INCEST:

A CASE STUDY IN DETERMINING THE OPTIMAL USE OF THE CRIMINAL SANCTION

MARY NEL

THESIS PRESENTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAW AT THE UNIVERSITY OF STELLENBOSCH

SUPERVISOR: PROF SE VAN DER MERWE

DECEMBER 2003

DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature. Date.

ABSTRACT

The aim of this study is to determine standards or criteria to be used when deciding on the optimal use of the criminal sanction and to evaluate the efficacy of such criteria by applying them to an existing crime, namely incest.

Since criminal punishment necessarily impacts negatively on the human rights of those subject to it, it is submitted that it should only be used as a last resort where it is absolutely necessary to do so. Relevant constitutional provisions and other legal sources are examined and used as the basis for expounding a test for determining the circumstances under which it is appropriate to criminalise. It is argued that the decision to utilise the criminal sanction may be tested against certain guidelines: the state bears the burden of showing, firstly, that the rationale of the crime in question is theoretically justifiable in that criminalisation serves a worthy state purpose; and secondly, that criminalisation is reasonable, being both practically desirable and effective in achieving legitimate state goals in the least restrictive manner possible.

In the second part of the thesis, the proposed criteria are applied to the common law crime of incest. An initial discussion of the crime indicates that a wide range of conduct is punishable as incest, including both extremely harmful conduct, such as the rape of a child by her father, and completely innocuous behaviour, for instance private sexual intercourse between consenting adults who are merely related by marriage.

Next, an attempt is made to ascertain the true rationale for criminalising incest and then to establish whether such rationale is justifiable. The conclusion is reached that despite there being good grounds for punishing certain manifestations of incest, the only reason for imposing criminal punishment that is valid in all instances, is the unconvincing contention that the state is justified in prohibiting incest merely because incest is regarded as morally abhorrent.

And even assuming that targeting and preventing undesirable forms of harmful or offensive conduct is a justifiable purpose of the incest prohibition, it is nevertheless submitted that criminalising incest is unreasonable, since the

crime as it is presently formulated is both over- and under-inclusive for the effective realisation of any praiseworthy aims.

After testing incest against the criteria developed, the recommendation is made that incest be decriminalised. It is contended that there are sufficient alternative criminal prohibitions available that would adequately punish harmful incestuous conduct without simultaneously unreasonably limiting the rights of consenting adults to choose their sexual (or marriage) partner without state interference. Decriminalisation would not only prevent potential violations of human rights, but the legitimacy of the criminal justice system as a whole would be considerably enhanced if it were apparent that the criminal sanction was reserved for conduct truly deserving of punishment.

OPSOMMING

Die oogmerk van hierdie studie is om standaarde of riglyne daar te stel ter aanwending waar besluit word oor die optimale benutting van die strafsanksie, asook om die doeltreffendheid van sulke riglyne vas te stel deur die toepassing daarvan op 'n bestaande misdaad, naamlik bloedskande.

Aangesien straf altyd 'n nadelige uitwerking op die menseregte van dié wat daaraan onderhewig is, het, word aan die hand gedoen dat dit slegs as 'n laaste uitweg aangewend moet word indien absoluut noodsaaklik. Ondersoek word ingestel na toepaslike grondwetlike bepalings en ander regsbronne, wat gebruik word as grondslag vir 'n toets ten einde te bepaal onder welke omstandighede kriminalisasie gepas is. Daar word aan die hand gedoen dat die besluit om gebruik te maak van 'n strafsanksie teen sekere riglyne getoets kan word. Die staat dra die bewyslas om aan te toon, eerstens, dat die bestaansrede vir die betrokke misdaad teoreties regverdigbaar is aangesien krimininalisasie 'n waardige staatsdoel dien; en tweedens, dat kriminalisasie redelik is, aangesien dit prakties wenslik is, asook die staat se legitieme doelwitte dien op effektiewe wyse op die mees onbeperkende wyse moontlik.

In die tweede gedeelte van die verhandeling word die voorgestelde riglyne op die gemeenregtelike misdaad bloedskande toegepas. 'n

Aanvanklike bespreking van die misdaad dui daarop dat die trefwydte van bloedskande sodanig is dat dit gedrag insluit wat uiters benadelend is, soos byvoorbeeld die verkragting van 'n kind deur haar vader, maar ook heeltemal onskadelike optrede soos byvoorbeeld geslagsverkeer tussen toestemmende volwassenes wat bloot aanverwante is.

Die volgende stap is om die ware bestaansrede vir die verbod op bloedskande vas te stel en daarna te oorweeg of sodanige bestaansrede regverdigbaar is. Die gevolgtrekking is dat alhoewel daar goeie gronde vir die bestrawwing van sekere verskyningsvorme van bloedskande is, die enigste altyd-geldende rede vir strafoplegging in hierdie verband die onoortuigende bewering dat bloedskande moreel onverdraaglik beskou word, is.

Selfs al word daar aanvaar dat die identifikasie en voorkoming van onwenslike verskyningsvorme van skadelike of aanstootlike gedrag 'n regverdigbare doel vir die bloedskandeverbod is, voer die skrywer nie te min aan dat die kriminalisasie van bloedskande onredelik is omrede die huidige misdaadomskrywing tegelykertyd beide oor- en onder- inklusief is om einge moontlike goeie doelwitte effektief te bereik.

Nadat bloedskande getoets word teen die riglyne wat ontwikkel is, word aanbeveel dat bloedskande gedekriminaliseer word. Daar word aan die hand gedoen dat daar genoegsame alternatiewe strafbepalings is wat aangewend kan word om skadelike gedrag wat onder die misdaad bloedskande resorteer te bestraf sonder dat die regte van toestemmende volwassenes om sonder staatsinmenging hul seksuele- (of huweliks-) maat te kies onredelik ingeperk word. Dekriminalisasie sal nie slegs moontlike menseregteskendings voorkom nie, maar ook die legitimiteit van die strafregstelsel as geheel bevorder deurdat dit duidelik blyk dat die strafsankie reserveer word vir optrede wat werklik straf verdien.

TABLE OF CONTENTS

1 OVERVIEW OF STUDY

1 1 Introduction

What is a crime? The only answer that is always valid is: "A crime is any conduct which is defined by law to be a crime and for which punishment is prescribed."[1]

However, this reply is unsatisfactory in that is says nothing about "what the content of a law of crimes is or ought to be."[2] Such a formal or procedural definition of crime also leaves one in the dark about whether the lawmaker has to use any particular standards or criteria in making the decision to criminalise conduct, or whether the conclusion to impose or remove the criminal sanction[3] may be reached on completely arbitrary grounds. The consequences of declaring conduct to be a crime are extremely far-reaching and potentially prejudicial. It would therefore be useful to be able to identify, at the very least, criteria that would indicate when it would be inappropriate to make use of the criminal sanction. Ideally, a reliable test could be developed and applied to each particular practical case to determine whether the conduct concerned should be subject to criminal punishment.

The aim of the present study is precisely that: to determine criteria (and so doing also a test) according to which a decision can be made about whether or not conduct should be criminalised. Initially, the Constitution,[4] the views of legal scholars[5] and case law will be examined to identify criteria that may be employed to make this determination. The next stage will be to develop a comprehensive test to be used when making the criminalisation decision.[6] The focus will then shift to an examination of the common law crime of incest, and to the application of the criteria and test to this crime.[7] An

---

[1] Burchell J *South African Criminal Law and Procedure Volume I: General Principles of Criminal Law* 3 ed (Burchell EM & Hunt PMA 1 ed) (1997) 1.
[2] Packer *The Limits of the Criminal Sanction* (1968) 18.
[3] According to Packer *The Limits of the Criminal Sanction* 3, the criminal sanction is a device aimed at addressing "the problem of trying to control anti-social behaviour by imposing punishment on people found guilty of violating rules of conduct called criminal statutes".
[4] Act 108 of 1996, hereafter "the Constitution". See § 2 2 *infra.*
[5] See discussion of Feinberg, Packer and Rabie §§ 2 3-2 5 *infra.*
[6] See ch 3 *infra.*
[7] Ch 4 and ch 5 *infra.*

attempt will be made to determine whether it is both justified and reasonable to reinforce the prohibition on sexual relations between persons closely related by blood, marriage or adoption, by declaring incest[8] to be a crime. It is hoped, however, that the conclusions reached in this regard may be applied more generally to other crimes in the quest to determine when the criminal sanction may be removed without undermining important societal values or frustrating significant state goals.

1 2 Dangers of indiscriminate utilisation of the criminal sanction[9]

The decision to criminalise conduct is not one that should be taken lightly. While it is sometimes apparent that the only way to adequately convey society's disapproval of harmful conduct is by declaring the conduct concerned a crime,[10] "the law's ultimate threat"[11] has unfortunately often been resorted to in other situations where the conduct concerned does not warrant such drastic and severe measures. This study will show that incest is a good example of the latter category of crimes.

It is also clear that the legislature's strategy of indiscriminately resorting to the criminal sanction as a way of regulating human conduct by compelling public obedience, has been largely unsuccessful in achieving the aim of decreasing the incidence of crime.[12] Indeed, the legislature has recognised the need for decriminalisation in the context of certain regulatory statutory offences.[13] It is submitted that this tendency needs to be extended to other crimes that have outlived their usefulness, including common law crimes such as incest.

---

[8] See §§ 4 1 and 4 2 *infra* for a detailed definition of the crime incest.

[9] To read more about the problem of over-criminalisation, see *LAWSA VI Criminal Law* § 9; Morris "The Overreach of the Criminal Law" in *Law, Crime and Community* (1975) 40-53; and Van der Vyver "The Overreach of the Criminal Law" in *Law, Crime and Community* (1975) 53-58.

[10] In such clear-cut cases, the benefits to society outweigh any interests the guilty individual may have in not being prosecuted and convicted. Although the rights of the accused are limited to a certain extent (see § 3 2 *infra*), such limitation may easily be justified.

[11] Packer *The Limits of the Criminal Sanction* 250.

