

## Moral Police and Constitutional Law

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Courts in contemporary legal systems ostensibly devoted to the rule of law regularly uphold the constitutionality of criminal incest statutes. These decisions strike me as both obviously and understandably wrong.

Obviously wrong because incest as a distinct offense is patently incompatible with the basic principle of law as law, autonomy or self-government, the specification and enforcement of which is the province of constitutional law as constitutional law. Understandably wrong because courts are only rarely faced with constitutional challenges to criminal incest prohibitions, which have little practical significance—except of course for those unfortunate enough to come within their reach—and, with one important exception, have gotten away with dismissing these challenges with a flick of the judicial wrist.

The one exception is the recent decision by the German Constitutional Court, which was forced into an unusually detailed attempt at justifying the decision to affirm the constitutionality of the criminal incest statute in question, as applied to an adult brother and sister, by a strongly worded and tightly argued dissenting opinion.<sup>1</sup> Not coincidentally, this dissent was authored by Justice Winfried Hassemer, a leading German criminal law scholar.

In this paper, I will analyze the criminal prohibition of incest from the perspectives of both law and police.<sup>2</sup> Drawing on this distinction is useful for two reasons: First, in Part 1, it frames the unconstitutionality of incest statutes within the broader concept of *law*. Incest statutes are not simply unconstitutional in some technical sense; they are unconstitutional in the sense that they are incompatible with the concept of law itself. Put another way, criminal incest statutes are unconstitutional in all states under the rule of law, no matter what their specific positive doctrines of constitutional law might be or whether their positive constitutional law consists of the interpretation of one or more written documents. The prohibition of incest, in other words, is not an act of law, understood as the mode of governance of persons, rather than of things, or

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\* Thanks to Lorenzo Perilli, once more, for help with matters ancient.

<sup>1</sup> BVerfGE 120, 224 (Feb. 26, 2008).

<sup>2</sup> On the distinction, see, e.g., Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

resources. It does not address the perpetrators as persons, nor does it protect the victims as persons, if only because incest qua incest—rather than as the particular instance of another, more general, violent crime, such as rape—is not an offender-victim crime, but a matter of consensual interaction. As such, the criminal prohibition of incest is incompatible with the principle of autonomy in general, and the principle of sexual autonomy in particular, as referenced in both Hassemer’s dissent in the German incest case and Justice Kennedy in the opening paragraph of his opinion for the U.S. Supreme Court in *Lawrence v. Texas*, striking down a criminal statute prohibiting “homosexual conduct.”<sup>3</sup>

Second, and perhaps more interesting, and less obvious, analyzing the criminal prohibition of incest from the perspective of *police* offers affirmative insights into the nature and function of the state action in question. Analysis in terms of constitutional law is essentially critical, or negative—it explores the question whether the state action in question exceeds the bounds of political legitimacy, or legality. Police analysis, by contrast, disregards the question of legitimacy altogether—since police, as an essentially discretionary mode of governance, is illegitimate—and instead looks to understand the state action in question as a regulatory device within the context of the police project, i.e., the project of governing the state as a macro household. It is one thing to recognize a given state action as a police measure; it’s another to appreciate its governmental mechanics.<sup>4</sup> Police analysis moves beyond the unhelpful classification of incest as a “morals offense” (which then is or isn’t legitimate depending on whether one thinks morals offenses in general are legitimate or not).

Courts, and legislatures, in fact, recently have tended to downplay the character of incest as a morals offense, if morals offense is taken to be conduct that gives offenses to the public’s moral sensibilities. Here, too, there is one, similarly refreshing, exception: Justice Scalia’s dissenting opinion in *Lawrence*, which forthrightly labels incest a morals offense in this sense and finds it constitutional for that reason, along with a slew of other offenses justifiable only as morals offenses, including homosexual sex (the offense at issue in *Lawrence*), along with bigamy, prostitution, masturbation, adultery, fornication, bestiality, obscenity, though not necessarily in that order. If the public’s moral police (in the traditional sense of welfare) isn’t at stake, then what is? Other objects of

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<sup>3</sup> 539 U.S. 558 (2003).

<sup>4</sup> For an extended discussion of possession offenses in this light see Markus D. Dubber, “Policing Possession: The War on Crime and the End of Criminal Law,” 91 *Journal of Criminal Law & Criminology* 829 (2002).

protection include marriage and, relatedly, the family, vulnerable family members (true incest victims), and health, including the physical and psychological health of offspring from incestuous intercourse, who may suffer from genetic defects and societal discrimination, as well as the public's health, taken as the publicization of the offspring's (which manifests itself tangibly in the public cost of treatment).

Judicial attempts to generate rationales for the criminal prohibition of incest deserve some attention, if only because they underscore the futility of the constitutional scrutiny of a police measure. In the end, even the most extended attempt to establish the constitutionality of the criminal prohibition of incest, by the German Constitutional Court, appears as an insincere assembly of a grab bag of independently insufficient, ill-defined, and speculative post hoc rationalizations of a discretionary police measure that requires no rationalization. In this sense, the German decision is simply less forthright than those by U.S. courts, and Justice Scalia's *Lawrence* dissent, which reach the same result by dismissing any constitutional scrutiny of incest statutes as categorically inappropriate.

Put another way, Scalia recognizes the criminal prohibition of incest as an exercise of the state's police power, i.e., of the sovereign's discretionary and essentially unreviewable power to protect the police (i.e., the welfare) of its subjects, considered as resource constituents of the macro household under its authority. To question the state's power to protect the public's moral police is tantamount to questioning its sovereignty, understood both in the narrow American sense of state sovereignty in a federal system and in the general sense of sovereignty as the essence of political power.

