

This article provides a critical analysis of so-called morals offences in general and the offence of incest in particular, within the context of the distinction between law and police as basic modes of governance and against the backdrop of the judgments by the German Constitutional Court in the Incest Case (2008) and the US Supreme Court in Lawrence v Texas (2003).

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I Introduction

Courts in legal systems ostensibly devoted to the rule of law regularly, and with little effort, uphold the constitutionality of criminal incest statutes. Yet incest as a distinct offence appears to be 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. The ease with which courts, with one notable exception, have dismissed constitutional challenges to criminal incest prohibitions suggests that they operate with an *alegal* conception of state penalty; that is, of punishment beyond law, or so I will argue in this article.

The exception is a 2008 judgment by the German Constitutional Court, which was forced into an unusually detailed attempt to justify its decision to affirm the constitutionality of a criminal incest statute, as applied to an adult brother and sister, by a strongly worded and tightly argued dissenting opinion.¹ Not coincidentally, the dissent was authored by a judge who, as a leading criminal law scholar, had published extensively on the foundation and limits of criminal law in a state under the rule of law (*Rechtsstaat*).²

In this article, I analyse the criminal prohibition of incest from the perspectives of both law and police as alternative modes of

* University of Toronto, Faculty of Law

† Many thanks to Galia Schneebaum for comments and to Lorenzo Perilli, once more, for help with matters ancient.

1 BVerfGE 120 at 224 (26 Feb 2008) [Incest Case].

2 Ibid at paras 73ff (Hassemer J, dissenting); see especially Winfried Hassemer, *Theorie und Soziologie des Verbrechens: Ansätze zu einer praxisorientierten Rechtsgutslehre* (Frankfurt am Main: Athenäum, 1973).

governance.³ Drawing on this distinction is useful for two reasons. First, in Part II of this article, it frames the unconstitutionality of incest statutes within the broader concept of *law*, understood as the mode of governing persons as beings endowed with the capacity for autonomy, or self-government, rather than of things or resources, human and otherwise. From this perspective, 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.

In this light, the prohibition of incest does not appear as an act of law; it is alegal insofar as it does not address the ‘perpetrators’ as persons nor does it set out to protect the ‘victims’ as persons. Incest *qua* incest – rather than as the particular instance of another, more general, violent crime, such as rape – is not a perpetrator–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 Justice Hassemer’s dissent in the German incest case and in the opening paragraph of Justice Kennedy’s opinion for the US Supreme Court in *Lawrence v Texas*,⁴ which struck down a criminal statute prohibiting ‘homosexual conduct’ five years before the German incest decision.

Second, and perhaps both more interesting and less obvious, analysing the criminal prohibition of incest from the perspective of *police* offers affirmative insights into the nature and function of the state action in question (see Part III of this article). Analysis in terms of constitutional law is essentially critical – it explores the question whether a given state action 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 alegal – and instead looks to understand the state action as a regulatory device within the context of the police project; that is, the project of governing the state as a macro-household.⁵ It is one thing to recognize a given state

3 On the distinction, see e.g. Markus D Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005) [Dubber, *Police Power*].

4 539 US 558 (2003) [*Lawrence*].

5 On the connection between household governance and police governance, see Dubber, *Police Power*, supra note 3; see also William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769) vol 4 at 169 [Blackstone]: the king, as *pater-familias*, governs ‘individuals of the state, like members of a well-governed family’; Jean Jacques Rousseau, *Discourse on Political Economy*, ed Roger D Masters,

action as a police measure; it's another to appreciate its governmental mechanics.⁶ Police analysis thus moves beyond the common, yet unhelpful, classification of incest as a 'morals offence' (which then is or isn't legitimate, depending on whether one thinks morals offences in general are legitimate or not). From the perspective of police, incest is not a 'morals offence' as an instance of a free-standing class of offences 'against morals' but is, more specifically, an offence against the *moral police*; that is, the public's moral welfare or the moral aspect of the commonweal(th).