[12] One of the reasons most frequently favoured to justify the imposition of criminal punishment on those who have been convicted of a crime, is general deterrence – that those threatened with punishment will abstain from committing crimes. See Burchell & Milton *Principles of Criminal Law* 2 ed (1997) 44 and the authorities cited there.

[13] For instance, the Decriminalization Act 107 of 1991 provides for the replacement of criminal offences with administrative action in certain circumstances.

The over-utilisation of the criminal sanction has various undesirable consequences.

If the legislature is too eager to resort to criminalisation to enforce obedience, the legitimacy of the whole criminal justice system is impaired. According to Packer,[14] only if the criminal sanction is reserved for the most serious forms of conduct, where there are no satisfactory alternatives to criminalisation, will the moral authority of the criminal law be upheld instead of being undermined. By using criminal punishment as a regulatory tool only, or merely as a means of expressing disapproval, the lawmaker effectively undermines the gravity and significance of a criminal conviction.[15] The stigma that accompanies a guilty verdict will no longer have the same force, and it will therefore be harder to utilise the criminal sanction effectively to persuade people to desist from committing crimes.

The public's lack of confidence in the criminal justice system is exacerbated by the perception that resources spent prosecuting trivial offences could better be used to ensure the speedy apprehension and prosecution of those committing serious and violent crimes. If many of the existing petty crimes were decriminalised, the state would no longer need to waste time and money enforcing them. The criminal justice system would have greater legitimacy, since police and judicial officers would be seen to focus on serious criminal matters rather than on trivialities.[16] The financial burden that the state bears in ensuring the smooth running of the criminal justice system should not be underestimated; and the greater the number of crimes that exist, the greater the cost. Packer addresses the heart of the matter when he says:

> "Every hour of police, prosecutorial, judicial and correctional time that is spent on marginal uses of the criminal sanction is an hour lost to the prevention of serious crime. Conversely, every trivial, imaginary, or otherwise dubious crime

[14] *The Limits of the Criminal Sanction* 261.

[15] Packer *The Limits of the Criminal Sanction* 272. See also 273 where Packer says: "The more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime."

[16] In the context of the decriminalisation of sodomy, Sachs J remarked: "[If sodomy is decriminalised], [t]he courts, the police and the prison system are enabled to devote the time and resources formerly spent on obnoxious and futile prosecutions, to catching and prosecuting criminals who prey on gays and straights alike" (*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC); 1998 2 SACR 556 (CC); 1998 12 BCLR 1517 (CC) § 130).

> that is removed from the list of criminal offenses [*sic*] represents the freeing of substantial resources to deal more effectively with the high-priority needs of the criminal justice system."[17]

Although it may be argued that a crime such as incest does not claim a particularly large slice of the criminal justice system's financial pie, such reasoning is unpersuasive. The same may be said of many other trifling and redundant criminal offences. Although enforcing each individual criminal prohibition may require a relatively negligible amount of time and money, the resources used add up. If there is a reluctance to consider economic reasons for decriminalisation with respect to each and every minor offence, the number of unnecessary offences will never be reduced.

The view that the limited resources of the police and the courts are being utilised inefficiently, as well as wide-spread frustration due to the often time-consuming court process, leads people to believe that they can only achieve justice by taking the law into their own hands.[18] Although it is not the direct focus of the present study, the undermining of the rule of law that accompanies this perceived need for vigilantism is an important priority that requires urgent attention on various fronts.

In addition to its economic cost, a proliferation of trivial crimes has a considerable social cost. Not only is there unnecessary suffering (inherent in punishment) imposed on all those convicted of crimes where non-criminal means of enforcement might be more appropriate,[19] but the mere stigma of a criminal record may be extremely prejudicial to convicted offenders themselves.[20] For instance, there can be little doubt that an incest conviction

---

[17] *The Limits of the Criminal Sanction* 259-260.

[18] Morris "Kangaroo Courts Demand Government Action" *The Star* (2002-01-21) at (http://www.iol.co.za/index.php?set_id=1andclick_id=13andart_id=ct20020121214147799G525179) (2003-02-03). The state is entrusted with the duty of exacting retribution against criminals on behalf of society, and if it is unable to do so, this may lead to the community's being understandably frustrated and feeling that there is no other option but to resort to self-help.

[19] This study will only peripherally attempt to address the issue of alternatives to the criminal sanction. Suffice it to say that the possibility of resorting to options other than punishment to enforce obedience is frequently not adequately taken into account by lawmakers. Options other than criminalisation will be considered in the context of incest only – see § 5 3 3 *infra*.

[20] This prejudice is apparent in a practical as well as symbolic sense. Practically speaking, it may for instance be far more difficult for persons with a criminal record to obtain employment, and they and their family may therefore suffer financially. On a symbolic level, the imposition by criminal law of status of "criminal" is regarded by Chidester *Shots in the Streets: Violence and Religion in South Africa* (1992) 68 as one of the means used to classify persons as "subhuman entities to be excluded, dominated or exploited." See also Van Zyl Smit "The Limits of the Criminal Sanction" (1986) *TRW*

is accompanied by a considerable stigma, since "our society has an intense moral abhorrence for sexual relations between close relatives."[21] As will be shown,[22] the aim of the punishment and stigma accompanying an incest conviction is to condemn perpetrators because they have violated a social or moral taboo, rather than because the conduct in question is harmful to others. Due to the intensity of social feeling against incest, the public humiliation of being exposed as having committed incest can be viewed as punishment enough – it is doubtful whether the additional reinforcement of a criminal sanction is required.[23]

1 3 The presumption against criminalisation

There is no doubt that all criminal laws are prejudicial to the individuals they affect.[24] It is therefore generally recognised that if the legislature resorts to criminalisation, it should be able to defend its decision.[25] According to Bayles,[26] the "burden of proof thus rests on those who favour criminal legislation; they must provide good reasons for overriding the presumption against it." If the legislature is to fulfil this duty of imposing criminal sanction sparingly and only in cases where it is deserved, the question is: how should the choice of deciding when the criminal sanction is appropriate, be made? How may the instances where the use of the criminal sanction is inappropriate be recognised in order to remove such conduct from the sphere of enforcement by means of the criminal law altogether?

188-191 for more on the symbolic significance of criminalisation. He notes at 190 that "the person who wishes to decriminalise, to limit the criminal sanction [in the area of immorality legislation] must … challenge the belief system itself."

[21] Milton *South African Criminal Law and Procedure Volume II: Common Law Crimes* 3 ed (Hunt 1 ed) (1996) 236.

[22] At § 5 2 2 *infra*.

[23] See in this regard Bailey & McCabe "Reforming the Law of Incest" 1979 *Crim LR* 749 756: "[T]he social taboo associated with incest would remain as, arguably, a more effective way of discouraging the conduct than that provided by criminal proscription." See also § 5 3 3 8 *infra*.

[24] See further §§ 3 2 1 and 3 2 2 *infra* on the rights of the accused affected by criminalisation.

[25] See Chaskalson *et al Constitutional Law of South Africa* (1999), where it is stated at 12-27: "By placing the burden of proof on the government we simply recognize the government's unmatched power to shape, manipulate and determine the content of our lives, and require it to justify the use of its power in areas in which the Constitution tells us we are notionally free."

[26] "Criminal Paternalism" in Pennock and Chapman (eds) *The Limits of Law: Nomos XV* (1974) 175.

1 4 The problem: how to identify criteria for determining the optimal use of the criminal sanction

In § 1 2 above it was stated that the legitimacy crisis of the criminal justice system has been brought about (in part) by the related problem of over-criminalisation. One way of tackling the issue is to attempt to create a hierarchy of crimes in order to "put first things first, but also, what is perhaps harder, to put last things last"[27] – in other words, to develop a way of identifying priority crimes and of distinguishing them from possible "candidates" for decriminalisation. This study addresses the question of over-criminalisation by identifying standards that should be applied in deciding whether to criminalise or decriminalise. It is argued that crimes without a convincing rationale as well as those that are ineffective in putting a stop to the evils that they are designed to prevent, or over-burdensome for persons subject to them, should be discarded.

Assuming the existence of a rational law-maker, who stops, looks and listens before legislating,[28] and assuming, too, that there are some grounds for criminalising conduct that carry more weight than others, the vexing question remains how to identify and distinguish good reasons for criminalisation from bad. And as will become clear, even if the rationale for criminalising particular conduct is theoretically laudable and justifiable,[29] this merely implies that criminalisation may be an option – it does not necessarily mean that the criminal sanction should be resorted to. It must also be established that imposing criminal punishment is practically feasible and effective, without being unduly onerous.[30]

The worthwhile reasons, if any, for punishing incest (and conduct in general) may only be distinguished from the bad if certain criteria relevant to such an investigation are developed and applied. Standards are also required

---

[27] Packer *The Limits of the Criminal Sanction* 260.

[28] Packer *The Limits of the Criminal Sanction* 3.

[29] See § 3 3 2 *infra* for a critical discussion of the various justifications for criminalisation. It will be argued that a criminal prohibition designed to prevent harm or serious offence to others is *prima facie* justifiable, whereas one that merely expresses moral outrage or paternalistically protects persons from the harmful consequences of their own decisions, is not.

[30] The second stage of the inquiry is aimed at determining the reasonableness of using criminal punishment (see § 3 3 3 *infra*).

to determine whether resorting to the criminal sanction is reasonable in a particular instance.

When determining guidelines for (de)criminalisation, there are always many competing values, rights and interests at stake. These include the rights of accused persons and their victims (if applicable), societal interests, state interests in retaining the criminal sanction, and practical considerations. On what grounds may one choose between them? What, or who, should have the final say? Society, and hence criminal law, is complex and dynamic,[31] which means that any criteria or test developed for determining the optimal use of the criminal sanction must be flexible and be able to be adapted in accordance with changing societal priorities. Criminalisation has far-reaching effects, and, for this reason, a decision as to its utilisation should surely be a well-reasoned, non-arbitrary one. A meaningful and workable solution must be found to the problem of balancing the conflicting interests, rights, principles and values that are at stake when criminalisation decisions are made.