The German Constitutional Court, by contrast, ostensibly operates within a law, rather than a police, paradigm. In the end, however, it does no more than pay lip service to the core principle of legitimate law power, autonomy, while in fact failing to subject the state action in question to meaningful constitutional scrutiny. It falls to the dissent by Hassemer to set out and then to apply "the rule of law" in the case.

This paper, then, can be seen as spinning out in somewhat greater detail the law and police analyses of the criminal prohibition of incest found in Hassemer's and Scalia's dissents, respectively. The law analysis in Hassemer's opinion leaves room for elaboration and contextualization both because the bulk of the dissent consists of a critique of the majority's half-hearted attempts at rationalization and because it assumes, without elaborating, the extensive

German literature on the concept of law good, or *Rechtsgut*, which the majority takes pains to dismiss, not without justification, as unhelpful. The analogue, or at least the closest thing there in the common law world, to the German doctrine of the *Rechtsgut*—the protection of which German criminal law science has insisted for some time is, and must be, the object of every exercise of the state’s power of penal law (if not of law, period)—appears in the first paragraph of Justice Kennedy’s opinion for the Court in *Lawrence*, and more specifically the following sentence: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>5</sup> The task, for purposes of this paper and, in fact, for criminal law theory in general, is to develop an account of the principles of state punishment that finds the happy middle between the over-elaborate, but ultimately inconsequential, German theory of *Rechtsgut* and the under-developed, but potentially powerful, analytical tool mentioned, and applied, in *Lawrence*.

Scalia’s police dissent does not go much beyond the blunt, and oft-repeated, assertion of the obvious inappropriateness of constitutionally scrutinizing the state’s exercise of its sovereign police power to criminalize incest, along with other conduct that threatens the public’s moral police (including homosexual marriage, which appears on Scalia’s lists of unmentionables without, however, being the subject of criminal punishment, as opposed to the absence of state recognition, suggesting that Scalia, in his indignation at the Court’s disrespect for sovereign dignity, commits the not uncommon error of failing to distinguish criminal prohibition from other tools of governance). Echoing the majority opinion by Justice White in *Bowers v. Hardwick*, in which the Supreme Court in 1986 had upheld another homosexual sodomy statute and which is overturned in *Lawrence*, Scalia is content to remark that constitution scrutiny is inapposite simply because there is no constitutional right—what *Bowers* called the “fundamental right [of] homosexuals to engage in sodomy”—the violation of which could be scrutinized.<sup>6</sup> This leaves, as in the Hassemer dissent, the task of fleshing out the affirmative position Scalia invokes implicitly, and—in his case, unlike in Hassemer’s—unconsciously; what remains to be done is to elucidate the policeness of incest, which renders it immune to the critique of law, and of constitutional law in particular.

## 1. The Illegality of Incest: Protecting Sexual Autonomy

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<sup>5</sup> 539 U.S. at 558.

<sup>6</sup> 478 U.S. 186 (1986).

Criminal prohibitions of incest have been, and still are, said to serve various functions, which also appear in the German Constitutional Court's opinion, not necessarily in this order: prevent genetic defects among children of an incestuous relationship, protect the family (and marriage), reflect traditional disapproval of the conduct, and protect young female incest victims. We will take a closer look at the first three cited rationales when we consider the criminal prohibition of incest from the perspective of police in Part 2. There we will try to understand how these purported functions operate and interact; this is not an easy task as each function often is more suggested than asserted, without bearing any justificatory weight on its own, as all cited functions are said to interact to generate an amalgam sufficiently strong to support the state action in question. (This alchemical interaction itself will be worth some attention.)

For now, though, let us focus on the last mentioned purported rationale, as it is the one that is most susceptible to being framed in law, rather than in police, terms. Here, incest is regarded as a crime of sexual exploitation, with the stronger, more powerful, person, ordinarily the father, victimizing the weaker, and younger, ordinarily the daughter. In this light, then, incest can be framed as an offense against the victim's sexual autonomy. Insofar as sex offenses are, at core, offenses against sexual autonomy—as has been argued in various ways in the U.S. and the U.K.,<sup>7</sup> and as has been officially recognized in the 1970s reform of the German Penal Code, which grouped sex offenses under the heading “crimes against sexual autonomy”<sup>8</sup>—incest appears as an ordinary sex offense and, as such, no less legitimate than other sex offenses. If sex offenses are legitimate as the state's attempt to safeguard a crucial aspect of personhood— one's sexual self— then so is incest.

There are two problems with this approach. To begin with, legislatures do not in fact classify incest as an offense against sexual autonomy. The German Penal Code devotes an entire chapter to Crimes Against Sexual Autonomy, but incest isn't among them. Incest instead appears among the—much shorter—list of Crimes Against Personal Status, Marriage and the Family, along with

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<sup>7</sup> See, e.g., Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998); Stephen Shute & John Gardner, “The Wrongness of Rape,” in J. Horder (ed.), *Oxford Essays on Jurisprudence. Fourth Series* (Oxford UP, 2000) 193-217.

<sup>8</sup> See Tatjana Hörnle, “Penal Law and Sexuality: Recent Reforms in German Criminal Law,” 3 *Buff. Crim. L. Rev.* 639 (2000).

