

# A LIBERTANIAN CRITIQUE OF INCEST LAWS: PHILOSOPHICAL AND ANTHROPOLOGICAL PERSPECTIVES

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**Abstract:** This article is a libertarian critique of incest laws. On the basis of the libertarian “harm principle”, one must ask what exactly is the harm that incest brings forth. Traditionally, anthropologists have tried to rationalize the incest taboo in various theories, and lawmakers have used these principles as grounds for the criminalization of incest. These principles are the preservation of family structure, the enhancement of alliances and the avoidance of genetic risks. While I acknowledge that these rationalizations are plausible, I argue that they are still not sufficient grounds for the preservation of incest laws, and consequently, there is an ethical need to reform them.

**Keywords:** incest; libertarian; anthropology; genetics; harm principle.

## Introduction

The search for human universals has long been a quest in anthropology. The anthropologist George Peter Murdock (1945) sought to produce an exhaustive list of behaviors that all humans, in all places and at all times, have shared. The list is rather extensive and includes things such as age grading, greetings, division of labor, language, amongst many others.

Yet, ever since anthropologists in the 19<sup>th</sup> century took notice of the immense diversity in the human species, they have been particularly struck by the universality of the incest taboo. No society (with the exception of Roman Egypt, and royal marriages in a few other societies) has ever allowed sexual relationships between parents and their offspring, or between siblings.

For most of human history, incest has been universally criminalized. Some reforms have decriminalized it in more recent times, and today, it is legal in countries such as Brazil, Spain and Russia (Max Planck Institute, 2018). Notoriously, some countries that would otherwise rank high in freedom indexes (such as the United States, Canada or Germany (Freedom House, 2018), do criminalize incest. And, even in those countries where it is not criminalized, it is still morally condemned.

Until we find a coherent and empirically founded reason to oppose incest, its criminalization should be suspended. There are, of course, situations in which incest

obviously causes harm. Most frequently, reported cases of incest involve minors. The most common occurrence is men abusing their underage daughters (Phelan, 1986). But in those cases, the harm is not caused by the incestuous relationship as such, but rather, by the fact that one of the participants in the intercourse is underage. This type of relationship must be criminalized on the grounds of pedophilia, but not on the grounds of incest.

Should the daughter or step-daughter be of age, then sexual intercourse with her father must not be considered an offence. If one of the parties in incestuous intercourse fails to give consent, then again, this violates the harm principle (which claims that an action is immoral only if it causes harm to non-consenting parties). In that case, the person having sexual intercourse against her will would be a victim, and the relationship would no longer be a “victimless crime”. But once again, this kind of relationship is to be criminalized on the grounds of nonconsensual sex (rape), instead of incest as such. As Sebo (2006) explains: “Sex between parents and children is immoral not because it is incestuous, but because it is rape. Minors are not allowed to give consent because they are not prepared emotionally, physically, or psychologically to have sex with an adult. And this binding moral imperative extends not only to parents, but also to counselors, doctors, religious leaders, teachers, and other figures of authority. Between two consenting adults, sex can be a means for procreation, for the expression of love and intimacy, or for nothing more than the simple pleasure of touch. But it can also be a means for domination and manipulation, especially between an adult and a minor, and it is for this reason that adults—parents and otherwise—should never have sex with children. Whether the act is incestuous is morally irrelevant.”

Let us then examine if consensual sex amongst adult close relatives causes any harm, and if there are any good reasons to criminalize it or even to morally oppose it.

## **Two early anthropological explanations of the incest taboo**

The best way to approach the possible harms of incest is by considering the intellectual history of anthropology. For, anthropologists have long been puzzled as to why, apparently, every society ever documented has prohibited incest relationships. Even though the extent of these prohibitions varies, at the very least intercourse between siblings and between parents and children, has been universally forbidden.