Choosing between multiple independent and irreconcilable claims is no easy task.[32] Some interests must perforce take precedence over others – it is not always possible to compromise and strike a balance between competing demands. But which interests and values should be deemed as deserving of more consideration? Sometimes the answer to this question is simple: the limitation for a certain period of a cold-blooded murderer's right to physical freedom is clearly justified by society's interest that murderers be punished for depriving others of the right to life.[33] And if the principle of *de minimis non*

---

[31] An example of the dynamic evolution of criminal law is the way in which a common law crime such as *crimen iniuria* has been utilised to protect persons against racially discriminatory remarks that infringe upon their human dignity – see *S v Steenberg* 1999 1 SACR 594 (N), where the joking use of the word "kaffir" was sufficient to warrant conviction, since it was shown that there was the necessary *dolus eventualis* to infringe the complainant's dignity. Changing societal values are reflected by the shift in types of conduct criminalised by this particular crime.

[32] Woolman in Chaskalson *et al Constitutional Law of SA* 12-56 goes so far as to say that balancing of rights is impossible, since "[h]uman goods are often incommensurable." In making the "[h]ard choices as to which human good we pursue", he advocates neither the adoption of a "strict hierarchy of goods" nor an *ad hoc* approach; instead, he suggests a combination of the two (see Chaskalson *supra* 12-57 to 12-64 for more details).

[33] For instance, it was decided in *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC); 1995 2 SACR 1 (CC) at § 123 that the right to life is important enough that those who violate it may be subject to life imprisonment.

curat lex is applied, society's interest in seeing all those who steal being convicted of theft and punished may have to yield to the right to freedom of a person who steals a worthless scrap of paper.[34] However, all cases are not so clear-cut.

1 5 **Addressing the problem: approach to be followed**

An attempt will be made to answer the questions raised above by initially identifying and isolating a number of criteria to be taken into account in the criminalisation determination, and then incorporating them into a test to be used in deciding whether state punishment of any particular conduct is both justifiable and reasonable.

To this end, this study commences[35] with an analysis of relevant constitutional provisions. Since the Constitution is supreme, it is an essential source in the quest for standards against which the decision whether to (de)criminalise can be tested. It is particularly hoped that the factors outlined in the limitation clause of the Constitution may be used as a point of departure for the development of guidelines to be considered when balancing competing interests in the criminal law context.

The next stage[36] is an evaluation of selected relevant academic literature. These sources are used in conjunction with the Constitution as the basis for drawing up a possible list of guidelines, and hence a test, that can serve as a basis for determining the desirability of criminalisation in any specific case. The focus is on critically discussing the opinions of various legal scholars regarding the proper use of the criminal sanction. Examples from relevant case law are also considered briefly throughout the following chapters. The purpose is to illustrate the application of the theoretical principles examined, as well as to evaluate the standards used by our courts in deciding whether the criminal sanction may be resorted to in a particular

[34] *S v Kgogong* 1980 3 SA 600 (A).
[35] In § 2 2.
[36] In §§ 2 3-2 5 *infra*.

situation.[37] An attempt is made to establish whether these judicial standards are the same as (or similar to) those identified in the Constitution and by academics.

Following this, a general test for evaluating the desirability of criminalisation is developed in chapter three. Although this test is fairly similar to the limitations test in section 36 of the Constitution, factors especially relevant to criminal law are taken into account in its formulation. It involves a step-by-step process that aims to maintain a fair balance between the competing rights and interests of the state, society, the victim and the accused. The ultimate goal is to evaluate whether the benefits to society (including the victim, if any) outweigh the negative consequences produced by criminalisation – ie, whether criminalisation will bring about "social or personal damage greater than it was designed to prevent".[38] By evaluating the cost of criminalisation against its advantages, it is hoped to reach a conclusion as to whether specific crimes such as incest should be decriminalised in their entirety, or whether certain aspects thereof may be retained without undermining the idea that the criminal sanction should be "reserved for what really matters."[39]

In addition to assessing, and borrowing from, the work done by others on the proper use of the criminal sanction, this study aims to distil some uniquely South African values and priorities that should be considered when determining whether particular forms of conduct should (continue to) be criminalised. For instance, in the development of general criteria for criminalisation, individual autonomy has often been regarded as a value that trumps all other rights or values.[40] For this study, however, in keeping with

---

[37] Eg *Jordan and Others v S and Others* 2002 6 SA 642 (CC); 2002 11 BCLR 1117 (CC) (prostitution); *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC); 2002 3 BCLR 231 (CC) (use of cannabis); and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (sodomy).

[38] Canadian Committee on Corrections in *Towards Unity: Criminal Justice and Corrections* (1969) 11-12 quoted in Burchell & Milton *Principles of Criminal Law* 33.

[39] Packer *The Limits of the Criminal Sanction* 250.

[40] As is commonly the approach of American authors, for example Feinberg *The Moral Limits of the Criminal Law* (1984), discussed in § 2 3 *infra*.

recent Constitutional Court decisions,[41] the value of human dignity is regarded as a value worthy of special protection. It should only be limited if there are compelling reasons for doing so, and, where necessary, human dignity should be given precedence over other values such as freedom.

After examining a number of sources that concern themselves with the problem of when the criminal sanction should be used, the focus of this study shifts to the examination of the desirability of the continued criminalisation of a single crime, incest. Before determining whether incest should be retained as a crime, it is essential to achieve clarity on the precise scope of the common law crime of incest, as well as of the Law Commission's proposed extension of the incest prohibition.[42] In addition, the history of the crime is investigated and a comparative analysis of incest in other jurisdictions is undertaken.[43] The objective is to establish whether there is conduct criminalised as incest in South Africa that is not regarded as worthy of punishment in other open and democratic societies as well as to identify a universal rationale for prohibiting incest, if any.

In chapter five, common law incest is then assessed in terms of the test developed in chapter three. This includes a detailed examination of the reasons advanced for justifying the criminalisation of incest.[44] The particular conduct to which each distinct justification applies is also identified. This is done in an attempt to separate the forms of incest where criminalisation may indeed be justified on balance, from those where criminalisation is unwarranted *per se*. Instances of incest where criminalisation achieves worthy state objectives are singled out. Whether justified criminalisation of incest in fact is necessary or desirable on policy grounds is then considered.[45]

---

[41] See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC); 2000 8 BCLR 837 (CC), where O'Regan J said:
"The value of dignity in our Constitutional framework cannot therefore be doubted ... Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights" (§ 35; footnotes omitted).

[42] §§ 4 2 and 4 3 4 2 *infra*.

[43] In §§ 4 3 and 4 4 *infra*.

[44] See § 5 2 *infra*.

[45] § 5 3 *infra*.

Once again, the criteria and test developed by examining the literature facilitate this task.

After the balancing process in accordance with the proposed test has been undertaken in the context of incest, a submission regarding the continued criminalisation of common law incest is then made. The outcome of applying the "criminalisation criteria" and test identified makes it apparent that the present crime is beyond salvation – the decriminalisation of the common law crime of incest in its entirety is advocated. Both criminal and extra-judicial alternatives to retaining incest as a crime are also outlined at this stage.[46]

The study concludes[47] with a summary of the investigation undertaken and aims to evaluate the extent to which its stated objectives were achieved. It includes recommendations for future study as well as final proposals regarding the optimal use the criminal sanction.

1 6 **Motivation for focusing on common law incest**

There are various reasons for using the common law crime of incest as a test case for investigating the circumstances in which it is inappropriate for the criminal sanction to be used.

First, in South Africa the various forms of conduct punishable as incest are extensive and diverse, encompassing both the trivial[48] and the potentially extremely harmful.[49] Since this is the case, various underlying justifications for the criminalisation of incest have been advanced, ranging from the prevention of harm to the mere enforcement of a particular morality.[50] Taking

---

[46] § 5 3 3 *infra*.

[47] In ch 6.

[48] Consensual sexual relations between an adult son and his mother-in-law, for example.

[49] Sexual intercourse between a father and minor daughter, which, although it may be consensual in the narrow sense of the word, is subject to a real danger of abuse of authority. See § 4 2 *infra* for a detailed discussion of the elements of the crime of common law incest.

[50] See, eg, in this regard Bailey & McCabe 1979 *Crim LR* 749; Bratt "Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?" 1984 *Family LQ* 257 267-296; Labuschagne "Dekriminalisasie van Bloedskande" 1985 *THRHR* 435 452-454; Labuschagne "Teoretiese Verklaring van die Bloedskandeverbod" 1990 *TSAR* 415; Temkin "Do We Need the Crime of Incest?" 1991 *Current Legal Problems* 185 188-193; Wolfram "Eugenics and the Punishment of Incest Act 1908" 1983 *Crim LR* 308 315-316; and Milton *SA Criminal Law & Procedure: Common Law Crimes* 235-237.

into account the wide scope of the incest prohibition, the reasons advanced for criminalising incest are critically examined in detail. The aim is to identify the true rationale for the incest prohibition as well as to separate the worthwhile motivations from those that seem unsatisfactory reasons for retaining incest as a crime. It is submitted that the diverse spectrum of conduct criminalised and the correspondingly disparate rationales for criminalisation make incest an ideal example for testing the hypothesis that some justifications for criminalising conduct are better than others.

Second, even if criminalising incest is justified in principle, a further question remains: is the specific crime of incest a reasonable limitation of the rights of those subject to it? It is argued that it is possible for the state (and others) to apply a variety of alternative (criminal and non-criminal) sanctions and pressures to inhibit the incidence of incest, if so desired. Thus an examination of incest is once again an appropriate means to assess the assumption that the criminal sanction should be used only as a last resort, where other alternatives are not available, ineffective or unduly onerous.

2 EVALUATION OF SOURCES FOR THE DEVELOPMENT OF A TEST

2 1 Introduction

The vague and general assertion has been made that only where the beneficial consequences of a criminal sanction outweigh its negative aspects, can criminal legislation truly be regarded as justified and reasonable. But how may this initial insight be expanded upon to practically determine whether the criminal sanction is being used optimally in a particular instance? There are various sources that may yield valuable insight into the process of giving good reasons for criminalisation, and which may assist in the formulation of guidelines as to what conduct ought to be criminalised and what ought to be beyond the reach of the criminal law.