Falsification of Personal Status, Violation of Maintenance Obligations, Violation of the Duty to Provide Care or Upbringing, and Bigamy. The American Model Penal Code of 1962, though it does not explicitly conceptualize sex offenses as offenses against sexual autonomy, similarly finds a place for Incest not in its article on Sexual Offenses, but among Offenses Against the Family (along with Bigamy, Abortion, Endangering Welfare of Children, and Persistent Non-Support). Incest, then, if it is to be a crime, is generally categorized not as a crime against autonomy, and sexual autonomy in particular, but as a crime against the family or, more specifically, against marriage and the family. (More on this in Part 2.)

More significant than this question of legislative intent, or at least of classification, is the substantive difficulty that incest's legitimacy as an offense against sexual autonomy would come at the price of its redundancy. Given that sexual autonomy is already protected by other, broader, criminal offenses— notably rape and even so-called “statutory” rape, which replaces the non-consent element with an age element—the offense of incest is pointless. Few would argue that criminal law should not concern itself with violations of sexual autonomy, including violations of the sexual autonomy of one family member by another. The issue is not whether intrafamilial conduct should be immunized from criminal law scrutiny, as in the case of the so-called spousal immunity doctrine in the law of rape, which can be seen as excluding a certain class of the violations of one family member's sexual autonomy, the wife's, by another, the husband—though there too, a distinction may be drawn between consent-based rationales for this now-discredited doctrine, and others, which draw on legal concepts but operate within a police realm, by stressing the *de facto*, if not *de jure*, sovereignty the householder holds over the members of his household, including his wife.<sup>9</sup> What's at stake is the justification of a separate criminal offense, incest, that operates exclusively within the familial context in the face of general offenses that apply to all persons, regardless of whether they are bound by familial ties or not. The issue is not the legal justifiability of some form of *droit de seigneur*, exercised by the householder over members of his household, no matter their age or, more to the point, their consent. Quite the opposite—it is the legitimacy of a specifically and exclusively familial criminal offense that threatens with punishment conduct that is already subject to serious punishment

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<sup>9</sup> *People v. Liberta*, 64 N.Y.2d 152 (1984), sets out a standard list of “traditional justifications,” including “the common law doctrines that a woman was the property of her husband and that the legal existence of the woman was “incorporated and consolidated into that of the husband.”

without reference to the familial relationship between offender and victim. (In this sense, it resembles the fascinating intrafamilial crime of petit treason, generally the murder of one's father or husband, which eventually was absorbed into the general law of interpersonal homicide.<sup>10</sup>)

It is worth noting here that incest, in the German Penal Code and elsewhere (for instance, once again, the Model Penal Code), is not limited to sexual intercourse between any particular family member and another. Specifically, it is not limited to relationships between father and child, between an older family member and a younger one, nor between a family member who is stronger, taller, craftier, etc. and another. As one result, the crime of incest does not on its face distinguish between the partners in the sexual relationship (or, in the Model Penal Code, the cohabitation), applying equally to offender-predator and victim-prey, resulting in the possibility—and in many cases, the actuality—of criminal prosecution, and even criminal punishment, for both partners.

Perhaps incest could be justified, within the law paradigm, on grounds similar to those said to justify the crime of statutory rape. The crime of statutory rape, of course, is itself not uncontroversial, though largely on account of its “statutory” aspect, which traditionally has been taken to distinguish it from “common law” rape, which requires not only proof of non-consent, but also (some sort of) mens rea regarding that non-consent. Statutory rape not only replaces non-consent with an age element, but also traditionally does away with the mens rea requirement regarding that element. Let us then, for present purposes, disregard statutory rape's statutoriness and simply focus on its use of a stand-in for non-consent. In the case of incest, that stand-in would be the familial relationship between the sexual partners, rather than the victim's age (and, perhaps, an additional requirement of some minimum required difference in age between perpetrator and victim).

No one suggests that familial relationship, by itself, could perform the function of a stand-in for non-consent ascribed to the age requirement in the case of statutory rape. Perhaps incest could be redefined, and dramatically narrowed, in terms of the age of its victim or the age difference between the sexual partners. But then incest would simply be statutory rape by another name, rendering it redundant once more. Or one might define incest in terms of the familial relationship between perpetrator and victim, along the lines suggested above, perhaps in conjunction with an age requirement, as a sort of enhanced variety of

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<sup>10</sup> See generally Dubber, *The Police Power*.

statutory rape, where the familial relationship aggravates the statutory rape or perhaps even takes the place of the age element (for instance, by raising the “age of consent” in cases of intrafamilial statutory rape).

Incest, however, is not currently defined in this way. In fact, even if a crime were defined in this way, it would not survive as a separate offense of incest but would find its place among other crimes against sexual autonomy. This is precisely what happened in the German Penal Code, where an offense of Sexual Abuse of Wards, and its various cognates (Sexual Abuse of Prisoners, Persons in the Custody of a Public Authority, and Persons in Institutions Who are Ill or in Need of Assistance, Sexual Abuse by Exploiting a Position in a Public Office, Sexual Abuse by Exploiting a Counseling, Treatment or Care Relationship, Sexual Abuse of Children) appears in the Chapter on Crimes Against Sexual Autonomy, sandwiched between Incest and Rape.

Once again, then, incest turns out to be not justifiable within a law paradigm, because either it does not concern itself with sexual autonomy or, insofar as it does, it merely mimics an existing offense defined explicitly in terms of the protection of sexual autonomy.

