conduct can be subject to criminal sanctions, it must cause or threaten "harm to others"; and, indeed, all of the rationales we considered in the case of juvenile incest involved a claim of harm or potential harm. We will return to a consideration of several additional harm-based rationales below, but for now we take a detour and consider the possibility that adult incest might satisfy the "offense" principle.

The offense principle functions as an alternative to the harm principle: though not necessarily causing a significant setback to interests, certain kinds of (intentional) conduct are so "unpleasant" that they elicit widely disliked mental states, such as disgust, revulsion, shock, shame, embarrassment, anxiety, annoyance, boredom, anger, fear, and humiliation.⁵⁸ Analyzing such conduct, Feinberg offers a famous thought experiment in which riders on a hypothetical bus engage in a wide range of conduct that produces offensive noises, smells, and sights – nails on chalk boards, belches and farts, garish clothing, a range of sexual exhibitionism, inappropriately familiar conversation, hate speech, and the like – and he asks which kinds of behavior could potentially be subject to criminal sanctions in a liberal state.

At first glance, the offense principle may seem to offer a promising approach for criminalizing adult incest. As we saw above, incest, even between consenting adults, violates a deeply engrained and almost universally observed taboo; it is proscribed by religious law; and it is a practice that generates widespread disgust in all but a few people who contemplate it. Is the fact that most people are "offended" by such conduct enough to justify its criminalization?

To see why the disgust evoked by incest is *not* sufficient to justify criminal sanctions, we need to consider an additional distinction Feinberg makes between two different kinds of offense: direct and indirect.⁵⁹ Direct, or "nuisance"-type, offense occurs when *D* engages in conduct that is directly intended to cause *V* offense. Typically, the conduct occurs within *V*'s direct apprehension. For example, if *D*, without *V*'s consent, "flashed" his naked body at her while she was walking through the park, that would most likely constitute a direct offense to *V*. It would be directed at what Feinberg called a "lower order sensibility," such as sight or smell.

⁵⁸ See generally Feinberg, *Offense to Others*, at _____. For alternative views of the offense principle, see the essays collected in Andrew von Hirsch and A.P. Simester (eds.), *Incivilities: Regulating Offensive Behaviour* (Hart, 2006).

⁵⁹ The discussion here is borrowed from Stuart P. Green, To See and be Seen: Reconstructing the Law of Voyeurism and Exhibitionism, 54 *American Criminal Law Review* ____ (forthcoming).

Indirect offense, by contrast, is directed at a “higher order sensibility,” such as a moral value or cultural symbol. For example, one can be offended, and “profoundly” so, to learn that someone has burned a flag or desecrated a corpse. Such an offense need not be perceived directly by the offended party for her to be offended; it is enough that she learn about it second hand. Feinberg believes, correctly in my view, that only the first kind of (direct) offense is the proper concern of a liberal system of criminal law. Concern with indirect offense reflects a kind of legal moralism, which is inconsistent with the tenets of liberalism.⁶⁰

So which kind of offense does consensual adult incest cause? Normally, it is indirect. When incest causes offense, it typically does so not in virtue of the sight or sound of the act itself, but by the very idea that it violates a cultural taboo. Adult incest is an act that is typically performed in private, rather than in a public place where viewers have no choice but to witness it. If people come to know about others’ acts of incest, it is normally through hearsay evidence: they have read about it on social media, or heard about it down the pub. If Feinberg’s distinction between direct and indirect offense is valid, and if I am right that incest normally involves only the latter,⁶¹ this would suggest that the offense principle would fail to provide an adequate rationale for criminalizing consensual adult incest performed in private. If there is to be a defensible justification, it will have to be found elsewhere.

C. Preventing Birth Defects

Having considered, and rejected, the possibility that adult incest should be criminalized under the offense principle, we can now return to the possibility that it might be criminalized under the harm principle. Perhaps the most commonly offered harm-based rationale for criminalizing adult incest is that it offers a means of preventing birth defects.

It is well settled that procreative sex between closely-related, consanguineous partners is substantially more likely to result in birth defects than procreative sex between those who are not related.⁶² All of us inherit damaged genes, containing harmful mutations, from our parents. Some genes are dominant, inflict their carriers, and get selected out. Most, however, are recessive and do no harm until the carrier mates with another carrier and they have children together. When we conceive a child with someone to whom we are not closely related, these genes are generally paired with a functional counterpart inherited from the other parent. When close relatives, such as a brother and sister or parent and offspring, have a child together, however, there is a substantial likelihood that the child will inherit two copies of the damaged gene. Inbreeding thus increases the probability that recessive genes will become dominant and activated, with all of the resulting problems that causes. (The risk resulting from unions between first cousins is significantly lower.)