The Constitution is a logical starting point in the quest for criteria, since all law and conduct, including criminal prohibitions, must be compatible with it.[51] As will be shown at §§ 2 2 and 3 1 below, section 36 of the Constitution is especially useful in this regard.

To enable the application of the constitutional criteria in the criminal law context, insights gleaned from the Constitution will be supplemented by the views of various academic writers concerning when the criminal sanction should be applied. The question of when the criminalisation is appropriate and desirable has not sufficiently come under the spotlight since the Constitution came into force; thus there is clearly scope for innovative work in this field.

For the purposes of this study, the discussion of legal authors will be confined to the approaches of Feinberg, Packer and Rabie. Although there is a variety of other academic literature that addresses the problem of criminalisation,[52] the three writers chosen are representative of the work done

---

[51] S 2 of the Constitution states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[52] Mill *On Liberty* (Shields ed) (1956); Hart *Law, Liberty and Morality* (1962); Hughes "Morals and the Criminal Law" 1962 *Yale LJ* 662; Devlin *The Enforcement of Morals* (1965); Mitchell *Law, Morality and Religion in a Secular Society* (1967), especially 52-69; Sartorius "The Enforcement of Morality" 1972 *Yale LJ* 891; Bayles "Criminal Paternalism" in *The Limits of Law* (Pennock & Chapman eds) (1974) 174-188; Morris *Law, Crime and Community* 40; Van der Vyver *Law, Crime and Community* 53; Bentham *An Introduction to the Principles of Morals and Legislation* (Burns &

in this field thus far. Feinberg and Packer both write from an American perspective, while the work of Rabie has been chosen to illustrate the South African approach.

The ideas of each chosen author will be examined separately, since their perspectives on the issue differ, and the viewpoint of each yields individual insight into how this problem may be approached. Feinberg, discussed at § 2 3 below, focuses on the circumstances under which criminalisation may be justified in principle, referring mainly to the underlying rationale for criminalisation. On the other hand, Packer[53] and Rabie[54] consider the criminalisation question from a more pragmatic perspective, emphasising the question of whether it is appropriate and desirable to criminalise in a particular situation. As will be seen at § 3 3 below, both angles are indispensable for the formulation of a comprehensive test for determining the appropriate use of the criminal sanction: it is necessary to establish not only whether conduct *may* be criminalised, but also, if criminalisation is indeed justified in theory, whether the criminal sanction *should* be used in practice.

It has been noted at § 1 4 above that the problem of conflicting interests – those of the victim, the accused, the state and society as a whole – is inherent to the issue of the optimal use of criminal punishment. A cost-benefit analysis is necessary to determine the proper limits of the criminal sanction. Such analysis is hampered by the fact that there is a significant grey area where it is virtually impossible to single out which interests ought to be protected at the expense of others – the assistance of certain guidelines is indispensable. By the end of the discussion of the Constitution and legal authors that follows, there should be more clarity on what these guidelines could be. In turn, the identification of criteria and standards used in the Constitution and by academic writers should facilitate the formulation of a more generally applicable test for deciding on the optimal use of the criminal sanction.

Hart eds) (1982); Hodson *The Ethics of Legal Coercion* (1983); Dash "Philosophy of Punishment" 1986 *TRW* 194; Van Zyl Smit 1986 *TRW* 186; Mureinik "Law and Morality in South Africa" 1988 *SALJ* 457; Dworkin *Taking Rights Seriously* (1977); *Law's Empire* (1986) and *A Matter of Principle* (1985); and Lötter *Moraliteitswetgewing en die Suid-Afrikaanse Strafreg* (1991).

[53] See § 2 4 *infra*.

[54] At § 2 5 *infra*.

2 2 Constitution

2 2 1 *Weighing up*

As has already been noted, no discussion of the limits of the criminal sanction in the South African context would be complete without mention of the impact of the Constitution. Since the Constitution is the supreme law of the country and any law inconsistent with it is invalid,[55] any law convicting and punishing people for engaging in forbidden conduct must also be in line with its fundamental constitutional principles and underlying values. There are a number of core fundamental values underlying the Constitution, namely openness, democracy, human dignity, freedom and equality.[56] Any weighing-up of competing constitutional rights needs to be done within the framework of these values, and must attempt to advance them wherever possible.[57]

It is also apparent that the decision to criminalise or to decriminalise seems to require a process whereby the relevant rights and interests at stake are weighed against each other. The social benefits of the criminal sanction, which include the interest of society in being protected against certain forms of antisocial conduct and in feeling appeased by the knowledge that persons who act in such a manner will be punished, must be weighed against the cost thereof, both to the person being punished and to society as a whole.[58] The unpleasant consequences for the person being punished may include loss of physical freedom, deprivation of property and undermining of human dignity due to the stigma attached to being labelled a criminal.[59]

On the one hand, there are interests or values so important and fundamental that society deems those who threaten or impair them as deserving of retribution and punishment, considerations outweighing any

---

[55] S 2 of the Constitution.

[56] Chaskalson *et al Constitutional Law of SA* 12-17. These values are constantly emphasised in the Bill of Rights as being central to South African society – see, eg, s 1(a), s 7(1), s 36(1) and s 39(1)(a).

[57] According to s 39(2) of the Constitution, when courts interpret legislation or develop the common law they must "promote the spirit, purport and object of the Bill of Rights". Especially important in interpreting the Bill of Rights itself are "the values that underlie an open and democratic society based on human dignity, equality and freedom" (s 39(1)(a)).

[58] This includes the social cost of criminalisation as well as its economic cost – considerable resources need to be expended for even minimally efficient enforcement of a criminal sanction. See also § 2 4 6 *infra*.

[59] See §§ 3 1 and 3 2 *supra* for more on the fundamental rights infringed by the imposition of criminal punishment.

interests that offending individuals may have in avoiding such punishment.[60] On the other hand, in instances where a value or interest is relatively insignificant, and the worth of its protection disproportionate in comparison to the drastic and far-reaching infringement of individual rights entailed by conviction, criminal punishment should not be utilised. The cost simply outweighs the benefit.[61]

But what about situations that are less straightforward, where the interests at stake appear to be fairly commensurate? In such hard cases it would be useful to be able to determine where the particular societal value protected by criminalising the conduct in question is situated in relation to the position of the interests of the accused (or society) that are infringed by such prohibition.[62]

Underlying constitutional values may be of assistance in this regard.[63] However, in instances where both competing interests advance (some of) the fundamental constitutional values, the task is somewhat more complicated. It is submitted that, although it may not be possible to discern an explicit hierarchy of rights in the Bill of Rights,[64] the Constitution contains sufficient implicit indications of the comparative status of rights to assist in the balancing process. There may be various ways to determine the position of a particular right or interest in relation to others. For instance, it is apparent that human rights not recognised in chapter two of the Constitution would in all likelihood be regarded as less worthy of protection that those that are so recognised.[65]

---

[60] See n 33 *supra*.

[61] In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) at § 37-38, it was decided in the context of the decriminalisation of sodomy, that the conflict between the state's desire to combat "immoral" conduct, and the rights of the accused not to be subject to the stigma of the criminal sanction, should be resolved in favour of the accused. It will be argued in ch 5 *supra* that incest is also an example of such a crime.

[62] As will become clear at § 2 3 *infra*, Feinberg's hierarchy would probably place human autonomy at the top, followed by the right not to be subjected to harm or offence from others, while the right to state protection from the harmful consequences of one's own voluntary conduct and the right to protection of one's moral sensibilities would be low on the list. See also Rabie (Rabie and Strauss *Punishment: An Introduction to Principles* 5 ed (1994) 102-103 referred to at § 2 5 1 *infra*) for the values that he prioritises.

[63] See *supra*.

[64] But see n 66, where it is noted that the interim Constitution (Act 200 of 1993) did indeed contain the equivalent of a rights hierarchy in its limitation clause, s 33.

[65] It may be argued in favour of the decriminalisation of incest that restricting the sexual relations permitted in the family context deprives people of the right to a distinctive variant of family life –

It is further proposed that rights that may not be derogated from, even in a state of emergency, such as human dignity and life, have more weight than those from which derogation is permitted.[66] Another consideration may be whether a right is limited by other constitutional provisions – if so, such provisions may take precedence over it.[67] Similarly, rights that are textually unqualified may enjoy priority above those that are internally qualified by language that "specifically demarcates their scope".[68] A clear indication that a right may have to yield to another is where it is stated explicitly that the right in question may not be exercised in a manner inconsistent with any provision in the Bill of Rights.[69] Rights that are not limited in this way might well be enforced at the expense of rights so limited. The Constitution also provides that some rights may only be exercised subject to legal regulation,[70] – a further sign that enforcement of another, non-limited, right may be preferred.

It must be emphasised that the considerations outlined above are merely indications of how the process of determining whether there has been a violation of a fundamental right might unfold, and are not necessarily decisive. Although the underlying values of the Constitution as a whole, as well as the status afforded to specific constitutional rights, may have some bearing on determining the outcome of the process involving the weighing up the rights of

---

namely incestuous family life. However, this particular right is not explicitly recognised in the Constitution (but see also n 163 and § 5 2 2 4 2 *infra*).

[66] See s 37 of the Constitution. It may also be noted that, in terms of s 33(1) of the interim Constitution, certain classes of rights and freedoms were more highly protected than others. S 33(1)(b) stated that rights including dignity, security, conscience, religion, thought, belief, opinion, voting, campaigning, freedom from servitude, unlimited detention, arrest without due process, and freedom of expression, association, assembly, movement and information where these rights relate to political activity, could only be limited if such limitation was reasonable and necessary. They received greater judicial protection than the rights outlined in s 33(1)(a), eg privacy, life, residence, labour relations, property, language, education, citizenship, access to court, environment and economic activity, where limitation was permissible, provided it was reasonable (Chaskalson *et al Constitutional Law of SA* 12-9). However, it must be noted that this "express hierarchy of constitutional rights" found in the limitations clause of the interim Constitution has been eliminated from the final Constitution (Chaskalson *et al supra* 12-13).

[67] See s 36(2) of the Constitution and, eg, *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC), where it was held (at § 14) that legislation allowing amnesty to be granted to the perpetrators of gross violations of human rights was permissible, in that the constitutional right of access to court was limited by the postamble (or epilogue) of the interim Constitution.