Hassemer’s dissent in the German Constitutional Court’s incest case makes these points about the possible connection between the criminal prohibition of incest and the protection of sexual autonomy, without fully exploring them; a dissent, after all, does not start from a clean slate but must respond to the majority opinion. And that opinion is framed in terms of the misleading, and ultimately unhelpful, concept of *Rechtsgut*, rather than subjecting the state action in question directly to a critical analysis in terms of the principle of autonomy. The majority’s roundabout, and even obfuscating, approach to constitutional analysis in turn reflects the established practice of German criminal law theory and doctrine, or “criminal law science” as it prefers to think of itself, which elevated the concept of *Rechtsgut* to the ultimate point of reference while, at the same time, draining it of all substance and, therefore, normative bite.

Given the emptiness and critical uselessness of the *Rechtsgut* concept, it is difficult to blame the German Constitutional Court for dismissing it, though it seized this opportunity with a gusto that suggests a deep seated predisposition toward upholding the constitutionality of the criminal prohibition of incest. At the same time, insofar as Hassemer’s dissent concerns itself with the defense of the *Rechtsgut* concept against the majority’s assault, it obscures the substantive core of the critique of incest from the perspective of law in the name of rescuing a

notoriously critical concept and, with it, of the German criminal law professoriate that has devoted decades to its study, scientific or not.

This is not the place for a detailed discussion of Rechtsgut theory, the literature on which fills volumes, perhaps libraries, but certainly shelves.<sup>11</sup> In short, the problem with the concept of Rechtsgut as a tool for critical analysis of law is that, at least in its present form, it has no critical purchase. It may well have a useful function as an interpretative guideline for doctrinal analysis of positive law, but it has no normative significance. The problem with the concept of Rechtsgut in constitutional law analysis, in particular, is that no effort has been by its inventors (or discoverers) and handlers, the German criminal law professoriate, to connect it to constitutional principles. So, even if Rechtsgut theory by itself had some normative bite, it is unclear why constitutional law, and the German Constitutional Court, should care.

It is no surprise that Rechtsgut performs no normative function if one considers that the concept entered the German criminal law literature—in the 1830s<sup>12</sup>—precisely to justify those criminal prohibitions that were in tension with the right-based criminal law theory at the time, associated with P.J.A. Feuerbach (and, through him, with Kant). Rechtsgut from the start was designed to deflect critique, not to enable it. The point of shifting emphasis from right (Recht) to good (Gut) was to rationalize criminal offenses against public interests, rather than against individual right bearers, including—notably for present purposes—incest and other offenses against Sittlichkeit. The concept of Rechtsgut, that uneasy yet all the more useful merger of two apparently irreconcilable concepts, did not assume its central place in German criminal law later in the nineteenth century, in the wake of the nationalist centralization of German law, in which criminal law and the German Criminal Code of 1871 played an early and important role, when the Rechtsgut concept was championed by Karl Binding, a devoted positivist, who held criminal law to be centrally, if not exclusively, concerned with protecting communal goods, societal interests, and eventually the state itself. Binding saw the Rechtsgut as “anything that the legislature considers valuable and the undisturbed retention of which it therefore must ensure through norms.”<sup>13</sup> (Incidentally, similar language can be found in the

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<sup>11</sup> See Dubber, “Theories of Crime and Punishment in German Criminal Law,” 53 *American Journal of Comparative Law* 679 (2006).

<sup>12</sup> Birnbaum, “Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens,” *Archiv des Criminalrechts (Neue Folge)* 15 (1834), at 149.

<sup>13</sup> Karl Binding, *Handbuch des Strafrechts*, vol. 1, at 169 (Leipzig 1885).

American literature of the time, proposing or detecting a shift from the penal protection of individual interests to that of public interests.<sup>14</sup>)

Although some writings under Nationalist Socialism took issue with the concept of *Rechtsgut* as an outdated liberal attempt to constrain state power in the service of the *Volk*, in the end the concept survived unscathed, precisely because it in fact performed no constraining function. Instead, the concept merely served as one, albeit a very basic, classificatory tool in the tool kit of German criminal law science. The “purity of the race” or the “health of the *Volk*” were recognized as *Rechtsgüter*, which various criminal prohibitions were legislatively designed, and therefore judicially interpreted, to protect. There was nothing about the concept of *Rechtsgut* that would have permitted its use in an argument that some interest does not qualify as a *Rechtsgut*.

This view of *Rechtsgut* as convenient label (useful, for instance, in various balancing exercises in the law of justification, such as in self-defense or necessity) has survived largely unchanged, occasional attempts to put a more normative gloss on the concept notwithstanding. German criminal law science, as a rule, saw the *Rechtsgut* not as a tool for critiquing existing criminal prohibitions, no matter what they might be at any given time.

At the same time, the concept was regarded, and defended, as an achievement of German criminal law science, charting the familiar path from Feuerbach to Birnbaum to Binding. Since it was developed long before the German Basic Law, by criminal legal scientists, without reference to constitutional principles (whatever they might have been at the time), *Rechtsgut* was not in fact grounded in German constitutional law, nor could it be. Nor should it be, German criminal law professors insisted, because it flows directly from the nature of crime and law and punishment, neither of which are specifically constitutional. More specifically, the concept of *Rechtsgut* did not rest on the German Basic Law as interpreted by the German Constitutional Court whose sprawling jurisprudence over the past five decades, rather than the constitutional text itself, has come increasingly to define German constitutional law.

It is therefore perhaps understandable why the German Constitutional Court made a point of dismissing the German criminal law literature on the concept of *Rechtsgut*—which was either toothless or unconstitutional, or both. That’s not to say, of course, that nothing useful could be, or has been, said about

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<sup>14</sup> Francis Sayre, “Public Welfare Offenses,” 33 *Columbia Law Review* 55 (1933).

the Rechtsgut; Rechtsgut is inherently neither meaningful nor meaningful, although its apparent internal tension (right and good) and its origin and history pose significant challenges to anyone who sets out to develop a substantive normative account of the concept.