Courts (and legislatures, in fact) have tended recently to downplay the character of incest as a morals offence, where morals offence is taken to be conduct that gives offence 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 offence in this sense and finds it constitutional for that reason, along with a slew of other offences justifiable (in Scalia's view) only as morals offences, including homosexual sex (the offence at issue in *Lawrence*), as well as bigamy, prostitution, masturbation, adultery, fornication, bestiality, and obscenity, though not necessarily in that order.⁷ If the public's moral police (in the traditional sense of welfare) isn't at stake, then what is? Other objects of protection include marriage and, relatedly, the family; vulnerable family members; 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 public aspect of the offspring's health (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 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 in its 2008 incest judgment appears as 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 of US courts and than Justice Scalia's *Lawrence* dissent, which reached the same result by

translated by Judith R Masters (New York: St. Martin's Press, 1978) [originally published in 1755] at 209: 'government of that great family, the State'.

6 For an extended discussion of possession offences in this light, see Markus D Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2002) 91 J Crim L & Criminology 829.

7 *Lawrence*, supra note 4 at 586 (Scalia J, dissenting).

dismissing any constitutional scrutiny of incest statutes as categorically inappropriate.

Put another way, Scalia recognized the criminal prohibition of incest as an exercise of the state's police power; that is, 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, more broadly and importantly, 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 article, then, can be seen as spinning out 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 discussing, the extensive German literature on the concept of law good, or *Rechtsgut* (generally translated, misleadingly, as 'legal interest'), which the majority took pains to dismiss, not without justification, as unhelpful. The analogue, or at least the closest thing there is 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)⁸ – 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.'⁹ The task, for purposes of this article 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 tool of critical analysis mentioned, and applied, in *Lawrence*.

8 See Markus D Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2006) 53 Am J Comp L 679 [Dubber, 'Theories'].

9 Supra note 4 at 558.

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 although it is not the subject of criminal punishment in contradistinction to 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*,¹⁰ the 1986 decision overturned in *Lawrence* in which the Supreme Court had upheld another homosexual sodomy statute, Scalia was content to remark that constitutional scrutiny is inapposite simply because there is no constitutional right – what *Bowers* called the 'fundamental right [of] homosexuals to engage in sodomy'¹¹ – the violation of which could be scrutinized. This leaves, as in the Hassemer dissent,¹² 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.

II *The illegality of incest: Protecting sexual autonomy*

Criminal prohibitions of incest have been and still are said to serve various functions that appear in the German Constitutional Court's opinion as elsewhere, including – in no particular order – preventing genetic defects among children of an incestuous relationship, protecting the family (and marriage), reflecting traditional disapproval of the conduct, and protecting 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 III. There, we will try to understand how these purported functions operate and interact; this is not an easy task, as each function is often 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 of being framed in terms of law

10 478 US 186 (1986).

11 *Ibid* at 190.

12 Incest Case, *supra* note 1.

rather than in terms of police. Here, incest is regarded as a crime of sexual exploitation, with the stronger and more powerful individual (ordinarily the father) victimizing the weaker and younger (ordinarily the daughter). In this light, then, incest can be framed as an offence against the victim's sexual autonomy. Insofar as sex offences are, at core, offences against sexual autonomy – as has been argued in various ways in the United States and the United Kingdom,¹³ and as was officially recognized in the 1970s reform of the German Penal Code, which regrouped sex offences previously classified as 'morals offences' (*Verbrechen und Vergehen wider die Sittlichkeit*) under the heading 'crimes against sexual autonomy'¹⁴ (*Straftaten gegen die sexuelle Selbstbestimmung*) – incest appears as an ordinary sex offence and, as such, is no less legitimate than other sex offences. If sex offences 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 offence against sexual autonomy. The German Penal Code devotes an entire chapter to 'crimes against sexual autonomy,' but incest isn't among them. Incest appears instead at the end of a much shorter list of 'crimes against personal status, marriage and the family,' along with a smorgasbord of other offences such as 'falsification of personal status,' 'violation of maintenance obligations,' 'violation of the duty to provide care or upbringing,' and eventually bigamy, in that order. The American Model Penal Code of 1962, although it does not explicitly conceptualize sex offences as offences 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').¹⁵ 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 III.)