⁶⁰ Feinberg, *Offense to Others*, at 60. Martha Nussbaum makes a somewhat similar point in her *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton U. Press, 2004).

⁶¹ Though one could certainly imagine a hypothetical case of what we might call “incestuous exhibitionists”: a brother and sister, explicitly referring to each other as such, have sex on a public bus, while others are forced to watch; the spectators are offended both by the act of public sex itself and the additional knowledge of the offenders’ relation; this would constitute simultaneously a direct and indirect offense.

⁶² See generally Wolf and Durham, *Inbreeding, Incest, and the Incest Taboo*.

Perhaps the most important study ever done of the genetic effects of incest involved Czech children whose fathers were first-degree relatives of their mothers (i.e., individuals with whom the mother shared fifty percent of her genes – in this case, a father or brother).⁶³ Less than half of the children who were the progeny of such unions were born healthy. Forty-two percent of them were born with severe birth defects or suffered early death, and another eleven percent suffered from mild mental impairments. What makes the study so particularly significant is that it included a crucial control group: children of the same mothers whose fathers were *not* the mothers' relatives. When the same women were impregnated by a non-relative, only seven percent of the births involved birth defects.

This and numerous other studies support the view that inbreeding significantly raises the risk of birth defects. But do such increased risks justify criminalization? One obvious problem is that only a particular subset of all cases of incest pose any such risk – namely, those involving consanguineous fertile partners of the opposite sex having vaginal intercourse without adequate contraception. Under this rationale, incest laws that apply to cases involving people who are not related by blood or are not having sex of this sort are clearly overbroad.

How often does adult incest take this form? It is hard to say: the data are sparse; almost all of the studies focus on juvenile, rather than adult, incest.⁶⁴ We can, however, carry out a thought experiment: We can ask, what if incest laws were rewritten to apply exclusively to cases involving consanguineous incestuous partners engaged in procreative sex, and what if it were possible to apply such a law only in such cases and not otherwise? Would such a regime be defensible under the harm principle?

Consider, for example, the German case of Patrick Stübing and Susan Karolewski, biological siblings who had four children together, three of whom were born with severe birth defects.⁶⁵ Given such facts, it seems hard to avoid the conclusion that the couple knowingly or recklessly created a risk of serious harm to others that could have been avoided. Isn't that exactly the sort of conduct that should be subject to criminal sanctions in a liberal society?

Perhaps. But note that the criminal law typically views acts as wrongful or harmful based on the effect they have on already-existing victims. Here, however, the act that potentially causes harm to the child is the very one that brings the child into existence in the first place. This fact raises the so-called "paradox of future individuals" or "nonidentity problem."⁶⁶ Had Stübing and Karolewski desisted from conceiving children out of fear they would be born with birth defects, the children would never have come into existence at all. And, assuming that the children's lives

⁶³ E. Seemanova, A Study of Children of Incestuous Matings, 21 *Human Heredity* 108 (1971).

⁶⁴ See Max Planck Institute for Foreign and International Criminal Law, Incest in Criminology and Genetics, https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzest_krim.html

⁶⁵ Case of Stübing v. Germany, European Court of Human Rights, Merits and Just Satisfaction (Application no. 43547/08), 2012. Patrick and Susan were raised separately; their relationship began when Susan was still a minor.

⁶⁶ The locus classicus is Derek Parfit, *Reasons and Persons* (OUP, 1984), 361.

are worth living, it could be argued that their conception constituted a net gain in utility. From such a utilitarian perspective, Stübing and Karolewski would arguably have done the right thing.

If this argument were correct, it would have significant implications with respect to criminalization. The liberal harm principle requires that an offender's act cause a victim's interests to be "set back." Here, an argument could be made that the interests of the conceived child were in fact "advanced." If this were true, it would imply that a couple who conceived a child knowing that it was likely to be born with birth defects would in fact have done something good, rather than causing harm or wrong; and for this reason alone criminalization would be impermissible.