Hassemer, in his dissent in the German Constitutional Court's incest judgment, hints at a robust account of Rechtsgut, without developing, or citing, one developed elsewhere. The only Rechtsgut Hassemer endorses in the dissent is that of sexual autonomy; in this light, the problem with the criminal incest prohibition is not that it pursues an illegitimate or ill-defined objective, but that it, unlike the slate of offenses grouped in the German Criminal Code's section on crimes against sexual autonomy, doesn't in fact pursue it. Even if it could be shown to pursue this legitimate objective, however, and if we disregarded the fact that a number of other offenses already safeguard the sexual autonomy of incest victims, the criminal prohibition of incest both curtails and protects sexual autonomy, of the same person—as opposed to (only) that of another person, the perpetrator, whose sexual autonomy is compromised, as is his autonomy more generally, with respect to both the criminalized act and the subsequent prosecution and punishment. The legitimacy challenge in the case of incest, then, is to determine at what point, if ever, the criminal prohibition of incest enhances or diminishes the victim's sexual autonomy. The result of this determination is less significant than its method.

The closest analogue to the concept of Rechtsgut in Anglo-American criminal law is the harm principle, which in John Stuart Mill's classic formulation provides that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>15</sup> The literature on the harm principle being roughly as voluminous as that on the Rechtsgut, this is not the place for a(nother) consideration of its promise and foundation. It is interesting to note, however, that it resembles the Rechtsgut in both its toothlessness and its questionable constitutional relevance. Despite its very different, and distinctly non-legal, origin and history, the harm principle also has been taken to task for its normative toothlessness in criminal law (though it should be noted that, unlike the Rechtsgut, the harm principle was not designed for criminal law alone, nor for that matter for law as a whole, but more broadly "to govern absolutely the dealings of society with the individual in

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<sup>15</sup> John Stuart Mill, *On Liberty* (1869).

the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion.”)<sup>16</sup>

Also like the concept of *Rechtsgut*, the harm principle has been found to lack constitutional significance, most recently and elaborately by the Canadian Supreme Court.<sup>17</sup> There has been at least one exception, in a Pennsylvania Supreme Court opinion on state constitutional law grounds,<sup>18</sup> and some effort has been made to establish its constitutional *bona fides*.<sup>19</sup>

The constitutional status of the harm principle (in US and Canadian constitutional law), however, may be ultimately as irrelevant as that of the *Rechtsgut*. As in the case of the *Rechtsgut*, whatever constitutional significance the harm principle might be thought to have derives from its reflection of the fundamental principle of legitimacy, or lawness, in a modern democratic state: autonomy, or self-government. This principle, and its relation to the harm principle, remains to be spelled out, and developed, in greater detail, but the U.S. Supreme Court’s opening paragraph in *Lawrence* makes a promising start, by declaring that “[l]iberty presumes an autonomy of self,” thus recognizing autonomy at the base of liberty, a concept that itself often has been thought to bear the full weight of modern views of political legitimacy.<sup>20</sup>

## 2. Policing Incest

The illegality of incest, as we’ve seen, is easily recognized once the centrality of the concept of autonomy in a law system is acknowledged. More interesting than its illegality, however, is its a legality. Incest doesn’t simply fail basic legitimacy scrutiny under the rule of law; it resists being subjected to this

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<sup>16</sup> See, e.g., Bernard Harcourt, “The Collapse of the Harm Principle,” 90 *Journal of Criminal Law and Criminology* 109 (1999).

<sup>17</sup> *R. v. Malmo-Levine; R. v. Caine* [2003] 3 S.C.R. 571, 2003 SCC 74 (upholding marijuana possession statute).

<sup>18</sup> *Com. v. Bonadio*, 415 A. 2d 47, 96-98 (Pa. 1980) (striking down homosexual sodomy statute).

<sup>19</sup> Dennis J. Baker, “Constitutionalizing the Harm Principle,” *Criminal Justice Ethics* 3 (Summer/Fall 2008).

<sup>20</sup> For some preliminary remarks, see Dubber, “Toward a Constitutional Law of Crime and Punishment.”

scrutiny in the first place. Incest, at its core, is not a matter of law, but a matter of police. Rather than trying to shoehorn it into the law paradigm, with predictable results, it may be more profitable, or at least more appropriate, to regard it from the perspective of police.

As a matter of police, the paradigmatic law image of incest (father-perpetrator and child daughter-victim) appears as a manifestation of the power of the state, as macro householder, over the father, as micro householder.

### A. Householder Police

While the discretionary power of the householder (*oikonomos*) over his household (*oikos*) was virtually unlimited, the centralization of power, and of sovereignty, and eventually the development of the modern state also meant an assertion of a central power to police the local policer. Insofar as the head of the micro family household was integrated into the macro household of the state, he was reduced to the position of governed, *vis-à-vis* the state, while retaining the position of governor, *vis-à-vis* his household (as a sort of housekeeper).

Even so, the exercise of the police power of the macro householder over the micro householder's police power over his household was limited to extreme cases, reflecting his utter incompetence to serve as governor and his more appropriate treatment as a mere object, rather than also as a subject of government. The boundaries of the micro householder's domestic power shifted over time and remained flexible and discretionary, which is not surprising given that they were set by the macro householder's exercise of his own sovereign, and essentially discretionary, power to police.