Before considering the various anthropological theories that have been offered to explain the incest taboo, it is important to note that, despite the enormous interest that this issue has traditionally aroused in the academic anthropological community, no definitive consensus exists. This may be evidence that, in fact, there is no single reason as to why incest is abhorred. Cofnas makes this very point, by emphasizing the diversity of incest prohibitions and their rationales:

Incest taboos vary enormously across time and place, and there is no specific prohibition found in all societies. Even the taboo on sibling sex is far from being universal. Many traditional societies simply lacked norms concerning sibling incest... Any society's norms governing sex will be shaped by a panoply of historical, sociological, and evolutionary forces, all of which interact with human biological dispositions. There is almost certainly no single explanation of the sibling incest taboo that fully explains every instance of it (Cofnas, 2020, p. 16).

The first formal anthropological explanation for the incest taboo goes back to 19<sup>th</sup> century anthropologist E.B. Tylor. According to his theory, human groups have always tried to establish relations with other groups, and the way to do it is by forcing individuals to marry outsiders (i.e., exogamy), and thus form alliances. In Tylor's memorable words, one has the option to "marry out or die out" as a result of isolation (Bolin & Whelehan, 2009, p. 194).

It is important to note that anthropologists who defend this particular theory have been careful not to exaggerate its claims. Such a theory has explanatory power, but its application is not necessarily universal. As Cofnas explains,

the fact that sibling and parent-child incest taboos are not universal casts doubt on the claim that they are the distinguishing features of human social life, but it is true that forced exogamy can foster interfamilial cooperation. Sex and marriage taboos can have other effects that influence group adaptedness in ways that could not be foreseen by any human designer (Cofnas, 2020, p. 17).

So, the alliance theory seems plausible enough. Yet, its true concern is with *exogamy*, not with the incest taboo as such. In other words, the theory is plausible in explaining why societies do not allow close relatives to *marry*, but does not explain well why societies would not allow close relatives to *have sex*. As Robin Fox (1983) memorably explains, adolescents know very well the difference between sex and marriage, but anthropologists struggle with it.

But even in the case of exogamy, it is still far from clear how marrying relatives would cause harm, in the libertarian sense. The harm that disregard of exogamy may cause is too abstract. If anything, it may harm the aspirations of a society that wants to expand its networks, but that would hardly count as moral grounds for forcing someone to marry outside of a particular group.

As an analogy, consider miscegenation. As the case of Latin America seems to prove, miscegenation has been a good strategy to tone down ethnic tensions and racism as a whole. From a genetic perspective, this may be the case, inasmuch as, over some generations, miscegenation dilutes the stark genetic differences between ethnic groups, thus weakening the ethnic nepotism that may be more easily aroused in situations in which two groups of markedly different genetic stock interact. As Pierre van den Berghe (1995) explains, "racism... will only persist as long as social barriers to exogamy prevent intermixture, and thus the recreation of a more typical situation where intragroup genetic diversity exceeds intergroup differences." Complementarily, from a social perspective, marriage between members of different racial groups certainly helps bridge their social distance, and encourages a more equal, color-blind and inclusive society.

But, should miscegenation be enforced? This would be social engineering at its worst. In the same manner that anti-miscegenation legislation has been rightly considered oppressive, criminalization of intra-marriage would be likewise oppressive. We may acknowledge that in the long term, marrying outside the race advances a more harmonious and inclusive society; but forbidding individuals from marrying people of their own race would be going too far. By the same token, marrying outside the kin group may help build alliances, but forbidding individuals to marry people of their own kin group would also be oppressive.

After Tylor, other anthropologists rationalized the incest taboo by arguing that sexual relations amongst close relatives would disrupt the structure of the family. This view, most

associated with Bronislaw Malinowski, holds that, inevitably, there would be sexual jealousy amongst members of the family, and that would destroy the harmony that is required for its functioning. As Ferraro and Andreatta explain,

if adolescents were permitted to satisfy their sexual urges within the nuclear family unit, fathers and sons and mothers and daughters would be competing with one another, and consequently normal family role relationships would be seriously disrupted. The incest taboo, according to this theory, originated as a mechanism to repress the desire to satisfy one's sexual urges within the nuclear family (Ferraro & Andreatta, 2011, p. 212).