[68] De Waal *et al The Bill of Rights Handbook* 4 ed (2001) 164. An example of an internally limited right is s 17, which protects the right to assembly only where such assembly is peaceful and unarmed.

[69] Eg s 30 and s 31. If there should be a conflict between, for instance, the right to language or culture and the right to dignity, dignity would in all likelihood take preference.

[70] Eg the right to choose one's profession – see s 22 of the Constitution.

the accused against those of society, establishing the relative merit of rights is an exercise that must be undertaken in context.

2 2 2 *Limitations clause*

Another very important aid in the quest for a uniquely South African way to demarcate the proper use of the criminal sanction, is section 36 of the Constitution, the limitations clause.[71] Section 36 recognises that compromise is not always possible – there will invariably be situations where it will be necessary to choose between competing rights or interests constitutionally recognised as worthy of (equal) protection. The limitations clause contains guidelines that must serve as a basis for balancing rights against one another and deciding which should weigh more heavily in specific circumstances.

If criminal punishment necessarily entails some degree of limitation (or deprivation) of freedom, dignity, etc, as it is submitted it does,[72] punishment must invariably also involve the infringement of constitutionally protected human rights of the accused. This has a crucial constitutional implication: the Constitution requires that in any situation where a constitutionally protected right is limited, such limitation needs to be convincingly justified if the law limiting such right is not to be declared invalid. In the case of a criminal prohibition, it is the state that would bear the onus of such justification. I am thus of the view that there is a constitutional imperative to restrict the use of criminal punishment to cases where the state is able to justify its use in terms of section 36 of the Constitution. The conclusion that resorting to the criminal sanction is an absolute last option is supported by the limitations clause itself. Analysis and application of the factors outlined in section 36 in the criminal law context strongly suggests that the limitation of fundamental rights is not something to be taken lightly. Rights should only be limited by resorting to criminal punishment in truly deserving cases where there is no other option but to do so.

---

[71] See § 3 1 *infra* for the full text of s 36 of the Constitution.
[72] See also §§ 3 2 1 and 3 2 2 *infra* for more on rights that may possibly be at stake.

If the argument is correct that, in principle, the Constitution requires the state to show that the use of any criminal sanction is a reasonable and justifiable limitation of the accused's fundamental rights, it may be asked how the state may go about doing this. Naturally, section 36 of the Constitution will be the point of departure, but it is a sketchy and incomplete guide for establishing whether the criminal sanction is justified and reasonable in a specific situation. Fortunately, it will become apparent that the criteria identified in the limitations clause as relevant in the balancing process for determining whether limitation of a right is constitutionally permissible, are echoed to a great extent by the literature analysed in §§ 2 3 to 2 5 below in the context of criminal punishment. Important considerations suggested by the various legal academics complement the guidelines in the limitations clause, in that they attempt to give substance to how one may practically go about determining whether the criminal sanction should be used in any particular instance. What follows is a closer analysis of the views of these writers. By combining the constitutional imperatives contained in the limitations clause with the standards proposed by the writers discussed below, it is hoped that it will be possible to formulate a comprehensive but simple test for determining whether the state has managed to show that criminalisation is indeed justified, and whether, if criminalisation is indeed theoretically permissible, the state should have recourse to the criminal sanction in the specific circumstances.

2 3 **Writers: Feinberg**

2 3 1 ***Introduction***

In the four volumes of his work *The Moral Limits of the Criminal Law*, Feinberg considers the broad question: "What sorts of conduct may the state rightly make criminal?"[73] He recognises that the purpose of the criminal prohibition is to "discourage the particular antisocial behavior [*sic*] that is forbidden",[74] and his objective is to come to an understanding of the forms of conduct that can legitimately be prohibited and punished. If a particular (criminal) legal prohibition oversteps the limits of such moral legitimacy, Feinberg would regard the prohibition itself as a serious moral crime. This is because he agrees that the stigma attached to the criminal sanction and its effect on human interests are inherently extremely destructive and therefore always need to be justified.[75]

Feinberg writes from a liberal perspective. He is committed to "the presumption in favour of liberty"[76] (liberty being the absence of legal coercion). He uses this point of departure to determine what kinds of penal laws (criminal sanctions) have sufficient weight to justify a limitation of individual liberty.[77] Each coercion-legitimising principle he considers is not a sufficient condition for criminalisation in itself, and may not on its own be decisive in determining when use of the criminal sanction would be appropriate.[78] However, each of the liberty-limiting principles discussed below may according to Feinberg be regarded as putting forth relevant reasons for justifying legal coercion in principle.

---

[73] *The Moral Limits of the Criminal Law Volume I: Harm to Others* (1984) 3.
[74] *Harm to Others* 20.
[75] *Harm to Others* 4. See also Bayles "Criminal Paternalism" in *The Limits of Law* 175.
[76] *Harm to Others* 14.
[77] *Harm to Others* 9.
[78] Although use of criminal coercion may be theoretically justified, it is still necessary to ascertain whether it is practically necessary in a particular case. See discussion of proposed test § 3 1 *infra*.

2 3 2 *"Harm to others principle"*

Feinberg defines this principle as follows:

> "It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values."[79]

Feinberg is of the view that criminal prohibitions are generally directed towards prohibiting conduct which causes harm to people. Harm he defines as the thwarting, setting-back or defeating an interest of another (a thing in which that person has a stake)[80] by causing the interest to be in a worse condition than it would otherwise have been in had the invasion not occurred at all.[81] Before the "harm principle" can apply, offenders should not only have harmed another person in the sense described above, but also have *wronged* such persons by violating their right(s)[82] in an indefensible (unjustifiable and inexcusable) manner.[83] Only where setbacks to interests ("harms") are also wrongs[84] can we speak of "harm to others" in Feinberg's sense.

However, Feinberg does not regard the harm-to-others principle as either a necessary or sufficient condition for justifying state coercion.[85] Indeed, as Feinberg himself admits,[86] on its own the harm principle is of little use as a practical guide to legislative decisions about the desirability (or not) of criminalising particular conduct. The harm principle must therefore be supplemented. Feinberg proposes various strategies (which he calls "mediating maxims") for coping with the "gaping uncertainties about how to

---

[79] *Harm to Others* 26.
[80] *Harm to Others* 34.
[81] *Harm to Others* 33 and 34.
[82] Analysed as a valid claim against another's conduct. A claim is valid when its rational support is decisive, not merely relevant and cogent – Feinberg *Harm to Others* 215.
[83] Feinberg *Harm to Others* 34.
[84] Thus "harms" which are not wrongs – such as set-back interests produced by justified or excused conduct (such as killing somebody in private defence – see, for instance, *Ex parte die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A), as well as *Harm to Others* 35-37) – and wrongs that are not "harms" – violations of rights that do not set back interests (such as where there is harmless trespass on land which violates the property rights of the landowner and thereby "wrongs" him, "even though it does not harm the land, and might incidentally improve it" – *Harm to Others* 34-35) – are excluded (see also *Harm to Others* 215). It is clear, therefore, that Feinberg sees *volenti not fit iniuria* as a "mediating maxim for the application of the harm principle" – a necessary implication of his emphasis on personal liberty and freedom of choice (see *Harm to Others* 215).
[85] *Harm to Others* 10; 187.
[86] *Harm to Others* 187.

apply the harm principle in tricky circumstances".[87] He outlines a number of supplementary criteria that may be used as "rules of thumb" when the legislature is deciding whether to criminalise:

- the greater the *gravity* of the possible harm,[88] the less probable its occurrence need be to justify conduct threatening to produce it;
- the greater the *probability* of harm, the less grave the harm need be to justify coercion;
- the greater the *magnitude of the risk* of harm (which consists of its gravity and probability), the less reasonable it is to accept the risk;
- the more *useful* (or valuable) the dangerous conduct (both to the actor and others), the more reasonable it is to take the risk of harmful consequences; and
- the more *reasonable* the risk of harm (the danger), the weaker the case for prohibiting conduct creating it.[89]

The *relative importance* of the harm must also be considered. In cases where the interests of more than one person are at stake, Feinberg recognises the need for the legislature to balance or compare the relative importance of conflicting interests in order to determine whether a "harm" (setback to interests) can also be viewed as a punishable wrong.[90] Relevant considerations include:

- how "vital" or important the particular interest is in the "interest network" of the one possessing it;
- the degree to which other interests, both public and private, reinforce the right;
- the inherent moral quality of the interest; and[91]
- whether the interest is a purely personal one or an external one.[92]

---

[87] *Harm to Others* 188.

[88] Feinberg advocates the use of the maxim *de minimis non curat lex* to avoid the need for resorting to the criminal sanction in cases where the harm is genuine, but so minor as to be trivial. He equates the use of the criminal sanction to punish conduct such as rudeness as "smashing mosquitoes with a club" (*Harm to Others* 188-200).

[89] Feinberg *Harm to Others* 216; see also detailed discussion of assessing and comparing harms 187-193.

[90] *Harm to Others* 203.

[91] Feinberg *Harm to Others* 202-206 and 217.

Finally, since criminal sanctions always invade citizens' interest in liberty by closing options to them,[93] legal prohibitions may be justified by the harm principle only if a greater harm would be caused to victims if the conduct were not proscribed. It is harder for the legislature to justify closing a "fecund" option (one which closes off many other options too) by prohibiting certain conduct on pain of punishment, as opposed to an alternative that limits freedom only very slightly.[94]

It is clear, however, that even by employing the guidelines outlined above that seek to clarify when punishment based on the harm principle would be justified, Feinberg's harm principle alone will not legitimise prohibiting conduct on the grounds that it is offensive to others, harmful to actors themselves or inherently immoral. These justifications will be considered below.

2 3 3 *"Offence principle"*

Feinberg's definition of the offence principle is:

> "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense [*sic*] (as opposed to injury or harm) to persons other than the actor and that it is probably a necessary means to that end."[95]

Feinberg defines offence in this context objectively, as any one of a number of unpleasant and disliked mental states or conditions (such as disgust, shame, hurt and anxiety), that is caused by the wrongful (right-violating) conduct of others.[96] Therefore, while it is necessary that there *be* a wrong, in Feinberg's sense, the victim need not *feel* wronged for the offence principle to come into play.