Evidence of micro householder incompetence might come in the form of sadistic violence or other behavior that was patently inconsistent with the householder's interest in maintaining the welfare of his household. Domestic discipline that cost the servant life or limb not only deprived (also) the macro householder of all, or a significant part, of a subject's human resource (in the same way that non-disciplinary, non-domestic homicide or "maiming" would), but also might mark the householder as incapable of governing himself, and therefore of others. Excessive discipline, in other words, was no longer discipline, but acting out of the micro householder's malevolence, his "malignant heart" (where the household included not only the core household, the family,

but also quasi-familial groups, such as military units, prisons, and “economic” units such as factories).

From the perspective of police, then, incest would be treated as a form of the abuse of paternal (or micro patriarchal) power, as one manifestation of the micro sovereign incompetence, which results in the macro householder’s exercise of its superior police power, literally, to humiliate the offending householder, who is now treated as a member of the macro household subject to household discipline. At the same time, this view of incest as a marginal manifestation of householder incompetence also draws into question the common suggestion, often found in discussions of the modern crime of incest, that the householder’s use of his household members as a sexual resource was uncommon or universally condemned since the beginning of mankind. A householder who held the power of life and death over members of his household (*vitae necisque potestas*) could hardly have been categorically prohibited from using these household members also as a sexual resource, though presumably the link between that use and the welfare of the household, as opposed to that of the householder himself, was more tenuous than in other cases, most obviously in the use of household constituents—human or not, animate or not—in productive labor. The remoter this link, however, the greater the likelihood that the use of the household resource in question might reflect incompetence on the householder’s part and, thus, in extreme cases, attract the attention of the macro householder. The state, after all, always also considered micro household members as members of its macro household and, in the case of children in particular, had an interest not only in preserving their human resource, but in developing them, through education, so that, at least in the case of males, they eventually could assume positions of governance themselves, or at least become more useful to the state household (in times of war, for instance).

Given that the police model differentiates categorically between householder and household, governor and governed, father-child (or rather householder-household member) sexual intercourse differs categorically from other intra-household sexual intercourse, a distinction that modern incest law does not draw. In the police mode, a particular conduct, or behavior or even state, is evaluated with respect to its effect on sovereignty. Initially, father-child incest is within the discretion of the father insofar as it does not exceed the flexible and, at least initially, very wide limits placed upon his competence, as judged by the macro householder.

Other intrafamilial sexual intercourse, by contrast, is subject to micro, rather than to macro, discipline at the hands of the father-householder, rather

than the state. Here, the behavior may pose a *threat* to the householder's sovereignty, which may, in his discretion, call for discipline. Mother-son incest challenges, rather than manifests, the father's sovereignty and monopoly over the use of sexual resources within the household, most directly and, by replacing the father/husband with another (his son), represents a form of petit treason (or parricide).<sup>21</sup> As such, it initially falls squarely within the disciplinary authority of the householder. Mother-son incest thus appears as an aggravated form of (wife) adultery, the penal response to which traditionally also was within the householder's authority. Even the macro householder's continuous expansion of what has come to be regarded as the state's monopoly over violence, which in fact is a transfer of disciplinary authority from the micro to the macro householder or an assertion of it by the latter at the expense of the former, has not erased all traces of the husband-householder's original punitive authority, as evidenced, for instance, by the retention of the "provocation" doctrine in modern criminal law (or the householder's right to use force to rebuff violations of his house peace by intruders, notably the still notorious "burglar").

So far, then, incest regarded from the perspective of police, rather than law, appears as a form of domestic abuse, subject to the same tension between domestic (micro) and state (macro) householdership that over time has been resolved increasingly in favor of expanding the latter over the former, at least in formal doctrine, if not necessarily in applicatory or executory practice. (Contemporary criminal incest prohibitions, of course, are no more defined to capture this image than they are defined to reflect the concern about sexual autonomy discussed in Part 1; incest is neither limited to father-child relations nor to abusive father-child relations in particular, regardless whether the abuse is directly or presumptively, e.g., through an age element, established.)

## B. Marriage and the Well-Ordered Family

Apart from this police version of the law-based autonomy rationale, three rationales for the criminal prohibition of incest tend to be advanced. It is often said—and criminal codes would say, if they could speak—that incest is an offense against the family, or marriage and the family. It is not difficult to see

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<sup>21</sup> As evidenced in Oedipus. See Elizabeth Archibald, *Incest and the Medieval Imagination* 12 (2001).

how incest might interfere with marital bliss, at least if the incestuous relationship includes one of the marital partners—which, of course, is not always the case, nor need it be the case, since criminal incest, once again, is not limited to sexual relations involving a spouse. Insofar as the relationship between the parents plays a significant role in the functioning of the family, assuming it includes others besides the parental pair, it is also easy to imagine how incest-induced marital strife could affect the welfare, or at least the general sense of well-being, of the family as a whole. Of course, none of this amounts to a rationale for punishing incest any more than it does for punishing any number of other behaviors that might strain a marital (or any other personal) relationship—including careless spending, heavy drinking, excessive snoring, or offenses of omission such as failing to mow the lawn, to pick up after oneself, to remember birthdays and other anniversaries, or to give sufficiently thoughtful presents.