More significant than this question of legislative intent or at least of classification is the substantive difficulty that incest's legitimacy as an offence against sexual autonomy would come at the price of its redundancy. Given that sexual autonomy is already protected by other,

13 See e.g. Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Harvard University Press, 1998); Stephen Shute & John Gardner, 'The Wrongness of Rape' in Jeremy Horder, ed, *Oxford Essays on Jurisprudence*, 4th Series (Oxford: Oxford University Press, 2000) at 193.

14 See Tatjana Hörnle, 'Penal Law and Sexuality: Recent Reforms in German Criminal Law' (2000) 3 *Buff Crim L Rev* 639.

15 American Law Institute, *Model Penal Code* (Philadelphia, PA: American Law Institute, 1962) § 230.

broader criminal offences – notably rape and even so-called ‘statutory’ rape, which replaces the non-consent element with an age element – the offence 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 intra-familial conduct should be immunized from criminal law scrutiny, as in the case of the so-called ‘spousal immunity’ doctrine in the law of rape¹⁶ 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; although there, too, a distinction may be drawn between consent-based rationales for this now discredited doctrine and others that draw on legal concepts but operate within a police realm by stressing the *de facto* if not *de jure* sovereignty of the householder over the members of his household, including his wife.¹⁷

What’s at stake is the justification of a separate criminal offence, incest, that operates exclusively within the familial context, in the face of general offences 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 offence that threatens with punishment conduct that is already subject to serious punishment without reference to the familial relationship between offender and victim. (In this sense, it resembles the fascinating intra-familial crime of ‘petit treason,’ generally the murder of one’s father or husband, which eventually was absorbed into the general law of interpersonal homicide.¹⁸)

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, and so forth, and another. As one result, the crime of incest does not, on its

16 See e.g. *People v Liberta*, 64 NY 2d 152 (1984); *Canadian Foundation for Children, Youth and the Law v Canada*, [2004] 1 SCR 76, on parental ‘discipline.’

17 See *Liberta*, *ibid* at 152, setting 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.”’

18 See generally Dubber, *Police Power*, *supra* note 3 at 27–30; on petty treason, see Thomas Jefferson, ‘A Bill for Proportioning Crimes and Punishments’ (1778) in Julian P Boyd et al, eds, *The Papers of Thomas Jefferson* (Princeton, NJ: Princeton University Press, 1950) vol 2 at 492–540.

face, distinguish between the partners in the sexual relationship (or, in the Model Penal Code, the cohabitation) but applies equally to offender–predator and victim–prey, resulting in possible and, in many cases, actual criminal prosecution and even criminal punishment for both partners.¹⁹

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.²⁰ 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 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 intra-familial 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 offence 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 offence 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

19 As, for instance, in the Incest Case, *supra* note 1.

20 ‘Statutory’ rape thus gave common-law courts an opportunity to highlight the superior rigour of the common law of crime with its *mens rea* (and *actus reus*) requirement; see Dubber, ‘Policing Possession,’ *supra* note 6 at 915–6.

by exploiting a counselling, treatment, or care relationship,' 'sexual abuse of children') appears in the chapter on crimes against sexual autonomy, sandwiched between incest and rape.²¹

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 offence defined explicitly in terms of the protection of sexual autonomy.

Hassemer's dissent in the German Constitutional Court's incest case²² 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 was framed in terms of the misleading and ultimately unhelpful concept of *Rechtsgut* (literally, law good) rather than subjecting the state action in question directly to a critical analysis in terms of the principle of autonomy. This 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 elevates the concept of *Rechtsgut* to the ultimate point of reference while, at the same time, draining it of all substance and normative bite.

