

Should Consensual Incest Between Consanguine Adults Be Restricted?

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Introduction

Most Americans recoil upon hearing the word “incest,” because the word can refer to a variety of situations that they find morally repugnant. The American Heritage Dictionary defines incest as “sexual relations between persons who are so closely related that their marriage is illegal or forbidden by custom.” In the U.S., incest laws cover such cases as sex between a brother and sister, cousins, or even a stepparent and stepchild (Driehaus, 2007).

Because the term “incest” can apply to such a wide variety of situations, people often confuse their feelings about incest with their feelings about pedophilia, rape, and adultery. The fact that incest often involves those acts, which seem obviously destructive and wrong, makes people associate it with grievous harm. Most news cases about incest report sexual relations between a parent or stepparent and a child. As an example of how people perceive incest, a New York Times article titled “Incest: Should Offenders Be Jailed?” discussed such adult-child cases exclusively, even though its title implied a more general topic (Gardner, 1981). A brief survey of incest news stories in the U.S. yields more results about stepfather-stepdaughter incest than any other type, even though people most commonly defend the illegality of incest by the fact that the offspring of closely related persons often suffer from genetic defects. To avoid the confusion of incest with other sexual crimes, this paper will restrict its scope to the issue of incest between consenting adults who are related by blood. What sort of restrictions should be placed on consensual sexual intercourse between biologically related individuals?

Though consensual incest appears relatively infrequently in the news, a couple of well-publicized cases have been covered recently. The latest, with news articles dating from 2007, involves a brother-sister couple in Germany. The lovers, Patrick Stuebing and Susan Karolewski, were separated at birth when Patrick was adopted by a family in another city. When they met again, they were already past childhood. Although not legally married, they have had four children together. Three of their children have been placed in foster care, presumably because incestuous couples are somehow unfit for parenting, though the exact reasons are unclear from news articles. In addition, Patrick has served two years in

prison for the crime of incestuous sexual intercourse. Even though he has undergone a vasectomy, he may still serve future terms in prison for that crime (Moore, 2007).

A similar case showed up in U.S. courts in 1997, when siblings Allen and Patricia Muth were charged as being unfit parents on the grounds of their incestuous relationship, and their child was taken into foster care. Allen and Patricia had been separated from three months after Patricia's birth until after their childhood. In a later court case, the couple was also convicted of incest, a crime for which Allen served eight years in prison and Patricia served four. During his imprisonment, Allen appealed to the court on the grounds that his imprisonment was unconstitutional, citing the case *Lawrence v. Texas*, which disallowed states from enacting anti-homosexual sodomy laws. His appeal was refused on many grounds, one of which was that the case only applied to homosexual sodomy and no other acts (Muth v. Frank, 2005).

Current American laws about consensual adult incest range widely in their scope and application. Some laws criminalize the act of sexual intercourse under any circumstances. Others are more complex; for example, Wisconsin allows first cousins to engage in sexual intercourse as long as they are unable to reproduce for reasons such as age or infertility, but as discovered by the Muths, the same state considers incestuous parenthood to be legitimate grounds for the state to terminate a couple's parental rights (Muth v. Frank, 2005). Does incest warrant such measures against it? To what extent should the U.S. government limit the sexual activity of closely-related consenting adults?

Arguments in Favor of Restricting Consensual Incestuous Activity

The most obvious reason for restricting consensual incestuous behavior is that the offspring of partners with a high level of consanguinity are more likely to have birth defects. The likelihood of birth defects increases with the number of generations that participate in incestuous behavior. Among British Pakistanis, where an estimated three out of four marriages are between first cousins, children are 13 times more likely than average British children to be born with genetic disorders (Rowlatt, 2005).

Why should the government care about children being born with birth defects? Since a large part of the government's purpose is to protect its citizens from harm, the government should be concerned with the harm introduced by the births of children with genetic disorders. Birth defects often cause suffering for the children who carry them, as well as emotional and practical difficulties for the families who raise them. In addition, children with genetic disorders pose a burden on the healthcare system, consuming medical resources and sometimes public funds. This allocation of resources may be distributively unjust, given that the incestuous parents could have avoided the cost to the state by not bearing children. The preamble to the Constitution reads that one of the country's goals is to

“promote the general welfare.” It follows that the state has a legitimate interest in discouraging behavior that carries a high risk of public harm.

For these reasons, governments may be justified in restricting the reproductive rights of incestuous couples. It is less clear that the government should ban incestuous couples from all sexual intercourse. Nevertheless, a number of reasons support that course of action.