Feinberg recognises that the offence principle is extremely dynamic, dependent on prevailing cultural standards and subject to change as society

---

[92] Generally speaking, if there is no distinction between the interests based on the first three criteria mentioned, Feinberg suggests that precedence be given to a personal interest (*The Moral Limits of the Criminal Law Volume IV: Harmless Wrongdoing* (1988) 57-61.

[93] Liberty is always limited by legal prohibitions in that people's options are narrowed by not permitting them to act in a certain manner – see Feinberg *Harm to Others* 206-214.

[94] Feinberg *Harm to Others* 206-214 and 217.

[95] *The Moral Limits of the Criminal Law Volume II: Offense to Others* (1985) 1.

[96] *Offense to Others* 1-2.

itself does.[97] Although it appears that people are generally most affronted when the offence concerns public nudity or sexual behaviour, the range of potentially offensive conduct is far wider than this.[98] What all "offended states" have in common is that they are unpleasant to those who suffer them, and they are nuisances, inconveniencing victims by making it difficult for them to enjoy work or leisure at a place which they cannot reasonably be expected to leave in the circumstances.[99]

Feinberg views offensive conduct as a minor evil in the sense that it is a "severely irritating nuisance" at worst – certainly not any "sort of menace to individual or collective interests".[100] Although offensive conduct wrongs its victims, Feinberg acknowledges that due to the fact that offence is almost always a less serious thing than harm, punishing "offenders" will most often also be a disproportionately greater evil than the offended mental states they cause their "victims". Thus it is not easy to justify why criminal law need concern itself with defining crimes of offensiveness at all, and it is clear that the criminal sanction should only be resorted to with extreme caution in cases of offence – preferably as a last resort where alternative less restrictive sanctions fail. In many cases, social sanction and public opinion are sufficient to keep more extreme forms of offence in check. Criminal punishment should be reserved as a back-up threat in most cases of offence-related crime, to be employed against persons not so much because they have caused offence, but because they have defied authority by persisting in prohibited conduct.[101] Even in cases where the criminal sanction is employed to punish offensive conduct, Feinberg believes that the penalties should be light.

Thus not all forms of offensive conduct that annoy or inconvenience others should be punished. Feinberg advocates the application of a qualified offence principle, whereby only offensive conduct satisfying certain criteria would warrant punishment. This requires a legal balancing act to weigh up

---

[97] *Offense to Others* 47-48.

[98] See Feinberg's graphic example of the ride on the bus. The hypothetical passenger is confronted with scenes ranging from coprophagia and blasphemy to sexual sadism, mutilation of corpses and people carrying banners with Nazi slogans (*Offense to Others* 10-13).

[99] Feinberg *Offense to Others* 21-22.

[100] *Offense to Others* 5.

[101] Feinberg *Offense to Others* 2-3.

the relative interests of "offenders" and their "victims". Relevant considerations for establishing whether criminalisation should be resorted to include:

- the *seriousness* of the offensiveness, which is determined by:
  - the *magnitude* of the offence, which concerns the *intensity* and *duration* of the repugnance produced, as well as its *extent* (whether there is widespread susceptibility to a given type of offence, while discounting abnormal susceptibilities);[102]
  - whether the offence can *reasonably be avoided*; and
  - whether or not the witnesses have willingly assumed the risk of being offended – application of the *volenti non fit iniuria* maxim.
- the *reasonableness* of the offending party's conduct, which depends on:
  - the conduct's *personal importance* to the actors themselves[103] and its *social value* generally (which includes the importance of *freedom of expression*);
  - the availability of *alternative times and places* where the conduct in question would cause less offence; and
  - the extent, if any, to which the offence was caused by *spiteful or malicious motives*.[104]

In Feinberg's opinion, if the above criteria are taken into account, criminal laws prohibiting pornography,[105] obscenity,[106] any kind of private sexual conduct and prostitution are but a few of the cases where offensiveness as justification for the criminalisation would fail. On the other hand, laws aimed at punishing public nuisances with an identifiable victim,

---

[102] Feinberg *Offense to Others* 26, 35.

[103] Feinberg uses the example of an activity by which the actor earns his living, so that curtailing it would harm his economic interest (*Offense to Others* 37). Possible examples would be prostitution or "stripping" – see *Jordan and Others v S and Others* 2002 6 SA 642 (CC) §§ 23-26 and §§ 54-56, where the Constitutional Court considered and rejected this argument in the context of prostitution.

[104] Feinberg *Offense to Others* 26, 37-44.

[105] Which he discusses in detail in Chapter 11 of *Offense to Others*.

[106] Unless it amounts to an offensive nuisance in that the victim is constantly being bombarded with obscenities – see Feinberg's detailed discussion of obscenity in Chapters 13-16 of *Offense to Others*.

which may range from solicitation and voyeurism[107] to disturbing the peace, might well be justifiable.[108]

Feinberg differentiates between the manifestations of offence described above, which he calls "offensive nuisances merely", where criminalisation would be inappropriate unless the conduct was serious and unreasonable and a specific victim could be identified,[109] and so-called "profound offences". The latter category refers to conduct which is not trivial and need not be perceived personally for it to cause offence. Examples would be the desecration of religious icons, the brandishing of symbols of race hatred and genocide, or the violation of a corpse.[110] It is submitted that offensive crimes in this category may also include attempting to commit the impossible, such as attempted murder[111] or attempted rape[112] of a corpse.[113] Feinberg is uncertain whether profound offences such as those above, even if they are unwitnessed and not pointedly personal,[114] warrant criminalisation on the basis that the mere

---

[107] Although in South Africa voyeurism is punishable as *crimen iniuria* even if "victims" are unaware of the fact that they are being observed – *R v Holliday* 1927 CPD 395 401-402 and *R v Daniels* 1938 TPD 312 – see discussion of "profound offence" *infra*.

[108] Feinberg *Offense to Others* 46.

[109] Hart (*Law, Liberty and Morality* 45-48) supports the view that the evil of merely being aware that "immoral" conduct is being indulged in in private is not sufficient for the imposition of the criminal sanction. He states (at 46) that "[t]he fundamental objection surely is that a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways that you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a virtue."

[110] The South African common law crime of violating a corpse does not require that the violation should have been witnessed, although this will clearly be taken into account as an aggravating factor – see *S v Coetzee* 1993 2 SACR 191 (T), where an undertaker invited a teacher and her biology class to observe the removal of the heart and lungs of the deceased. The offended parties in this case were not the observers, but non-observers affected by the mere knowledge that such conduct had taken place. In this case the *ratio* for punishment was thus clearly based on the profound offence principle. Roos J observed at 197 g-h:
"Namens die Staat is betoog dat die misdryf 'n ernstige misdryf is en dat dit die gemeenskap met afsku en walging vervul het. Ek stem met laasgenoemde submissie saam. Die appellante het deurentyd roekeloos en onsensitief opgetree. Selfs in die hof *a quo* het hulle geen berou getoon nie, maar het hulle gepoog om hulle laakbare optrede te probeer regverdig. Die eerste appellante het in haar getuienis gesê dat 'n lyk feitlik as iets heiligs beskou moet word. Daarmee stem ek saam. Selfs primitiewe volkere het die hoogste respek vir dooies en hulle grafte."

[111] *S v Ndhlovu* 1984 3 SA 23 (A).

[112] *S v W* 1976 1 SA 1 (A).

[113] However, it could also be argued that attempt to commit the impossible is punishable because conduct such as attempting to murder or rape a corpse is indicative of the fact that the perpetrator shows a potential tendency to harm others.

[114] An example of a personal offence might be bare knowledge of a person's wife that his corpse has been violated without her knowledge or consent and without prior consent of the deceased, although not in her presence. Thus Feinberg would view violation, etc of a corpse as a crime only where it takes place in public and there are identifiable offended parties, or where it is a personal offence in the sense described above.

knowledge that such activities take place is sufficiently offensive.[115] He nevertheless concludes that punishment based on the offence principle would be inappropriate, since there is no violation of a particular offended party's rights.

It is submitted that the state of mind of the offender should be taken into account, and could be decisive, in concluding whether criminalisation would be permissible in cases of profound offence where there is no identifiable victim.[116] The main reason for punishing attempts to commit the impossible, such as "murder" of a corpse, is because of the evil and malicious state of mind of the offender, and not because harm or offence to an identifiable "victim" has been caused.[117] If the motive of the perpetrator is considered, it would be possible to distinguish between unwitnessed offensive conduct such as engaging in cannibalism as an act with the aim of self-preservation and survival in a situation where no other food is available,[118] and the same conduct engaged in purely to shock or disgust others. Similarly, one could distinguish the brandishing of a swastika engaged in as an act of political conviction and self-expression, with the aim of advocating policies, entering political debates or persuading audiences,[119] from the same behaviour engaged in purely to shock, insult, terrorise or intimidate others. It could be argued that the latter should be subject to criminal prosecution, but not the former.[120]

---

[115] *Offense to Others* 60-96.

[116] See Chachalia *et al Fundamental Rights in the New Constitution* (1994) 54, where it is stated that the degree of protection afforded to freedom of expression depends on "the nature of the expression and the purpose it is intended to achieve."

[117] In *R v Davies* 1956 3 SA 52 (A), which concerned attempted abortion where the foetus was already dead, Schreiner AJ held that the fact that the conduct in question caused no harm was irrelevant for finding the accused guilty of attempted abortion: the "*moral guilt* of the accused person" was decisive (61 D-F) [emphasis added].

[118] See also *R v Dudley and Stephens* 1884 14 QB 273, where the defendants' reliance on the defence of necessity in a similar situation did not succeed. The *Dudley* case may be distinguished from the scenario sketched above, however, on the grounds that Dudley and Stephens killed their victim before eating him, whereas the cannibal in my example did not do so – harm to others is thus not at issue.

[119] Feinberg *Offense to Others* 95.