Given the emptiness and critical uselessness of the *Rechtsgut* concept, it is difficult to fault the German Constitutional Court for dismissing it, although it seized this opportunity with an eagerness that suggests a deep-seated predisposition towards upholding the constitutionality of the criminal prohibition of incest. At the same time, insofar as Hassemer's dissent concerns itself with the defence 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 empty critical concept and, with it, 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.²³ 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 interpretive 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 made by its inventors

21 StGB §§ 174–6a.

22 Supra note 1.

23 See Markus D Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2006) 53 Am J Comp L 679.

(or discoverers) and handlers, the German criminal law professoriate, to connect it to constitutional principles. So even if the *Rechtsgut* 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 an 1834 article by the otherwise unremarkable JMF Birnbaum²⁴) precisely to justify those criminal prohibitions ('police offences,' *Polizeiverbrechen*²⁵) that were in tension with the right-based criminal law theory at the time associated with PJA Feuerbach and through him with Kant. From the start, *Rechtsgut* was designed to deflect critique, not to enable it. As Birnbaum makes clear, the very point of shifting emphasis from right (*Recht*) to good (*Gut*) was to rationalize criminal offences against public interests rather than against individual right bearers including, notably for present purposes, incest and other offences against *Sittlichkeit*.

The concept of *Rechtsgut*, that uneasy yet all the more useful merger of two apparently irreconcilable concepts ('law' and 'good'), did not assume its central place in German criminal law until 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. At the time, 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.'²⁶ (Incidentally, similar language can be found in the American literature of the time, for instance, in the work of Roscoe Pound and Francis Sayre proposing or detecting a shift from the penal protection of individual interests to that of public interests.²⁷)

24 Johann Michael Franz Birnbaum, 'Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens' (1834) 15 *Archiv des Criminalrechts* (Neue Folge) 149.

25 *Ibid* at 164, aimed at maintaining 'religiosity, morals and morality.' Birnbaum explicitly compares *Polizeiverbrechen* to what 'today is called offense [sic] against the Common wealth in England'; *ibid* [translated by author].

26 Karl Binding, *Handbuch des Strafrechts* (Leipzig: Duncker & Humblot, 1885) vol 1 at 169 [translated by author].

27 Roscoe Pound, 'Introduction' in Francis Bowes Sayre, *A Selection of Cases on Criminal Law* (Rochester, NY: Lawyer's Cooperative, 1927) xxix. On Pound's views on criminal law, see Thomas A Green, 'Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice' (1995) 93 *Mich L Rev* 1915; Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York: New York University Press, 2002) at 27–8, 124–8, 144–5; Francis Sayre, 'Public Welfare Offenses' (1933) 33 *Colum L Rev* 55.

Although some writings under National Socialism took issue with the concept of *Rechtsgut* as an out-dated 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 device 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 self-defence 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, has not seen the *Rechtsgut* as a tool for critiquing existing criminal prohibitions, no matter what they might be at any given time.

At the same time, the concept has been 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 by criminal legal scientists long before the German Basic Law and 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, none of which are specifically constitutional. More specifically, the concept of *Rechtsgut* does 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.

The German Constitutional Court, therefore, may be forgiven for dismissing the German criminal law literature on the concept of *Rechtsgut* – which is either toothless or a-constitutional or both. That’s not to say, of course, that nothing useful could be or has been said about the *Rechtsgut*; *Rechtsgut* is inherently neither meaningless nor meaningful although its apparent internal tension (between 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,²⁸ hints at a robust account of *Rechtsgut* without developing

28 *Supra* note 1.

one 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 offences grouped in the German Criminal Code's section on crimes against sexual autonomy, does *not*, 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 offences 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 challenge for legitimating the offence 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 ordinarily thought to be 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.'²⁹ 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 has also been taken to task for its lack of normative bite in criminal law (though it should be noted that, unlike the *Rechtsgut*, the harm principle was not designed for criminal law nor, for that matter, for law as a whole but more broadly 'to govern absolutely the dealings of society with the individual in 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.'³⁰)

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.³¹ There has been at least one exception, in a

29 John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, IN: Hackett, 1978) [originally published in 1859] at 9–11.

30 *Ibid*; see e.g. Bernard Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *J Crim L & Criminology* 109.

31 *R v Malm-Levine, R v Caine* [2003] 3 SCR 571, upholding the marijuana possession statute.