First, any sort of sexual intercourse between a man and a woman with reproductive abilities can lead to offspring, even if they use birth control. The government may determine that the risk of the couple bearing children is high enough to merit banning all incestuous sexual intercourse, or at least all incest between people who are biologically capable of reproduction.

Second, almost all Americans find incest to be an offensive practice (citation needed). Thus, the government may be justified in banning the act on the grounds of the offense principle. An incestuous sexual relationship is certainly non-trivial and non-transient. It is also almost universally condemned, at least in the United States. Finally, while people may easily avoid witnessing acts of incest, they cannot avoid knowing about their occurrence in most cases. Since all cases that lend themselves to prosecution are already public, they should be considered violations of the offense principle.

Third, the vast majority of people in this country have deep-seated beliefs that incest is immoral. Both Jews and Christians, for example, have scriptural passages that forbid sexual relations within a family, even if the members are not biologically related (such as a father and his daughter-in-law) (Is Incest Okay?, 2009). And many people who do not subscribe to an established religion would also consider incest immoral. Thus, legal moralism may justify banning incest. According to legal moralism, part of the law’s purpose is to enforce the morality of its followers, as demonstrated in a variety of court cases involving issues like sex toys and adultery (e.g. *Lawrence v. Texas*).

Since there are reasons to ban incest stemming from the harm principle, legal moralism, and the offense principle, people in favor of banning incest would argue that current restrictions on incestuous behavior should not be lifted.

Arguments Against Restricting Consensual Incestuous Activity
Supporters of the right to consensual incest between adults usually appeal to John Stuart Mills’ (1859) presumption in favor of liberty, which states that an act should be allowed by default unless there are compelling reasons to restrict it. The presumption in favor of liberty was invoked in the *Lawrence v. Texas* (2003) decision with regard to homosexual sodomy, and proponents of legalizing incest argue that the same logic should prevent the government from interfering in cases of consensual incest as well. In accordance with the presumption, a call to abolish laws

against consensual incest need only show that opposing concerns are either irrelevant or too weak to override it.

Those in favor of legalizing incest first argue that incest does not cause enough harm to justify its prohibition. Though the act of incestuous sexual intercourse does not cause harm directly, opponents of incest rights claim that an incestuous couple does harm indirectly, by creating a higher-than-average risk of the birth of children with genetic disorders (citation needed). However, the same claim can be made of sexually active women over the age of 40, or couples with genetic disabilities that they could pass on to their children. A study has found that the risk of genetic birth defects in children of a first-cousin couple (where cousin mating has not been practiced over several generations) is only as high as for children of a 41-year-old woman (Cousin Couple, 2009). Yet the government does not restrict the liberty of older women or people with congenital disorders to engage in sexual intercourse.

Supporters of the right to incest also dismiss claims that incest should be banned on the basis of legal moralism. An author at the *Boston Globe*, discussing the case of the Muths, summarized a common view of legal moralism: “Dissenting in *Lawrence*, Justice Antonin Scalia warned that the decision ‘effectively decrees the end of all morals legislation.’ It was a prediction the majority made no effort to refute” (Jacoby, 2005). The idea that government should not enforce morals has gained increasing popularity over the years. Regardless of whether incest is inherently wrong, some people do not consider it wrong, and incestuous couples are not clearly infringing on the rights of others (except, perhaps, the rights of their potential offspring). The choice to commit or not to commit incest is often a choice shaped by religious belief or cultural traditions. For the same reason that the government is committed to keeping church and state separate, it should be committed to leaving liberty in the hands of its people when the disputed action is only considered immoral to some people.

To enforce morals in law also leads to resentment by dissenting parties who disagree with the majority view, which strengthens their resolve to defy those morals. In the case of homosexuality, anti-gay marriage laws have given rise to a form of subtle bigotry. Angered by the institution of those laws, some gay rights supporters have expressed much disrespect in the media for Christians and Christianity, even when only a subset of that religious group, most notably the Christian Right, supports anti-gay marriage laws. A search for “Christian” on the popular media website *Slate.com* yields article summaries containing “the deep contradictions of Christian popular culture,” “cracks in the Christian ascendancy,” and other similarly negative phrases, which the authors justify by citing the Christian Right’s attitude towards gay rights (2009).