The non-identity problem is no easy one to solve,⁶⁷ but there are at least two possible preliminary responses I can think of. One is to reject the utilitarian approach entirely. Conceiving a child whom one knows is likely to have birth defects would be viewed as wrong, deontologically, without regard to any weighing of costs and benefits. To conceive a child in such circumstances would be to risk violating the future child's presumed "right" to live a life unburdened by suffering. The second response is to take on the utilitarian argument on its own terms. I would argue that "existence" is not a basic good against which "bads" like birth defects are to be weighed. Existence itself is neither good nor bad. It becomes good or bad only in reference to the stuff of which it is comprised. To put the matter simply, sometimes it really is better not to exist at all than to exist in circumstances that involve ongoing suffering.

But even if there was agreement that conceiving a child knowing that it was likely to suffer from birth defects was wrong and harmful, and even if adult incest laws could somehow be applied exclusively to fertile consanguineous heterosexual couples having unprotected sex, it is still doubtful that such laws would pass muster in a liberal system of criminal law, such as that in the U.S. The problem is countervailing concerns with privacy and sexual autonomy.

U.S. law involving prohibitions on reproductive rights has gone through a dramatic transformation. During the Progressive Era of the late 19th and early 20th century, laws that placed limits on the ability of people with disabilities to reproduce were considered a legitimate method of promoting social progress.⁶⁸ In its 1927 decision in *Buck v. Bell*, for example, the Supreme Court approved a Virginia law that allowed for the forced sterilization of patients at a home for the intellectually disabled.⁶⁹ In rationalizing the law, Chief Justice Holmes famously concluded his opinion by stating, "[t]hree generations of imbeciles are enough."⁷⁰

⁶⁷ For attempts, see, e.g., David Boonan, *The Non-Identity Problem and the Ethics of Future People* (OUP, 2014); Melinda Roberts and David Wasserman (eds.), *Harming Future Persons: Ethics, Genetics, and the Non-Identity Problem* (Springer, 2009); Kieran Setiya, *The Ethics of Existence*, 28 *Philosophical Perspectives* 291 (2014). An analogous issue arises, in tort law, in so-called "wrongful life" cases. See generally Ronen Perry, *It's a Wonderful Life*, 93 *Cornell L. Rev.* 329 (2008).

⁶⁸ For a leading account, see Edwin Black, *War Against the Weak: Eugenics and America's Campaign to Create a Master Race* (Four Walls Eight Windows, 2003).

⁶⁹ 274 U.S. 200 (1927).

⁷⁰ *Id.* at 207.

In the wake of Nazi-era eugenics practices, however, such policies came to be seen as racist and discriminatory, and are now very much disfavored. And, though *Buck* itself has never been overruled, legislation that prohibits individuals with particular characteristics from reproducing seems almost unthinkable today. As a result, *non*-incestuous couples are completely free to conceive children even when they are aware of significant risks of birth defects – such as from Huntington’s disease, hemophilia, sickle cell anemia, Down syndrome, Tay Sachs, cystic fibrosis, or any number of other devastating congenital diseases, many of which can now be prevented through genetic testing and the use of contraception. Yet any attempt to impose criminal sanctions on parents who fail to prevent or terminate such pregnancies, or even obtain genetic testing, would surely be regarded as a gross invasion of privacy and an unacceptable limit on sexual autonomy and reproductive freedom.⁷¹ Even sanctions on women who engage in heavy alcohol use while pregnant (a practice that significantly increases the risk of conditions such as fetal alcohol syndrome) are highly disfavored.⁷² In short, the idea that incest laws – even when narrowly tailored to apply exclusively to fertile consanguineous heterosexual couples having unprotected sex -- can be justified as a means to prevent birth defects seems fundamentally at odds with contemporary liberal values.

D. Protecting Family Integrity

Another commonly-offered harm-based rationale for prohibiting consensual adult incest is that the practice is believed to be destructive of family integrity: it is said to cause, or exacerbate, rivalries and jealousies, and undermine the traditional allocation of roles, within the family structure. Children born of incestuous unions will presumably grow up in highly unconventional family circumstances: for example, a child’s father will also be the child’s uncle or grandfather; a child’s mother will also be the child’s half-sibling or cousin. Such blurring of roles, it is argued, is likely to lead to instability and unwarranted stigmatization. Moreover, even when no child is conceived, family relations will be much complicated by entangling sexual intimacies: for example, parents will find themselves competing with their own children for the sexual attention of their spouses, and vice versa.