It is of course true that this potential for jealousy and conclusiveness is always present in families. But it is doubtful that the incest taboo makes a great contribution in making that jealousy disappear. Isn't there always the latent possibility that two brothers compete for the affections of another woman who is not their relative? Aren't there plenty of other intra-familial rivalries that cause strained relationships? For example, it is well-known that doing businesses with in-laws runs the risk of disrupting familial relationships, as frequently happens. Does this justify a law forbidding in-laws from ever engaging in private voluntary transactions? To answer affirmatively, again, is to favor social engineering and disregard any value of individual autonomy and rights.

Within this theory, Malinowski and other anthropologists also argued that, were incest not prohibited, social roles within the family would be disrupted, and its structure would be too chaotic. If, say, a father is the same person as a sexual partner, roles would be too confusing for the family unit to function adequately.

This claim seems logical enough. However, perhaps surprisingly, it has little empirical support. Anthropologist Donald Brown summarizes the anthropological data:

Bagley... analyzed 425 published cases of incest, finding 93 instances in which incest was the means that allowed the family to *maintain* its functional integrity. Typically, a father-daughter relationship replaced the father-mother relationship when the mother was either unable or unwilling to fulfill her role. Bagley... describes this as 'functional incest'. Whatever the psychological costs may be to individuals, the study of actual cases of incest gives no obvious support to the assumption that a society, or even the family, is necessarily threatened by incest (Brown, 1991, p. 125).

Furthermore, if the rationale for the incest taboo were truly the preservation of the familial structure, then it hardly makes sense that close relatives that were not raised together should be forbidden from engaging in sexual activity. In fact, most cases of sibling or father-daughter incest happen amongst individuals who have *not* been together since infancy (most likely as a result of the so-called "Westermarck effect", to which we shall return shortly). By the time they engage in sexual activity, there is no danger of it disrupting the structure of the family. Yet it is still a fact that most legislation criminalizing incest applies to intercourse between genetically close relatives who were not originally part of the same family unit.

Likewise, if the goal is to avoid role confusion, then parents should be forbidden from performing other roles in their children's upbringing. This would preclude home schooling, because the parent would have the same role as the teacher. If this does not seem too oppressive and someone wants to argue in favor of compulsory public education, then

consider a father coaching his son's baseball team. Again, such a situation would confuse the roles of father and coach, but should the State criminalize such a dual role? If this is considered going too far, then one may wonder how that role confusion is any different from role confusion in incest.

A more persuasive line of reasoning in favor of the incest taboo would be to appeal, not just to the role confusion, but also to the power differential that incestuous relationships entail, especially father-daughter incest. Libertarianism has been criticized for assuming too hastily that seemingly consensual relationships are indeed consensual. In John Stuart Mill's classic formulation, consenting individuals must be adults and not mentally impaired. But we are left to wonder whether or not there is real consent whenever there is a power differential, as in a father-daughter relationship.

A feminist perspective also offers solid grounds on which to build this argument. According to feminist critical theory, most cases of incest not only rely on power differentials in specific cases, but as a whole, patriarchal structures enable men to their power and privilege to gain sexual access to close female relatives. Based on a Foucaultian approach to power, Bell (1993, p. 174) argues that "feminist analyses have placed incest within a generalised theory of patriarchal power and sexual violence, analysing it more or less according to a model of rape."