Pennsylvania Supreme Court opinion applying state constitutional law,³² and some effort has been made to establish its constitutional bona fides.³³

The constitutional status of the harm principle in US and Canadian constitutional law, however, may ultimately be 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 US Supreme Court's opening paragraph in *Lawrence* makes a promising start by declaring that '[I]liberty presumes an autonomy of self,'³⁴ thus locating autonomy at the base of liberty, a concept that itself often has been thought to bear the full weight of modern accounts of political legitimacy.³⁵

III *The alegality of incest: Policing the moral state*

The illegality of the criminal prohibition 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 alegality: the criminalization of incest doesn't simply fail basic legitimacy scrutiny under the rule of law; it resists being subjected to this 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.³⁶

A HOUSEHOLDER POLICE

As a matter of police, the paradigmatic law image of incest (father–perpetrator and child daughter–victim) instead appears as a manifestation

32 *Com v Bonadio*, 415 A 2d 47 at 96–8 (Pa 1980), striking down the homosexual sodomy statute.

33 Dennis J Baker, 'Constitutionalizing the Harm Principle' (2008) *Criminal Justice Ethics* 3.

34 *Supra* note 4.

35 For some preliminary remarks, see Markus D Dubber, 'Toward a Constitutional Law of Crime and Punishment' (2004) 55 *Hastings LJ* 509.

36 The notion of alegality is further explored in Markus D Dubber, 'Common Civility: The Culture of Alegality in International Criminal Law' (2011) 24 *Leiden J Int'l L* 923; Markus D Dubber, 'The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History' in Georges Martyn et al, eds, *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (forthcoming).

of the power of the state as macro-householder over the father as micro-householder.

While the discretionary power of the householder (*oikonomos*) over his household (*oikos*) was once virtually unlimited, the centralization of power and of sovereignty and eventually the development of the modern state have 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 the governed *vis-à-vis* the state while retaining the position of governor *vis-à-vis* his household (householder *as* housekeeper).³⁷

Even so, the exercise of the macro-householder's police power over the micro-householder was limited to extreme cases, reflecting the micro-householder's 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 its own sovereign and essentially discretionary power to police.

Evidence of micro-householder incompetence might come in the form of sadistic violence or other behaviour 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 (also) deprived 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 micro-householder as incapable of governing himself and therefore of governing 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).³⁸

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's incompetence resulting in the macro-householder's exercise of its superior police power literally to humiliate the offending householder, who would now be 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 micro-householder incompetence also draws into question the common suggestion, often found in discussions of the modern crime of incest, that the

37 See generally, Dubber, *Police Power*, supra note 3 at ch 1.

38 Ibid at 39–41.

micro-householder's use of his household members as a sexual resource is uncommon or has been universally condemned since time immemorial. A householder who holds the power of life and death over members of his household (*vitae necisque potestas*) can hardly be categorically prohibited from using those household members as a sexual resource even if the link between that use and the welfare of the household (as opposed to that of the householder himself) is presumably more tenuous than in other cases, such as, most obviously, the use of household constituents (human or not, animate or not) in productive labour. The remoter this link, however, the greater the likelihood that the use of the household resource in question may reflect incompetence on the micro-householder's part and thus, in extreme cases, attract the disciplinary attention of the macro-householder. The state, after all, always 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).³⁹

Given that the police model differentiates categorically between householder and household, governor and governed, father and child (or rather householder and household member) sexual intercourse differs categorically from other intra-household sexual intercourse. In the police mode, a particular conduct or behaviour or even state is evaluated with respect to its effect on householder sovereignty. From the perspective of police, then, insofar as sexual relations between the householder and a member of his household would not challenge, and in fact may manifest, his sovereignty, they initially would fall within the householder's discretion, provided they do not exceed the limits mentioned previously that are placed upon his competence as governor in the eyes of the macro-householder (if, for instance, the effects of the sexual relations on the welfare of the household were judged to be sufficiently detrimental to indicate the householder *qua* housekeeper's inability to govern himself and therefore the household).