One significant difference between the previously-discussed birth defects rationale and the family integrity rationale is that the latter would seem to apply to a much broader range of cases. Family integrity will arguably be threatened regardless of the kind of sexual relations the parties are engaged in (whether procreative or not), and regardless of whether family members are related by blood. If consensual adult incest really did threaten family integrity, that fact should justify a broader definition of sexual activity than under the birth defects rationale.

⁷¹ Indeed, as Andrew Solomon describes in his path-breaking book *Far from the Tree*, many parents quite consciously decide to conceive children knowing that they are likely to suffer from various disabilities. Andrew Solomon, *Far from the Tree: Parents, Children, and the Search for Identity* (Norton, 2012). Moreover, as Vera Bergelson points out: “[E]arly prenatal diagnostics today often given prospective parents the option of aborting an abnormal fetus. If they choose not to exercise that option, they act with a much higher degree of subjective responsibility than an incestuous couple having unprotected sex. . . . Society, however, does not . . . ban the couple already known to possess the unfortunate recessive gene from having intercourse in the future, getting or remaining married, or having more children.” Bergelson, at 47-48.

⁷² Erin D. Kampschmidt, Note, Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up, 25 *Health Matrix* 487 (2015).

The problem is, we really don't know the extent to which consensual incestuous relationships between adults affect family stability. As we saw above, there are virtually no data on the incidence of such relationships, their dynamics, or their psychological impact on participants and their families. Almost all of the empirical studies we have concerning the effects of incest on individuals and families involve *juvenile* victims.⁷³

Moreover, even if we did have conclusive evidence that consensual adult incest was likely to cause serious family disruptions, that hardly means that criminalization would be justified. Just as the government lacks the authority to prevent people from having procreative sex when the risk of birth defects is high, it would seem to have even less authority to prevent people from engaging in sexual practices that allegedly lead to family dysfunction. The family integrity rationale, relied on by the framers of the original Model Penal Code in justifying the prohibition on adult incest, seems hopelessly dated.⁷⁴ In a liberal society such as ours, people are free to engage in all kinds of intimate behaviors. They can be heterosexual, homosexual, bisexual, or asexual; monogamous, promiscuous, celibate, or polyamorous; cisgender or transgender. They can have sexual and romantic relationships with, and marry, people their parents or siblings do not approve of; have affairs; get divorced or separated. They can raise their children in a traditional, heterosexual "nuclear" family; as single parents; in a straight, gay, or lesbian two-parent household; or on a commune or kibbutz. They can be rigid disciplinarians or overly permissive. They can be cossetting "helicopter" parents or parents who leave the job to paid nannies. Any of this conduct may cause great dismay, and even long term estrangements, within their families. Yet there is little the criminal law can, or presumably should, do about any of it.⁷⁵

If people choose to compete with family members for the sexual attention of other family members, it is arguably their business to do so, even if the impact on their children and other family members itself is highly adverse. In our system of law, children have a right not to be beaten or have their most basic physical needs neglected by their parents. But, for better or worse, they have no legally recognized "right" to be raised in a psychological healthy household. The idea that the law is somehow justified in making it a crime to enter into a particular kind of sexual or romantic relationship because of the impact it might have on family dynamics is illiberal in the same way it would be illiberal to prevent people from conceiving children who are likely to suffer from birth defects.

⁷³ Without further study, the best we can do is look to anecdotal evidence suggesting that at least some adult incestuous relationships are quite disruptive. For example, in her best-selling memoir, *The Kiss*, Kathryn Harrison describes the four-year incestuous relationship she had, as an adult, with her father. According to Harrison, both she and her father had been wounded by her mother's emotionally manipulative behavior; and they entered into their relationship precisely for the purpose of causing family disruption and obtaining vengeance against her. Kathryn Harrison, *The Kiss* (Random House, 1997). The case is considered, as somehow exemplary, in Robert William Fischer, Why Incest is Usually Wrong, 19 *Philosophy in the Contemporary World* 17, 24 (2012).

⁷⁴ Model Penal Code Commentary §230.2, comment 2(c), at 406 ("The essentials of a nuclear family are a man and a woman in a relation of sexual intimacy and bearing a responsibility for the upbringing of the woman's children. This institution is the principal context for the socialization of the individual. A critical component of that process is the channeling of the individual's erotic impulses into socially acceptable patterns.").