More interesting is the underlying assumption that “marriage” itself, in the form of a particular marriage between two specific persons (or, for that matter, between two types of person), is worthy of penal protection. Insofar as this assumption reflects a substantive view of what constitutes a marriage, or a proper marriage, or a proper relationship among persons, it will be addressed in the context of the discussion of incest as a “morals offense” later on in this paper. For now, it is enough to notice that the state’s penal power here is invoked to protect an institution *per se*, without regard to the contribution this institution might make to the lives of persons. Note, here, that the question is not whether the state is *obligated* to permit persons to choose to enter into a particular relationship, but whether it is permitted to punish those who interfere with the institutionalized relationship itself, including notably those who constitute the relationship. Incest here is, once again, a particular instance of adultery (i.e., a particular breach of the marital bond of loyalty, most egregiously by the wife)—which, incidentally, was decriminalized *de jure* in Germany and has been decriminalized *de facto* in the United States, with the notable exception of the military, which continues to use penal sanctions to police conformity to a standard of behavior, presumably shaped by its military function, the pursuit of which has long been taken to require obedience by subordinates and exemplary character by superiors.

Apart from the mentioned concern about “moral police,” it is not clear why the state would have an interest in protecting marriage as an institution—apart from a law-based interest in protecting the right of persons to enter into a marriage as a manifestation of their autonomy (sexual and otherwise), which

may help to explain the explicit recognition of marriage as a protected institution in the German Basic Law, drafted in the wake of Nazi miscegenation laws.

An indirect, non-moral, interest might emerge from the relation between marriage and family welfare, so that marriage requires protection for the sake of protecting the family as an institution. If we once again disregard for the moment the weighty moral considerations surrounding the protection of “the family” —however defined—retention of the family, though certainly not necessary for the management of a political community by definition (e.g., Kibbutz, communism, Western utopian communities), traditionally has played a significant role in the operation of Western state government. Even as the modern state has continued to centralize power, it has continued to enlist families as local oeconomic (household) units that perform functions (including care, sustenance, socialization, education), either as a matter of delegation or of apparent sovereignty.<sup>22</sup>

In this view, though the state would not be incapable of functioning without micro families, it may decide to retain them and, if so, to use its penal power to protect individual families as well as “the family” as an institution. Still, the family would not be worthy of protection for its own sake, but within the oeconomic calculus of the state household.

In a particular case, of course, protection of “the family” through penal means will tend to imply destruction of the family in a particular case, to the extent a particular family can be said to exist. Assuming *arguendo* that incest destroys the protection-worthy family, or at least reflects the absence of a protection-worthy family brought about in some other way, then penally disciplining one or both of partners in the incestuous relationship will do nothing to retain the family, nor to restore it. To the contrary, it will destroy, and will be designed to destroy, the family constituted by, and based on, the incestuous relationship itself. (Whether a particular family conforms to some image of the family, again, is a matter of moral police, to be addressed below. How deviation from a particular family image threatens the public police is not immediately obvious as long as the family performs its function within the state household, though of course any deviation from sovereign commands can be viewed as an act of defiance, or at least of disobedience.)

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<sup>22</sup> There is a parallel between the hybrid role of families and other governmental units, which is often exposed, and disputed, for instance, in cases raising the scope of the criminal jurisdiction in Native American tribal courts. See, e.g., *United States v. Lara*, 541 U.S. 193 (2004).

It has also been suggested that proper functioning of the family unit within the macro household may be compromised directly, rather than indirectly as a result of marital strife brought on by an incestuous relationship involving one or both of the spouses with other family members. The family order, it is said, is disrupted by sexual relationships between family members, excluding that between the (married) father and mother. More specifically, any “competition” for sexual partners is said to disturb family order and, presumably, challenge the sovereignty of the householder, who enjoys the monopoly over sexual intercourse (properly, in the form of sexual intercourse with his wife). It appears as though a disorderly family is undesirable, from the state’s perspective, in and of itself, presumably on the assumption of the pursuit of a model of a well-ordered family, perhaps as a micro version of the ideal of the well-ordered, i.e., well-policed, state. Again, the question arises why it is the state’s business, literally, to concern itself with the proper ordering of a micro household, originally and presumptively the province of the micro householder’s sovereignty. Presumably, a matter of domestic disorder becomes a state matter when the micro householder is not in a position to reestablish order, either because he is the source of the disorder (through his incestuous behavior) or because he is incapable of governing his disordered household.

### C. Health: Public, Genetic, Psychological

The criminal incest prohibition is said to advance an important aspect of the public police—health. Traditionally, the most frequently voiced health-related rationale referred to the possibility of genetic defects in the children of an incestuous relationship. Empirical evidence for this claim has been hard to come by and, at any rate, would not distinguish children of relatives from children of other persons who are more likely to produce genetic defects in their offspring, but who are not prohibited under threat of criminal punishment from having sexual intercourse. But the absence of empirical evidence, for our purposes, is beside the point. Police analysis is not concerned primarily with evaluating possible rationales, but with appreciating the functioning of a particular policing tool within the context of the police project. The invocation of the possibility of genetic defects is a common feature of police analysis framed in terms of threats to public health; consider, for instance, Justice Holmes’s famous remark, in *Buck*

*v. Bell*, a 1927 case upholding a Virginia forced sterilization statute under the state police power, that “three generations of imbeciles are enough.”<sup>23</sup>

If we leave aside the absence of compelling empirical evidence, the effect on public health of the birth and life of persons with genetic defects is not immediately apparent. References to public health, or the people’s health (*Volksgesundheit*), tend to remain unspecified, and therefore not easily substantiated. The Virginia Supreme Court in its opinion in *Buck* suggested such a direct link, by holding that the forced sterilization of “mental defectives” served “to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people.”<sup>24</sup> An analogous argument does not appear in more recent judicial and legislative discussions of the criminal prohibition of incest. While the “average standard of intelligence of the people” presumably remains a proper police power objective, though perhaps not one that requires use of the state’s penal power, the same cannot be said for racial purity or health, both in the United States and in Germany. (Membership in the household is ultimately in the eye of the householder or, put another way, households are defined in terms of their householder as they are merely that resource which is under the householder’s control; just as there is nothing inherently racial about the household, there is nothing inherently non-racial about it either.)