If incest should not be banned on the basis of legal moralism, should it still be banned on the offense principle? People in favor of legalizing incest would point to the way the government has responded to

homosexuality in recent times. If *Lawrence v. Texas* (2003) allowed homosexuality to be practiced without government interference, even though it offends many other citizens, the government should take the same attitude towards incest. While it is true that homosexuality is not as universally offensive as incest, the threshold above which a percentage of the population qualifies as “universal” is arbitrary. Moreover, as with homosexuality, many people consider the offense to be reasonably avoidable. The feeling of revulsion that most people feel towards incest is not stimulated by the sight of a brother and sister couple walking along a street; rather, it is caused by the sexual act itself, which remains private. Thus, incest does not fulfill the conditions necessary for the offense principle to be invoked.

In summary, supporters of incest rights believe that none of the reasons for banning incest are strong enough to outweigh the value of protecting liberty. Laws prohibiting consensual incest restrict liberty unjustly, and should be removed.

Conclusions

Supporters of incest rights argue convincingly against using the offense principle or legal moralism to justify banning incest. In general, the American government has been moving away from justifying its laws based on those principles, as Scalia noted in *Lawrence v. Texas* (Jacoby, 2005). However, the arguments based on the harm principle merit further consideration.

Those in favor of banning incest observe that birth defects, almost by definition, cause suffering. Few would contest that observation. Since the government should take an interest in actions that raise the risk of harm to its citizens, it should consider incest separately from other forms of sexual intercourse. However, there are many actions that raise the risk of some harm, such as driving a car, which the government allows its citizens to do. The government only bans an action when it considers the risk of harm from an action to be too high, as with riding a car without a seatbelt. Ideally, the government would have some threshold probability value that would determine whether actions are risky enough to be banned. Since it does not, a discussion of the level of risk created by incestuous sexual intercourse must draw on comparisons with other types of sexual intercourse. Rawls' (1971) Difference Principle, which states that the treatment of two situations should differ to the extent that their morally relevant aspects differ, provides guidance as to the correct measures to take based on those comparisons.

In the case for legalizing incest described above, the risk of genetic defects in the offspring of first-cousin parents (where incestuous mating has not been practiced in repeated generations) is only as high as the risk for the offspring of a 41-year-old woman. Since the arguments against legalizing incest based on legal moralism and the offense principle have been dismissed, the risk of harm from birth defects is the only morally

relevant aspect of sexual intercourse involving a woman above the age of 40 and sexual intercourse involving closely related adults. There is no difference between the two situations in that respect, and therefore, according to Rawls' Difference Principle, both cases should be treated equally. If incest should be banned, women above the age of 40 should also be banned from sexual intercourse. Moreover, there are many other groups that bear offspring with a high risk of having harmful disorders, whether genetic or not, and these groups would have to be banned from sexual intercourse as well. For example, people with HIV are not currently barred from sexual activity, even though the offspring of HIV-infected women have a 25% chance of being infected with HIV (HIV/AIDS, 2004)—a number much higher than the 6% risk of birth defects for children of first-cousin couples (Rowlatt, 2005).

That said, the risk of birth defects is significantly higher when incest is a cultural norm and is practiced over several generations, as with British Pakistanis. British Pakistanis are 13 times more likely to give birth to children with birth defects than the average population in the United Kingdom. Since unrelated parents have a three percent chance of having such children, the rate of British Pakistani children being born with genetic disorders is higher than 39 percent (Rowlatt, 2005). This risk is even higher than the risk of HIV-infected women giving birth to children with HIV. Given that the risk of harm is significant for multiple generations of incestuous mating, should the government attempt to restrict incest in families that have a history of interbreeding?

If the government were to implement a restrictive policy that only targeted this type of incest, it would need to keep track of family histories and choose an arbitrary value above which an incestuous couple's risk of giving birth to children with defects would be considered too high. Such a policy would be extremely impractical to implement. An alternative solution is education, the same solution used to combat the risk of HIV infection and various other harms. Public health groups could discourage incest to prevent it from becoming a recurring pattern. This is the course of action suggested by Ann Cryer, a British MP with a large Pakistani constituency. Cryer points out that education has been effective for other health concerns such as obesity and smoking (Rowlatt, 2005). It is much easier to promote awareness of the harms caused by this type of incest than to attempt coercion.

The government should consider changing its measures in the manner outlined above, rather than continuing to enforce unreasonable laws. The current laws have lasted as long as they have simply because consensual incestuous couples are too few in number to raise awareness of their plight effectively. The Muths had to fight their case alone against the force of public prejudice, and they lost. Incest laws must be abolished to ensure that no other consenting incestuous couples face the same injustice.

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