⁷⁵ For a similar argument, see Bergelson, at 48-49; Jeffrey Sebo, The Ethics of Incest, 13 *Philosophy in the Contemporary World* 48, 49 (2006).

E. Preventing Coercive Sexual Relationships

So far in this discussion, we have been considering the rationale for criminalizing sexual relationships between adult relatives that have been presumed, initially, to be consensual. We now need to consider the possibility that some significant number of adult incestuous relationships, though putatively consensual, will be found, upon further inspection, to be coercive or exploitative.

The suggestion parallels an argument that is frequently made in the context of prostitution laws. Liberals typically argue that prostitution should be legalized to the extent it involves a sexual act between consenting adults.⁷⁶ Many feminists disagree, on the grounds that consent is often illusory; few women, they argue, go into prostitution out of free choice. Understood within the broader, patriarchal, oppressive social context in which it typically occurs, prostitution seems much less “consensual” than it does through the narrow conceptual lens adopted by liberal theorists.⁷⁷ Perhaps adult incest should be understood in an analogous manner: If we dig deeper into the background of adult incestuous relationships, we may find that they are generally less consensual, and more coercive, than liberal theorists assume.

For purposes of discussion, let us stipulate that at least some subset of cases of adult incest involve sex that *is* genuinely consensual, and that the parties who engage in such conduct are exercising important sexual autonomy rights when they do so.⁷⁸ Let us further stipulate that a separate subset of cases of adult incest is *not* genuinely consensual, and that some of the parties to these encounters will be subject to a significant infringement of their rights in sexual autonomy. Given such a mix, what is the right way to regulate? If we prohibited all cases of adult incest, then some persons would obviously have their rights infringed (by the government): they would be prohibited from engaging in conduct that is truly consensual; the regime would be *overinclusive*. On the other hand, if we prohibited and punished only those cases in which actual nonconsent could be demonstrated, we would be bound, as a result of imperfect procedures and incomplete evidence, to miss some cases in which sex was in fact nonconsensual; some infringements of sexual autonomy (by offenders) would thus go uncensured; the regime would be *underinclusive*.

So how should we achieve an optimal level of enforcement, one which maximizes the rights of people to engage in truly consensual adult incest, and minimizes the occurrence of

⁷⁶ See, e.g., Peter de Marneffe, *Liberalism and Prostitution* (Oxford U. Press 2010) (considering such arguments).

⁷⁷ See, e.g., Michelle Dempsey, Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism, 158 *U. Pennsylvania L. Rev.* 1729 (2010).

⁷⁸ Imagine a case in which children who are biologically related but not raised in the same home meet for the first time as adults and find themselves attracted to each other – a phenomenon that has been called “genetic sexual attraction.” It is in some sense the flip side of the Westermarck Effect. See Alix Kirsta, Genetic Sexual Attraction, *The Guardian* (May 16, 2003), <https://www.theguardian.com/theguardian/2003/may/17/weekend7.weekend2>

harmful nonconsensual adult incest? One possibility would be to try to narrow the universe of adult incest cases we wish to prohibit. If we could identify those factors that tend to increase the likelihood that a given case of adult incest was nonconsensual, we might be able to reduce both false positives and false negatives.

Though not speaking in the language of under- and overinclusiveness as such, Tatjana Hörnle has identified two types of case involving adult incest in which she says it is “plausible to assume invalid consent despite the fact that the young woman or young man was legally an adult.”⁷⁹ The first sort of case occurs when the sexual relationship started while the younger partner was still a juvenile, and continued into adulthood. She gives the example of Pola Kinski, whose father, the famed German actor Klaus Kinski, allegedly began to sexually abuse her when she was a child, and with whom she continued to have a sexual relationship well into adulthood. Pola describes “how a lonely child’s intense need for love creates vulnerability and dependence, and how difficult it can be to free oneself finally from a web of well-established dependencies and psychological pressures.”⁸⁰ “Under such circumstances,” Hörnle says, “it is defensible to deem even those acts that happen at the time when the younger ‘partner’ became legally an adult as lacking valid consent.” A similar kind of abuse, Hörnle says, can occur with siblings and perhaps other relatives.