Alternatively, the health rationale is framed not in public, but in individual terms, with only incidental relevance to public welfare (through the possible burden on publicly funded insurance schemes, for instance). The consideration of individual welfare for its own sake, however, is foreign to police analysis, which regards state action through the prism of public welfare, the police of the state. It is law analysis, by contrast, that focuses on the individual, and more specifically on the individual considered as a person defined by the capacity for autonomy, or self-government. At any rate, the consideration of individual interests, or right, is difficult, if not impossible, in this case, which involves an individual who does not (yet) exist, and who (given the ready availability of birth control and vagaries of fertility, procreation, birth, etc.) may never come to exist.

While genetic defects tend to attract the lion’s share of attention, there’s another rationale that, though difficult to classify, might—charitably—be regarded as another variant of the individual health effect rationale, albeit a

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<sup>23</sup> 274 U.S. 200 (1927).

<sup>24</sup> *Buck v. Bell*, 143 Va. 310, 318–19 (1925).

psychological, rather than a physical one. I mean the argument that incest should be criminally punished because children of incestuous relationships may be subject to discrimination or, more ominously, ostracism and other manifestations of communal displeasure or, rather, disgust. This rationale—also raised in support of criminal miscegenation statutes, which did not survive the collapse of the Third Reich in 1945 (and which help account for the constitutionalization of marriage in the German Basic Law, cited the German Constitutional Court its decision upholding the criminal *incest* prohibition) and which in the United States were not invalidated on constitutional grounds until some twenty years later<sup>25</sup>—adds nothing to the argument that incest is criminalized as a morals offense, an offense, in other words, that disgusts, or gives offense to the moral sensibilities of, “the public.”

#### D. Moral Police

The aspect of the public police, i.e., its well-being considered as a macro household that is most directly associated with the criminal prohibition of incest, is moral police. Incest offends the public’s moral sensibilities, it is said, and therefore is properly subject to criminal punishment under the state’s police power, along with a long list of other similarly objectionable conduct, including bigamy, prostitution, masturbation, adultery, fornication, bestiality, obscenity, to borrow once more from Justice Scalia’s dissent in *Lawrence*. Attitudes toward this rationale differ widely, ranging from Scalia’s unquestioned endorsement to uneasy noncommittal (in at least some passages of the German Constitutional Court’s incest decision) to outright rejection (which appears to be the position of the U.S. Supreme Court majority in *Lawrence*).

No matter which attitude is the preferred one, the precise sense in which incest qualifies as a morals offense remains unclear. The initial assumptions tends to be that incest is properly criminalized because it offends the public’s moral sensibilities. It is not obvious why giving offense in this way would mark incest as a police matter, i.e., as a matter that concerns the police, or well-being, of the macro household. After all, something (or someone) can offend the public (or anyone or anything else) without diminishing its well-being; even if one classifies the experience of taking offense in and of itself as a diminution of well-

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<sup>25</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

being, however small, it is not obvious why that comparably trivial displeasure would warrant the use of the state's penal power.

Incest also has been framed as a morals offense in a different sense, not as offending the moral sensibilities of the public, but of directly threatening its moral police, i.e., its moral well-being. Here, morality is not seen as a set of norms that may be offended by norm deviations, but as an aspect of the public, the people, or the macro household that may require protection by the state-householder, along alongside others, including, at various times, offenses against the church, public order, peace, safety, security, and, most broadly, welfare. As a threat to the public's moral police (or "the moral fibre of society," as a Canadian court recently put it), incest represents, quite literally, a public nuisance, that requires abatement, or destruction, much like a brothel or other so-called nuisances *per se* such as "[r]otten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and imminently dangerous structures."<sup>26</sup> Incest, in this sense, threatens the public's moral health much like the opium of the "Heathen Chinees" threatened the moral police of an unsuspecting (beer-drinking) American public at the turn of the twentieth century – though, in the case of incest, the mere knowledge of its existence presumably posed a greater threat of moral corruption than the temptation to engage in the alien practice.<sup>27</sup>

In the end, the very attempt to precisely define the nature and degree of the relationship between incest and the police of the macro household, and therefore the police power of the sovereign state, misses the point. When it comes to the essentially discretionary power to police, which traditionally has been defined by its indefinability, it is sufficient to intimate, or to suspect, that a given behavior, or state, offends the police in some way, which may not be clearly or consistently specifiable. Various forms of offense may interact in non-articulable ways to pose a threat to the public police, directly or indirectly, including through the disobedience of state norms, which represents an offense against the sovereignty of the state and its authority to govern the macro household.

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<sup>26</sup> Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 554 (1904).

<sup>27</sup> See Richard J. Bonnie & Charles H. Whitebread, II, "The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition," 56 *Va. L. Rev.* 971 (1970).

What may be most interesting about judicial opinions affirming the constitutionality of criminal incest prohibition is not the various rationales taken individually, but the consideration of their almost magical, or alchemical, interplay, in the presence of which ordinary tools of rationalization are abandoned in favor of vague description that attempts, however clumsily, to capture an image or a felt sense of urgency, rather than to set out and scrutinize a legal justification. Ordinary juristic analysis must stand mute if confronted with something as inexplicable, yet, powerful as the “continually manifested societal conviction, rooted in cultural history, that incest deserves criminal punishment,” sensed by the German Constitutional Court in its incest judgment.