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

39 C.f. Dubber, *Police Power*, supra note 3 at 42. On education as a police project, see generally Peter Preu, *Polizeibegriff und Staatszwecklehre: Die Entwicklung des Polizeibegriffs durch die Rechts- und Staatswissenschaften des 18. Jahrhunderts* (Göttingen, Germany: O Schwartz, 1983). This is not to say that public education, from the perspective of law, may not also help develop a citizenry with a realized and recognized capacity for autonomy. See Jennings L Wagoner, *Jefferson and Education* (Chapel Hill, NC: University of North Carolina Press, 2004).

macro-discipline at the hands of the state. Here, the behaviour may pose a *threat* to the householder's sovereignty that may, in his discretion, call for discipline. Mother-son incest challenges most directly, rather than manifests the father's sovereignty and monopoly over the use of sexual resources within the household and, by replacing the father/husband with another (his son), represents a form of petit treason (or parricide).⁴⁰ 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 was also 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 – a monopoly that, in fact, is a transfer of disciplinary authority from the micro- to the macro-householder or rather 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').⁴¹

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 favour of expanding the latter over the former, at least in formal doctrine if not necessarily in practice.

B MARRIAGE AND THE WELL-ORDERED FAMILY

It is often said – and criminal codes would say if they could speak – that incest is an offence against the family or against marriage and the family. It is not difficult to see how incest might interfere with marital bliss, at least if the incestuous relationship included one of the marital partners; which, of course, is not always the case nor need it be the case, since criminal incest is not generally or necessarily limited to sexual relations involving a spouse (recall that the German incest case involved siblings). Insofar as the relationship between the parents plays a significant role in the functioning of the family where the family 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

40 As evidenced in Oedipus. See Elizabeth Archibald, *Incest and the Medieval Imagination* (Oxford: Clarendon Press, 2001) at 12.

41 Note, however, that ironically the doctrine of provocation has been recast – with considerable difficulty – as an exculpatory loss of self-control rather than an exercise of other-control; *i.e.*, an assertion of householder sovereignty.

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 other behaviours that might strain a marital (or any other personal) relationship.

More interesting is the underlying assumption that 'marriage' itself in the form of a particular marriage between two specific persons 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 offence' later on in this article. For now, it is enough to notice that the state's penal power is invoked here to protect an institution *per se*, without regard to the contribution this institution might make to the lives of persons. Note 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). Adultery, of course, has already been decriminalized *de jure* in Germany and at least *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 behaviour, presumably shaped by its military function, the pursuit of which has long been taken to require obedience by subordinates and exemplary character by superiors.⁴²

Apart from the concern about 'moral police' mentioned earlier, 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.⁴³

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), retaining the institution of the family, although certainly not necessary by definition for

42 Under US military law, adultery may fall under the catch-all 'General Article' of the Uniform Code of Military Justice, which provides, among other things, that 'all disorders and neglects to the prejudice of good order and discipline in the armed forces' are punishable 'at the discretion of [the appropriate] court.': 10 USC § 934.

43 German Basic Law, art 6(1): 'Marriage and the family shall enjoy the special protection of the state.'

the management of a political community (consider, for example, the Kibbutz, communism, Western utopian communities), has traditionally 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) units⁴⁴ performing such functions as care, sustenance, socialization, education, and so on, as a matter either of delegation or of apparent sovereignty.⁴⁵

In this view, although the state would not be *incapable* of functioning without micro-families, it might 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 may result in the destruction of the family in a specific case, to the extent a particular family can be said to exist as an entity separate from its constituents.⁴⁶ Assuming, *arguendo*, that incest destroys the protection-worthy family or at least reflects the absence, brought about in some other way, of a protection-worthy family, then penally disciplining one or both of partners in an incestuous relationship will do nothing to preserve the family or to restore it. To the contrary, disciplining 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 is, again, 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 although, of course, any deviation from sovereign commands can be viewed as an act of defiance or at least of disobedience.)

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

44 See Kurt Singer, 'Oikonomia: An Inquiry into Beginnings of Economic Thought and Language' (1958) 11 *Kylos* 29.

45 There is a parallel between the hybrid role of families and that of various governmental units that is often exposed and disputed; for instance, in cases expanding the scope of the criminal jurisdiction in Native American tribal courts. See e.g. *United States v Lara*, 541 US 193 (2004).