Bell goes on to argue that incest ought not be considered a clinical pathology (as psychiatrists are often prone to do), but rather, the logical consequence of the ever-increasing establishment of patriarchal power. Consequently, a feminist analysis of incest must include a sociological dimension that takes into consideration the power dynamics, as Bell explicitly argues:

As opposed to placing incest on the side of the 'abnormal', feminist contributions suggest that, on the contrary, given the power dynamics of male-dominated society and the understandings of sexuality which we live out, incestuous abuse is in a sense unsurprising. In feminist analysis, incest signals not the chaos it did (and does) for sociological functionalism, but an order, the familiar and familial order of patriarchy, in both its strict and its feminist sense. Incest reveals the gendered power dynamics of the society in which we exist (Bell, 1993, p. 3).

To this particular feminist challenge, some counterarguments can be considered. It is admittedly true that relationships with a power differential are not as consensual as relationships with a greater level of power balance. Yet, incest would by no means be the only relationship where that power differential exists. Physicians also occasionally have liaisons with their adult patients, and so on. While these relationships can also be considered unethical, no reasonable lawmaker proposes to criminalize them (legislation typically punishes psychiatrists who become romantically involved with patients, but this legal measure does not apply to patients treated within other specialties).

Admittedly, most of these relationships do come from patriarchal structures of power that are deeply enshrined in society. But, inasmuch as patriarchy has taken centuries to become firmly established, it is unrealistic to believe that laws against incest can eradicate such a state of affairs. A more radical shift of power is needed, and laws against incest contribute little to that. Women need empowerment, but the way to do get there is via other types of legislation (stronger laws against rape, greater job opportunities for women via affirmative

action, etc.), instead of legal punishments against practices that are, after all, technically consensual.

More interestingly, whereas a Foucaultian critique of power would at first seem to support the case in favor of upholding laws against incest (inasmuch as father-daughter incest is facilitated by power dynamics and patriarchal structures), Foucault actually believed that incest laws are themselves instruments of oppression. This is because, in Foucault's view, through incest laws, patriarchal structures of power decide where sexuality is to be performed. Consequently, the family is selected as a locus of the restrictive power of men, by determining which women are available for sexual relationships and which are not.

As Chloe Tylor (2016, p. 86) explains, "Foucault is arguing against a sovereign view of power in which power, in the form of the law, says 'No' to incest." Whereas Foucault would be concerned about the imbalance of power in patriarchy, he would also likely be concerned about the way excessive repression of consensual sexual activity can be counterproductive, to the extent that it provides grounds for more sexual regulation that, ultimately, strengthens the status quo enshrined in Victorian morality.

Foucault himself points out the excessive repression of incest regulations, which ultimately serve as instruments of power:

If for more than a century the West has displayed such a strong interest in the prohibition of incest... perhaps this is because it was found to be a means of self-defense, not against an incestuous desire, but against the expansion and the implications of this deployment of sexuality which had been set up (Foucault, 1978, p. 149).

Therefore, in Foucault's philosophy, although cases of father-daughter incestuous rape can be clearly seen as a manifestation of patriarchal power, the criminalization of consensual incest must also be considered a strategy for enshrining power structures in society. Consequently, any attempt aiming at true liberation from these power structures ought to consider the need to abolish obsolete incest laws.

Furthermore, many of these relationships begin with power differentials, but they do not always remain as such. As the relationship grows, roles can change towards a more equitable power balance, as indeed is frequently the case between professor and student, or physician and patient. If we allow for change in these cases, there is little reason to believe that the power differential in an incestuous relationship must remain fixed.

### **The main argument: the biological risk of incest**

Admittedly, there is some biological risk in incest because it increases the chances of deleterious recessive genes becoming manifest. Most deleterious genes are recessive (that is the only way they can be preserved in the gene pool), meaning that having one copy is not enough for the gene to be expressed. Incest decreases the variability that protects the gene pool in case deleterious recessive genes appear. In human beings, incestuous unions significantly increase the risk of both single gene defects (congenital hypothyroidism, deaf-mutism, Marfan syndrome, amongst others) and polygenic disorders (congenital heart defects, microcephaly, hydrocephalus, amongst others) (Devi et al., 1984).