[120] In constitutional terms, it is submitted that the latter is in conflict with s 16(2)(c) of the Constitution, which prohibits "advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm", while the former conduct may be justified either as legitimate self-expression or as a reasonable limitation of s 16(2)(c).

2 3 4 *Legal paternalism*

The crux of legal paternalism, a view that Feinberg as liberal rejects as being a non-legitimate justification for imposing the criminal sanction, is:

> "It is always a good and relevant (though not necessarily decisive) reason in support of a criminal prohibition that it will prevent harm (physical, psychological, or economic) to the actor himself."[121]

Feinberg distinguishes between two types of paternalism:

He refers to the first category as *presumptively blameable paternalism*, which consists of "treating adults as if they were children, or older children as if they were younger children"[122] by forcing them to act in certain ways, either "for their own good" (*benevolent paternalism*) or for the good of other parties, irrespective of the wishes of the parties themselves (*non-benevolent paternalism*). It is contentious whether the former is justifiable, while it is fairly apparent that the latter is not, since it treats parties as a means to an end that is not even to their advantage.

The second category identified is *presumptively non-blameable paternalism*, which consists of

> "defending relatively helpless or vulnerable people from external dangers, including harm from *other* people when the protected parties have not voluntarily consented to the risk, and doing so in a manner analogous in its motivation and vigilance to that in which parents protect their children."[123]

This form of paternalism is usually concerned with protecting minors and other persons lacking the necessary legal capacity, such as mentally ill adults, and interference in such cases is generally legitimate. Although the vulnerable party may give *de facto* consent to the harm or danger in question, it is doubtful whether such consent could be regarded as *de iure* consent. This is because the vulnerable party is not sufficiently capable in law of comprehending the nature and consequences of the harm consented to, and thus of giving real, informed and voluntary consent.[124]

---

[121] Feinberg *The Moral Limits of the Criminal Sanction Volume III: Harm to Self* (1986) 4.
[122] *Harm to Self* 5.
[123] Feinberg *Harm to Self* 5.
[124] See Burchell *SA Criminal Law & Procedure: General Principles* 127-129 for more on the criminal law requirements for valid consent. It is noted at 129 that "the recognition of consent as a defence depends upon identifying the societal objectives of the crime in question. In the end, the determining issue is whether, in all the circumstances, public policy warrants juristic recognition of the consent."

The type of paternalism where justification is most contentious is benevolent paternalism, and Feinberg devotes the rest of his discussion to this topic.

Paternalistic legislation is not always easy to identify. After all, it may be argued that even purely self-destructive behaviour, such as refusing to wear a crash helmet when riding a motor-bike, implies a degree of social harm as well as self-harm, especially if the envisaged harm to self materialises.[125] It may therefore be contended that it is impossible to characterise criminal sanctions as (wholly) paternalistic, since prohibiting self-destructive conduct is always to some extent in the public interest. In order to address this dilemma, Feinberg suggests distinguishing between conduct that is "primarily and directly self-regarding", where the public interest is only trivially or indirectly affected and where prohibition cannot be justified on that basis alone, and "other-regarding" behaviour, where criminal sanctions could be more easily justified on the basis of protection to others.[126] Only in the former situation would one be concerned with justifying prohibitive legislation on a paternalistic basis.

Another indication of whether the underlying rationale for a particular criminal sanction is purely paternalistic or not, is whether the prohibition or command in question has as its only motive the prevention of self-harm or consented-to harm from others, or alternatively whether it is justified partly by the rationale of preventing people from suffering harm at their own hands (or with their own consent at the hands of others), and partly for other reasons, such as protecting others or the general public from harm or offence.[127] The

---

[125] For example, if the motorcyclist in this example crashes and is seriously injured, not only is society deprived of the services of the injured party, but other expenses, such as medical expenses, may also have to be paid out of state coffers.

[126] *Harm to Self* 22.

[127] Feinberg *Harm to Self* 8. It is often very difficult to establish the "real reason" for criminalisation in a particular instance. There may be alternative rationales for a prohibition, or the rationale for proscribing certain conduct may change over time. A good example of this is the reasoning of the minority in *Jordan and Others v State and Others* 2002 6 SA 642 (CC). The laws at issue were provisions of the Sexual Offences Act 23 of 1957, which the Court accepted as having been enacted in 1988 for the illegitimate governmental purpose of enforcing a particular conception of morality on the whole of society (§ 108). However, the minority stated that "the mere fact that the original legislative purpose of a statute might have been incompatible with current constitutional standards, does not deprive it of the capacity to serve a legitimate governmental purpose today" (§ 112). O'Regan and Sachs JJ were of the view that an overall purpose could be ascribed to the Act that was

harshness of the punishment imposed may be indicative of the purpose: if it is far more severe than the harm to self risked by the offender, this signifies that "protective solicitude toward prospective violators"[128] is not a high priority, but that the law is motivated by other considerations, such as expressing moral abhorrence or preventing harm to others.

According to Arneson,[129] something else that may be considered when deciding whether to characterise a prohibition as paternalistic, is that although the chief justification for paternalistic laws is consideration for the good or welfare of those subject to them, such laws are always applied against the will of those who must obey them. Thus, if the majority of people subject to it, approve of a coercive rule that has been imposed for their sakes, and such rule is essentially in the public interest, the rationale of the prohibition is not paternalistic, even if the unwilling minority is incidentally prejudiced by it.

It is possible to classify paternalistic laws still further. Some such criminal sanctions apply to the *single-party case,* such as laws against drug use (also called *direct* paternalism), while others apply to the *two-party case*, for example laws prohibiting euthanasia (also called *indirect* paternalism). In such instances, legal paternalism comes into play where a party cannot validly consent to the action of the second party – ie, the *volenti non fit iniuria* maxim will not apply – which means that consent will not be a ground of justification excluding unlawfulness.[130] Such a law is paternalistic towards the first party in that it prevents such party from having their wishes done. There is a distinction between the word "harm" as meaning "*wrongful* injury" (used in the

---

not inconsistent with the values of the new South African constitutional order, and which was both important and legitimate – namely the control of commercial sex (§ 114). See also § 3 3 2 2 *infra*.

[128] Feinberg *Harm to Self* 17.

[129] "Mill versus Paternalism" 1980 *Ethics* 471.

[130] The decision to exclude consent as a defence is one that is explained with reference to considerations of public policy. For instance, it is said that the *boni mores* (or legal convictions of the community) would oppose the notion of killers going free merely because their victims consented to their own death. See also Burchell *SA Criminal Law and Procedure: General Principles*, where it is stated at 127-128:

"A crime is not so much harm against the victim as a harm against the community as a whole. Thus it does not lie within the power of the victim of a crime to render the act not unlawful by consenting to suffer the harm involved. Accordingly, the general rule of criminal law is that consent on the part of the victim will not serve to excuse the crime of the offender. There are exceptions to this principle … The question of whether consent will be a defence is determined not so much by logic as by public policy."

context of the harm principle),[131] and its use in this sense, as a simple setback to interest, whether unlawful or not. The implication is that, where criminal prohibitions are justified by reference to legal paternalism, the *volenti* maxim will not apply, whereas consent will always be a valid defence where harm to others is the justification for a criminal sanction.

Feinberg also distinguishes between *hard* paternalism, which accepts that it may be necessary to "protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings";[132] and *soft* paternalism, which holds that the state has the right to "prevent self-regarding harmful conduct only when the conduct is substantially non-voluntary, or where temporary intervention is necessary to establish whether it is voluntary or not."[133] Thus this view holds that is crucial to establish whether the consent is fully voluntary[134] – whether the choice is one made by the actor's "true self" or not.[135] According to Feinberg, factors excluding voluntariness may include ignorance or mistake,[136] coercion,[137] and incapacity due to derangement, drugs, etc.[138] Feinberg views "soft paternalism" as completely reconcilable with the spirit of liberalism, and therefore not really paternalism[139] at all,[140] while he regards "hard paternalism" as morally offensive and demeaning because it "invades the

---

[131] § 2 3 2 *supra*.
[132] *Harm to Self* 12.
[133] *Harm to Self* 12.
[134] *Contra* Arneson 1980 *Ethics* 482, where he criticises Feinberg's strict definition of voluntariness, being of the view that Feinberg confuses the voluntariness of a choice with its rationality. He argues (at 488) that persons who make irrational choices should not be prevented by the law from doing so – "a person who is capable of thinking matters through and does not should be held responsible for his choice." After restricting his attention to "adults who are neither severely mentally retarded nor emotionally deranged", he proposes (at 482) that "we may say that a person acts voluntarily if and only if his choice of the act (a) would not be abandoned if he were apprized of all the act's unforeseeable consequences, (b) does not proceed from an emotional state so troubled as to preclude the full use of the reasoning faculty, and (c) does not occur under conditions of external coercion or compulsion."
[135] The question may be asked whether "soft paternalism" is in any way distinguishable from the harm to others principle. However, soft paternalism cannot be reduced to the harm principle where there is only one person involved in non-voluntary self-harming conduct, since the actor requires protection only from himself, not another person, as would be the case if a second party were inflicting the harm.
[136] Feinberg discusses this ground in detail in ch 25 of *Harm to Self*.
[137] Feinberg discusses this ground in detail in ch 23 and 24 of *Harm to Self*.
[138] Feinberg discusses this ground in detail in ch 26 of *Harm to Self*.
[139] As understood in the sense of "hard paternalism", *supra*.
[140] *Harm to Self* 14.

realm of personal autonomy where each competent, responsible, adult human being should reign supreme."[141]