46 Hassemer makes this point in his dissent in the Incest Case, *supra* note 1, remarking that the two adult incest defendants had formed a family unit.

householder, who enjoys the monopoly over sexual intercourse (acceptably, 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 that a model of the well-ordered family, perhaps as a micro-version of the ideal of the well-ordered (*i.e.*, well-policed) state is to be pursued.⁴⁷ Again, the question arises as to why, from the perspective of police, it is the state's business 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 only in marginal cases, when the micro-householder is not in a position to re-establish order either because he is the source of the disorder (through his incestuous behaviour) or because he is incapable of governing his disordered household.

C HEALTH: PUBLIC, GENETIC, PSYCHOLOGICAL

The criminal incest prohibition also has been 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 (not to mention the fact that incest prohibitions tend not to differentiate between blood relatives and other family members). 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.'⁴⁸

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

47 Recall here Blackstone's view, *supra* note 5 at 169, of the police power as the power to govern 'individuals of the state, like members of a well-governed family.'

48 274 US 200 at 208 (1927).

therefore are not easily substantiated.⁴⁹ 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.’⁵⁰ 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 either in the United States or in Germany.⁵¹

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 the vagaries of fertility, procreation, birth, etc) may never come to exist.

While genetic defects tend to attract the lion’s share of attention, there is another rationale that, though difficult to classify, might charitably be regarded as another variant of the ‘individual health effect’ rationale, albeit a psychological rather than a physical one. I mean the suggestion that incest is punishable because children of incestuous relationships may be subject to discrimination or, more ominously, ostracism and other manifestations of communal displeasure or disgust. This rationale, also raised in support of criminal miscegenation statutes that did not survive the collapse of the Third Reich in 1945⁵² and of those that in the United States were not invalidated on constitutional grounds until

49 For a sustained critical analysis of the attempt to ground German drug criminal law in the protection of *Volksundheit*, see Cornelius Nestler, ‘Betäubungsmittelstrafrecht, Grundlagen und Kritik,’ in Arthur Kreuzer, ed, *Handbuch des Betäubungsmittelstrafrechts* (Munich, Germany: Verlag CH Beck, 1997) at 130.

50 *Buck v Bell*, 143 Va 310 at 318–9 (1925).

51 Which is not to say that racial purity was not considered a valid *Rechtsgut* in German criminal law under National Socialism; see Dubber, ‘Theories,’ supra note 8 at 506.

52 The rejection of these statutes helps account for the constitutionalization of marriage in the German Basic Law; see text at note 43 supra. German Basic Law art 6(1) was cited by the German Constitutional Court in its decision upholding the criminal incest prohibition.

some twenty years later,⁵³ adds nothing to the suggestion that incest is criminalized as a morals offence – an offence, in other words, that disgusts or gives offence to the moral sensibilities of ‘the public’; to this argument, last but not least, we now turn.

IV *Conclusion: Morals police and moral police*

Moral police is that aspect of the public police – that is, the well-being of the public considered as a macro-household – that is most directly, if not most frequently or at least openly associated with the criminal prohibition of incest. (Whether moral police is considered as one aspect of the public’s health or as a separate characteristic of the public is generally left unspecified.) Incest offends the public’s moral sensibilities and therefore is properly subject to criminal punishment under the state’s police power along with an extensive list of other similarly objectionable conduct, including bigamy, prostitution, masturbation, adultery, fornication, bestiality, and obscenity, to borrow once more from Justice Scalia’s dissent in *Lawrence*.⁵⁴ Attitudes toward this rationale differ widely, ranging from Scalia’s unquestioned endorsement to uneasy non-committal (in at least some passages of the German Constitutional Court’s incest decision) to outright rejection (which appears to have been the position of the US Supreme Court majority in *Lawrence* that triggered Scalia’s expression of disgust⁵⁵).

No matter which attitude one prefers, just what makes incest a morals offence, however, is unclear. One might think, initially, that incest is properly criminalized because it offends the public’s ‘moral sensibilities.’ It is not obvious, however, why giving offence in this way would mark incest as a police matter; that is, 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 offence in and of itself as a diminution of well-being, however small, it is not obvious why that comparably trivial displeasure would warrant the use of the state’s penal power.