However, it is doubtful that the biological danger of incest is sufficient grounds for its criminalization. If the rationale for the criminalization of incest were truly its genetic consequences, then sexual acts between relatives that do not lead to conception (oral sex, anal sex, vaginal sex with contraceptive methods, etc.) would not be illegal. Yet, in most legislation, these acts are still criminalized. In some cases, laws that criminalize incest extend to non-consanguineous relatives (in-laws, step relatives, etc.); once again, it is difficult to make sense of this if the rationale for incest criminalization is merely biological.

Furthermore, if legislators were really concerned about genetic risks, then they would criminalize sexual relations between people who are at even greater risk of conceiving children with genetic defects. Consider Huntington's disease. Inasmuch as this is an autosomal dominant disease, any person diagnosed with Huntington's disease has a 50% chance of passing the condition on to his/her child. Huntington's disease is an extremely disabling condition. Yet, no legislation impedes patients with Huntington's disease from engaging in sexual activity.

Critics of incest laws have long pointed out such inconsistencies. For example, Sebo writes:

when this [biological] argument is used in opposition to incest, it commits us to an untenable set of corollaries, for the potential level of harm resulting from incest is similar to, if not less than, the potential level of harm resulting from sex between carriers of congenital disorders. After all, the supposed danger of incest is that it increases the probability that recessive genes will become dominant; and this is the same problem that allows congenital disorders to emerge in the fetus. Therefore, we should not condemn incest unless we are prepared to condemn sex among carriers of genetic disorders as well (Sebo, 2006, p. 51).

Sebo puts his finger on a problem that, although not explicitly made, comes to the fore: to forcibly restrict the sexual lives of people with Huntington's disease (or any other person who is a carrier of a congenital disorder) would be a form of eugenics. There are plenty of moral arguments against eugenics, not least of which is, once again, the libertarian argument that individual rights cannot be trumped for the good of society. This is very clear and non-controversial. However, we must also note that if the rationale for the criminalization of incest is the prevention of genetic diseases, then this is also a form of eugenics, and should be opposed on the same libertarian basis.

### **The alleged wisdom of repugnance**

One final argument in favor of the criminalization of incest appeals, not directly to the biological dangers, but rather to the naturalness of the incest taboo. There seems to be something instinctual about preventing incest, and in that sense, proponents of the criminalization of incest believe that the law should follow those instincts. And, as a corollary to that argument, some opponents to the decriminalization of incest appeal to the so-called "wisdom of repugnance".

This term goes back to philosopher Leon Kass. When discussing the ethics of cloning, Kass admitted that he did not have strong rationalist arguments for opposing cloning, but felt that such a procedure was so intuitively repulsive that we must follow our gut feeling

in cases like this (Kass, 1997). If something is so repugnant, then there is good reason to morally oppose it and even criminalize it, even if we cannot be sure what exactly is wrong with it. This argument is in fact nothing new. When the decriminalization of homosexuality in Western countries began to be discussed, philosopher Patrick Devlin also invoked disgust as a reason to continue the criminalization of homosexuality, as a way of enforcing morals (Devlin, 1965).

On homosexuality, at least, the pendulum of public opinion has now swung towards the idea that just because a behavior may be repugnant to some, it is not necessarily immoral. In fact, immorality and disgust do not always coincide. There may be immoral behaviors that do not elicit disgust (e.g. adultery, theft, traffic violations), and there may be morally neutral behaviors that do (eating worms, marrying someone 60 years older).

Most disgust reactions are evolutionary adaptations. For example, why does rotten meat or feces seem so disgusting to us, but not to flies? Because both rotten meat and feces carry microorganisms that have great potential to harm us, but not flies. Therefore, as psychologist Steven Pinker (1997) so eloquently states, disgust is “intuitive microbiology”.