The second (partially overlapping) type of case occurs when “the social roles are such that there is a clear and evident social split into ‘weaker partner’ and ‘powerful partner.’” What Hörnle has in mind, primarily, are sexual relationships between parents and adult children, so long as the child was raised by the parent for some significant period of time during childhood. This ban would apply even if the relationship began when both parties were already adults, and even if the two parties were unrelated by blood. (On the other hand, if the child was not raised by the parent or other relatives, sexual contact would not be prohibited; the fact that they were blood relations would be immaterial.⁸¹)

Hörnle argues that “[m]ost modern criminal statutes contain norms that extend the definition of ‘sexual offense’ to adults in situations without explicit coercion: for instance, corrections officers and police officers commit a sexual offense if they have sex with an inmate or a suspect in a criminal investigation The prisoner’s or suspect’s approval or disapproval

⁷⁹ Hörnle, *Consensual Adult Incest*, above, at 89 (emphasis removed).

⁸⁰ *Id.* (quoting Pola Kinski memoir, published in German).

⁸¹ In focusing on the distinctive imbalance of power in relationships between parents and children, Hörnle’s argument reflects a point that Kant, interestingly, wrote about in his *Lectures on Ethics*. See Immanuel Kant, *Lectures on Ethics* (Louis Infield, trans. Hackett, 1930, 1963), 168. Kant distinguishes between two different rationales for prohibiting incest. Normally, he says, the act should be prohibited only where it “conditionally” involves consanguinity – in other words, where there is a risk of inbreeding. But, he says, sex between parents and children specifically should be viewed differently. These unions should be prohibited categorically, because “[b]etween parents and children there must be a respect which should continue throughout life, and this rules out of court any question of equality. Moreover, in sexual intercourse each person submits to the other in the highest degree, whereas between parents and their children subjection is one-sided; the children must submit to the parents only; there can, therefore, be no equal union. This is the only case in which incest is absolutely forbidden by nature.” *Id.* Although Kant is addressing the morality, rather than legality, of such conduct, his reasoning, concerning the implicit coercion in such relationships, seems pertinent here.

is irrelevant; under such extreme circumstances of dependence, even explicit factual consent does not count as voluntarily given.”⁸² In essence, Hörnle’s approach to criminalizing (some cases of) adult incest parallels the liberal approach to criminalizing *juvenile* incest: in both contexts, we assume coercion in all cases in order to prevent coercion in some.

I have several concerns with this approach. First, the analogy between adult incest and sex involving corrections and police officers is problematic. In the latter kinds of case, we are concerned at least as much with the possibility that justice might be perverted as we are with any danger of sexual coercion: sex that officers have with inmates and suspects, regardless of whether it is consensual, tends to compromise their duties as officers of the state. In the case of adult incest, such institutional concerns seem less relevant. In a liberal state, as we saw above, the criminal law has virtually no legitimate role to play in regulating family life. Moreover, a person who takes on the role of prison guard or police officer does so voluntarily, presumably aware of the limitations such a role places on him, including in the sexual sphere. The same cannot be said of certain familial roles, such as being a sibling. In addition, the relationship between prison guards and inmates, and between police officers and witnesses, is a temporary one; the ban on sex normally ends when the guard or officer leaves the job, or when the inmate or witness is released. By contrast, the relationship between family members is enduring; the proposed ban on sex is “for life.”

An even more serious problem concerns the lack of empirical data we have concerning incestuous relationships involving adults. If one reads the literature on adult incest, one is struck by the almost exclusive reliance on a small body of anecdotal evidence that may or may not be representative of such cases more generally – essentially, descriptions of cases involving figures such as Patrick Stübing and Susan Karolewski, Klaus and Pola Kinski, and Allen and Patricia Muth.⁸³ And, though it might be reasonable to speculate that sexual relationships between parents and their children are likely to be coercive, it seems dangerous to base such significant liberty-limiting legislation on non-empirically-verified speculations.

For purposes of discussion, however, let us assume that we did have reliable data indicating a high rate of incidence of coercive sex in one or both of the situations Hörnle identifies. Could a provision that prohibited only adult incest of these sorts survive scrutiny under a liberal theory of criminalization? Note that, even in such narrowed form, such statutes would still be overinclusive: there would still be some set of cases in which truly consensual adult incestuous would be prohibited, thereby infringing the rights of some people to choose the willing sexual partner of their choice.

⁸² Hörnle, at 91.