Incest, however, also can be framed as a morals offence in a different sense, not as offending the moral sensibilities of the public but as directly

53 *Loving v Virginia*, 388 US 1 (1967).

54 See text accompanying note 7 *supra*.

55 See Andrew F March, ‘What Lies beyond Same-Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification’ (2010) 27 *Journal of Applied Philosophy* 39. I thank Mohammad Fadel for this reference.

threatening its moral police; that is, its moral well-being or *bonos mores*.⁵⁶ Here, morality is not seen as a set of norms that may be offended by norm deviations but as an aspect of the public – or the people, the macro-household – that may require protection by the state householder, alongside others including, at various times, the public's 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 it⁵⁷), incest represents, quite literally, a public nuisance that requires abatement or destruction, much like that of a brothel or other so-called nuisance *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.'⁵⁸ Incest, in this sense, threatens the public's moral police 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; in the case of incest, however, the mere knowledge of its existence presumably posed a greater threat of moral corruption than did the temptation to engage in the alien practice.⁵⁹

Now, the very inability – or rather the lack of any serious attempt – to specify 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 is itself symptomatic. When it comes to the essentially discretionary power to police, which traditionally has been defined by its indefinability,⁶⁰ it is sufficient to intimate or to suspect that a given behaviour or status offends the police in some way which may not be – and, more to the point, need not be – clearly or consistently identifiable, never mind verifiable. Various forms of offence may interact in non-articulable ways to pose a threat to the public police, directly or indirectly, including disobedience to state norms, which represents an offence against the sovereignty of the state and its authority to govern the macro-household.

From this more general perspective, what matters is not that incest is an offence against the *moral* police but that it is an offence against police, not that it is a morals offence but that it is a police offence.

56 See Blackstone, *supra* note 5 at 253, discussing bonds for 'good behaviour for causes of scandal, contra bonos mores, as well as contra pacem'; *Shaw v DPP*, [1962] AC 220: courts as *custos morum*.

57 *R v RPF et al*, (1996) 149 NSR (2d) 91 at 96 (quoting Crown's submission).

58 Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: University of Chicago Press, 1904) at 554.

59 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' (1970) 56 Va L Rev 971.

60 See generally Dubber, *Police Power*; *supra* note 3.

In the end, judicial opinions affirming the constitutionality of criminal incest prohibition may be less noteworthy for the various rationales they set out taken individually, including the classification of incest as a 'morals offense' (or offence against moral sensibilities), but for the almost alchemical interplay of these rationales, which appear content to conjure up a sense of urgency or at least of unease rather than to construct a recognizable legal justification or set of justifications. Instead of juristic analysis in terms of legality, courts are content to invoke such amorphous notions as the 'continually manifested societal conviction, rooted in cultural history, that incest deserves criminal punishment.'⁶¹ Courts in incest cases, in other words, are not trying to legitimate the criminalization of incest in terms of legal principles; they operate in an alegal sphere, the realm of police (moral or otherwise).

In this light, judicial opinions in incest cases appear not as constitutional opinions or legal judgments of any kind (insofar as constitutional law is concerned with the lawness of law or, to put it another way, with the rule rather than merely rules of law). They are better understood as 'policial' – and in this sense alegal – rather than as legal opinions.

To regard the judicial treatment of the constitutionality of the crime of incest as a police matter rather than a legal matter is not to suggest that the criminalization of incest or, for that matter, any state action could not be rationalized, justified, or at least explained in policial terms. It is instead to say, first, that whatever account might be assembled would not invoke principles of justice or legitimacy (and therefore constitutionality) but instead might take into account some notion of sovereign wisdom, prudence, or efficiency; and second, that any justificatory enterprise, however framed, would be doubly discretionary, as to whether to pursue it in the first place and, if so, whether to consider (never mind to implement and to comply with) its results. Viewed as a police measure, the criminal prohibition of incest is no more susceptible to critical analysis in terms of constitutional law (or any other mode of scrutinizing the legitimacy of state action) than is any other manifestation of the power to police.

61 Incest Case, *supra* note 1 at para 50.

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