Repugnance for incest is also clearly an evolutionary adaptation, inasmuch as it prevents the proliferation of recessive genes. But, if the incest taboo is enshrined in our genes, what need is there to criminalize it? Eating rotten meat and feces is a dangerous and extremely disgusting thing to do. But there are no laws against it, precisely because there is the understanding that it would be redundant to do so: nature has already primed us not to do it, and in the very exceptional cases in which it does happen, such actions do not harm anybody else. The same should hold for incest.

By way of comparison, consider suicide. Largely due to libertarian arguments that call for respect of a person’s autonomy in decision-making, suicide legislation is now very rare, at least in the modernized Western world. The decriminalization of suicide will not motivate anybody to commit suicide, simply because very few people have that natural disposition, and those that do, are highly unlikely to be dissuaded by legislation; they are likely to try it nevertheless, as has been the case throughout history. By the same token, the decriminalization of incest will not elicit rampant promiscuity between relatives. At most, it would make it legal for the very few cases of close relatives wanting to have sexual intercourse.

Furthermore, it is of interest to note that, as philosopher Martha Nussbaum has argued, disgust has also been traditionally used in defense of very harmful prejudices and racist attitudes. For example, as she describes it, “... many laws in the Jim Crow South were fueled by disgust at the thought of sharing toilets, drinking fountains, or other public facilities with African Americans, and by the magical thinking about contamination that accompanied racist disgust” (Nussbaum, 2004). On the basis of this irrational side of disgust, Nussbaum rightly argues that disgust cannot be a reliable guide for morality, let alone the law.

## Conclusion

Although incest may be considered the most universal of all taboos, modern legislations around the world do seem to be moving towards its legalization (Bowers and Duncan, 2016). An increasing number of European countries are decriminalizing incest between siblings.

But, the further step of decriminalizing incest between parents and their offspring has not been taken. Likewise, the legalization of marriage between siblings or parents and their offspring (and not just the decriminalization of incest) is even more unlikely to be accepted.

The discussion about the need to decriminalize incest may also open the door to a further discussion about the need to legalize incestuous marriage. A libertarian approach to marriage would advise legislators to allow for such marriages to take place, probably on the same philosophical basis that supports the case for gay marriage. Parkman (2008, p. 318) explains that, in regards to marriage, “libertarians would permit individuals to make the decisions that are most likely to increase their welfare, subject to limitations if there are effects on third parties”. As previously discussed, consensual incestuous unions do have an additional risk of causing harm to offspring (i.e. a third party), but this risk is no higher than a 40-year-old woman giving birth, and yet, no law forbids a 40-year-old woman from marrying.

Parkman (2008, p. 318) also makes very clear that, “in summary, from a libertarian perspective, social welfare could be improved by permitting people more freedom to choose their spouse and to determine the grounds under which their marriage can be dissolved.” This libertarian approach to marriage would also extend to consensual incestuous partners. Under libertarianism, marriage is a contract between willing parties, and no outside interference is licit. The degree of consanguinity between the parties to the contract says little about the legitimacy of the contract itself. In fact, as libertarian philosopher Kurt Hiller argued, appealing to biological risks in order to sustain the prohibition of incestuous marriage is not altogether different from a eugenic approach to society in which, in the name of social hygiene, particular individuals are prevented from reproducing (Ellis, 1912). Compulsory eugenics is morally abhorrent, not only to libertarians, but to people at large. Yet, there is some inconsistency in opposing eugenic programs while somehow approving of restrictions on incestuous marriage by appealing to biological risks.

Perhaps it is still too early to take steps towards legalizing incestuous marriage, but modern societies do at least need to think harder about what exactly is morally wrong with incest, beyond the mere *yuck* factor. If ultimately, no coherent argument is found, then serious attempts at reforming the legislation should be tried. History has shown that disgust does tend to go away, once the public is educated about the particular behavior that is being judged. This was certainly the case with homosexuality and interracial marriage, and it should now be the case with incest. Whether incest should remain a crime must be decided on the basis of rational argument about its harms, and not just repulsive reactions.

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