⁸³ The Muths, cohabitating siblings, were defendants in the case of *State v. Allen M.*, 571 N.W.2d 872 (Wis. Ct. App. 1997) (upholding prosecution under Wisconsin’s incest provision); see also *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005), cert. denied, _____ (denying petition for habeas corpus relief and finding Wisconsin’s incest law not unconstitutional after *Lawrence*).

The problem of overinclusive statutes has attracted the attention of several criminal law theorists.⁸⁴ Most of this analysis, however, has focused on the problem of regulatory and *malum prohibitum*-type laws -- involving, for example, speed limits and drunk driving. In that context, the problem is this: some skillful drivers will obviously be able to drive carefully even at high speeds or when intoxicated. With respect to them, such laws will be overinclusive; their right to drive safely at high speed or while intoxicated, such as it is, would be infringed. Antony Duff, notably, has argued that such laws *are* tolerable so long as: (1) the burden of obedience is reasonable; (2) we can trust police and prosecutors to recognize, and not to pursue, so-called *de minimis* cases, which do not involve the mischief at which the law is aimed; and (3) their exercise of that discretion can be made appropriately accountable.⁸⁵

I agree with Duff that there are circumstances in which certain kinds of over-inclusive statutes would be tolerable even in a liberal system of criminal justice. In particular, I agree that *mala prohibita* or regulatory statutes of the sort he considers are good candidates for such treatment. The risk and magnitude of harm are high, while the burden of compliance, applicable penalties, and associated stigma are relatively light.

Statutes prohibiting sex between parents and their adult children, however, present a significantly more difficult question. On the one hand, the burden of compliance, penalties, and stigma are all likely to be higher than in the case of speeding and DWI laws (at least for those inclined to engage in such conduct). On the other hand, requiring the state to prove actual coercion in such cases might lead to significant under-enforcement. The kinds of coercion present in such intra-familial cases can be particularly subtle, involving, for example, the withholding of affection as much as the imposition of more direct pressure.⁸⁶

One possible compromise solution for the parent/child-type cases would be to treat such relationships as raising a rebuttable presumption of coercion, rather than as conclusive evidence under a regime of strict liability. Under such a regime, defendants would be permitted to present affirmative evidence that, despite their violating the letter of the law, their relationship was in fact characterized by genuine consent. This would not be a perfect solution: it would intrude into the privacy of some innocent defendants' lives and subject them to stigma that attends even unproved charges of this sort. But it would at least reduce the potentially over-inclusive effects of a strict liability regime.

Conclusion

For the liberal theorist, the line between consensual and nonconsensual sex typically marks what conduct can be criminalized and what cannot. Under such an approach, the fact that sex involves close family members should have no criminal law significance other than that it

⁸⁴ See, e.g., Antony Duff, Discretion and Accountability in a Democratic Criminal Law (unpublished manuscript); Douglas Husak, The *De Minimis* Defense to Criminal Liability, in Husak, *Philosophy of Criminal Law* (OUP, 2010), 363; work by Susan Dimock, Dan Markel.

⁸⁵ I am grateful to Antony Duff for his help in summarizing his views.

⁸⁶ Thanks to Kathy Stone for this point. For an arguably analogous context, see R.G. Simmons, et al., Family Tension in the Search for a Kidney Donor, 215 *JAMA* 909 (1971).

might serve as an indicator of non-consent. I have discussed two basic circumstances in which proof of incest could potentially serve that function. The first is in cases involving juvenile victims. Sex between adults and juveniles is already treated as statutory rape. The fact that the adult and juvenile are related may serve to aggravate the seriousness of the act, since the juvenile will often be unable to find refuge at home, and the harms she suffers may well be particularly severe. Consequently, I would treat such cases as a form of aggravated statutory rape, rather than as a separate, free-standing offense of juvenile incest.

The case of adult incest is more problematic. An important prima facie right to choose one's sexual partners is at stake here. The risk of non-consent is arguably highest in cases in which an adult relationship is a continuation of one that started when one of the parties was a minor, or where it involves parties who are in an inherently unequal relationship, such as that between a parent and a child. Rather than treat such cases under a (potentially under-inclusive) case-by-case regime or a (potentially over-inclusive) strict liability regime, I have suggested a third way – a statutory provision that would create a presumption of coercion, but one which could be rebutted by affirmative evidence of genuine consent.