It is submitted that legal paternalism in the hard sense not only undermines personal autonomy, but also human dignity, since the underlying assumption is that the state knows what will be for the good of an individual better than that individual knows it himself. It is surely a core element of human dignity that the rational choices and decisions of competent adults be taken seriously, since status as a person is dependent on being in rightful control of one's own life. Insofar as the criminal sanction ought not to be imposed merely because the state regards a certain choice as self-destructive, Feinberg's presumption against legal paternalism may be supported as a general point of departure. However, it is debatable whether Feinberg and Arneson's conclusion is correct that a person has a sovereign and absolute right to make voluntary, informed and genuine (although objectively foolish and unreasonable) choices, and that personal autonomy should thus always be regarded as a "moral trump card".[142] This implies that state intervention by means of criminal punishment is never justified to prevent harm to the offender himself, even where the potential harm to the person concerned resulting from a free choice is great and the limitation of freedom and human dignity as a consequence of state coercion is slight.[143] If a cost-benefit analysis is undertaken, it is possible to argue that there may be some limited instances where coercing persons to act in a certain manner for their own good, should be permissible. Although it is true that "[w]henever a person is compelled to act or not to act on the grounds that he must be protected from his own bad judgment even though no one else is endangered, then his autonomy is infringed",[144] autonomy (or even human dignity) are not absolute and unqualified rights. Depending on the relevant interests at stake when someone's right to make a choice is weighed up against their own good, a "hard" paternalistic criminal sanction that prevents a graver harm than it causes may be capable of justification if public policy is taken into

[141] *Harm to Self* 25.
[142] Feinberg *Harmless Wrongdoing* xvii.
[143] See further Feinberg *Harm to Self* 94, where he compares a "trivial interference" with personal sovereignty to a "minor invasion of virginity".
[144] Feinberg *Harm to Self* 68.

consideration.[145] However, in keeping with the idea of criminal punishment as sanction of last resort, alternative means of control or coercion would generally be more appropriate than criminalisation in such instances.[146]

It appears that, although Feinberg largely ignores the role of public policy in limiting the freedom of persons to make "self-regarding" decisions, he limits personal autonomy in a more subtle and implicit way. He sets very high standards that must be complied with before a choice of this nature will be regarded as truly voluntary (and thus not susceptible to state intrusion), especially where it appears to be a decision that is not in the interests of the one making it. He even concedes that in such cases of unreasonable and harmful-to-self decision-making, state intervention should be allowed until it can be properly established whether the decision made is indeed truly voluntary. Thus Feinberg moderates his standpoint against legal paternalism to some extent, in that he regards fewer decisions as voluntary and thus within the sphere of personal autonomy than originally supposed, and is not opposed to state intervention in circumstances that seem suspiciously similar to "hard" paternalism. If this argument is correct, the question may be asked whether the "soft" paternalism argument is not just a way of bringing necessary elements of "hard" paternalism in through the back door?

2 3 5 ***Legal moralism***

Feinberg uses the term "legal moralism" in two senses. According to him, the narrow version of the legal moralism principle may be defined as follows:

---

[145] Feinberg *Harm to Self* 25-26; 61. The magnitude of harm may be relevant here. For instance, the minor infringement of freedom and human dignity entailed by requiring motorists to buckle up their seat belts on pain of punishment while driving a car, may be justified on balance if it is compared to the extreme harm that may be suffered by a motorist not having a fastened seat belt while being involved in a head-on collision. After all, dying in a car accident irrevocably terminates the motorist's capacity to choose altogether!

[146] See also discussion of Packer's viewpoint § 2 4 7 *supra* and Rabie's viewpoint § 2 5 3 1 *infra*. For example, the state may wish to compel people to install smoke detectors and fire extinguishers in their private residences in order to safeguard themselves from fires. Instead of criminalising non-compliance with a rule of this sort, provision need merely be made that no insurance benefits would be paid out to persons not in possession of smoke detectors and fire alarms whose houses had suffered fire damage.

> "It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others."[147]

Legal moralism in its broad sense embodies the principle that

> "[i]t can be morally legitimate for the state to prohibit certain types of action that cause neither harm nor offence to anyone, on the grounds that such actions constitute or cause evils of other ("free-floating") kinds."[148]

When referring to "morality", Feinberg distinguishes between two types of "morality": (moral) "rules designed to protect individual interests from being thwarted or individual rights from being infringed" and "rules designed to prevent evils of a kind whose existence would not be the basis of any assignable person's grievance", which he characterises as "free-floating" evils.[149] While criminalisation may be justified to enforce the former category of morality on the basis of the harm to others or offence principles, this is not the case where the evil in question is "free-floating". According to Feinberg, no-one at all needs protection from the occurrence of a "free-floating" evil or is entitled to complain or claim the prevention of such an evil as their due, since the evils in question are impersonal and do not violate the rights of anyone in particular.[150] Although he concedes that the prevention of non-harmful/ offensive "evils" in the above sense[151] is not a completely irrelevant motivation for imposing criminal punishment, Feinberg is of the view that its weight, when balanced against that of the presumption in favour of liberty, is so slight that legal moralism is extremely rarely, if ever, a decisive reason for imposing the criminal sanction. The interest in enforcing morality for its own sake or punishing "free-floating" evils by means of the criminal sanction is invariably outweighed by the suffering and injury inherent in imposing criminal punishment. Thus Feinberg rejects so-called *strict moralism*. This view holds that true morality should be enforced for its own sake – regardless of whether the immoral conduct is also harmful or offensive – and that criminalisation is

---

[147] *Harm to Others* 27.
[148] Feinberg *Harm to Others* 27.
[149] *Harmless Wrongdoing* 79.
[150] *Harmless Wrongdoing* 65,
[151] Conduct possibly qualifying as a "free-floating evil" includes violations of taboos, "immoral" conduct performed in private by consenting adults; religiously forbidden practices; moral corruption of another (or oneself); evil or impure thoughts; false beliefs, cultural change, etc (see *Harmless Wrongdoing* 20-25).

justified on the basis that free-floating evils/immoralities should be forbidden due to their inherent evil alone.[152]

---

[152] Although Feinberg's *Harmless Wrongdoing* includes an interesting and comprehensive discussion of the Lord Devlin v Professor HLA Hart debate (and the original John Stuart Mill v James Fitzjames Stephen argument) in the chapter on strict moralism (at 124-175), it has been decided not to re-hash the enforcement of morality discussion in full here. For more on the general debate on law and morality, see Blom-Cooper and Drewry (eds) *Law and Morality* (1976) 1-35 and the sources quoted in n 52 *supra*. Suffice it to say that I am of the view that the enforcement of morality is on its own an insufficient reason for the justification of the criminal sanction.
This view is also clearly espoused by the Constitutional Court. A good example is to be found in the context of the decriminalisation of sodomy (*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC)). When considering whether the limitation of gay men's rights to equality, privacy, dignity and freedom caused by sodomy's criminalisation could be justified in terms of section 36 of the Constitution, the majority, *per* Ackermann J, refers to the purported purpose of such limitation, namely "[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice" (§ 37). Ackermann J does not regard this as a valid or legitimate purpose. He also refers to the changing religious and societal attitudes about such matters and concludes that even if people continue to condemn sodomy based on deep conviction and sincere belief, these views "cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation." (§ 38). Thus Ackermann J opposes criminal enforcement of morality alone as being unconstitutional, in that he is of the opinion that conflict between mere moral disapproval and a right entrenched in the Constitution would always be resolved in favour of the bearer of the constitutional right (in this case the accused person), with arguments based on the supposed immorality of the conduct in question being immaterial in comparison. He does not consider whether those wishing to enforce morality may possibly base their claim on constitutional grounds, (such as the rights to freedom of religion, belief and opinion entrenched in sec 15 of the Constitution) but it is apparent that, even if he were to recognise a constitutional right allowing enforcement of mere morality by means of the criminal sanction, such right would in Ackermann J's opinion be trivial when balanced against the much more significant considerations of human dignity and equality that would be undermined if purely immoral conduct such as sodomy continued to be a crime. I would venture to say that Ackermann J would under no circumstances regard enforcement of mere morality as a justifiable limitation of the various constitutional rights of the accused.
In contrast, at first glance Sachs J, who delivered the minority judgment in *National Coalition supra*, seems to support criminalisation of conduct that is merely morally wrong. At § 136, he states:
"A State that recognizes difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with peoples and groups, but is not neutral in its value system. *The Constitution certainly does not debar the State from enforcing morality*. Indeed, the Constitution is nothing if not a document based on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself [emphasis added]."
It would be easy to misunderstand Sachs J and to conclude from the above that he wholeheartedly advocates the legal enforcement of *mere* morality, unconnected to harm or serious offence to others. However, a closer reading of the passage in context suggests otherwise. The enforcement of morality in its broader sense does not entail criminalisation of conduct on the basis of moral undesirability alone, and it is unlikely that Sachs J meant to suggest as such. It is submitted that all this extract does is to highlight the point that conduct that is harmful or seriously offensive is necessarily bad or evil – morally reprehensible – too. This clearly does not mean that use of the criminal sanction in such cases is inappropriate. However, confusion may arise in that Sachs J fails to draw a distinction between the enforcement of *mere* morality – which is unjustifiable apart from in the most exceptional (and inconceivable) circumstances – and the criminal enforcement of morality where moral disapproval is accompanied by some other evil, such as harm to others, and the conduct is not therefore condemned on moral grounds alone. The use of the term "political morality" is also somewhat misleading. It appears that what Sachs J is implying by using this expression is that the "text and spirit" of the Constitution should be taken into account when balancing the benefits of criminalisation against its disadvantages. According to Sachs J, the rights and values given

Feinberg is also strongly opposed to the idea of using persons as "means to an end" unless the "end" is the protection of other persons. Thus he regards *moral conservatism*,[153] which argues in favour of prohibiting certain conduct on the grounds that permitting the behaviour in question would "subtly change the moral environment", as an unjustified and "perverse" limitation of the individual's liberty for the sake of the interests of others. The criminal sanction should not be used to prohibit non-harmful and inoffensive behaviour merely to prevent such "evils" as social or cultural change.[154]

---

precedence in the Constitution should serve as the point of departure when determining which interests are deemed so important that those who undermine them should be subject to the wrath of the criminal sanction (see also § 2 2 1 *supra* for more on the Constitution's fundamental underlying values). The reverse is also true: the Constitution is the standard against which the cost of criminalisation should be assessed – if too high a price has to be paid by the offender to protect the interest concerned, the option of criminalisation should not be resorted to. Thus it is submitted that his viewpoint is perfectly reconcilable with the claim that criminal enforcement of "mere" morality is impermissible.

Similarly, in the case of *Jordan and Others v S and Others* 2002 6 SA 642 (CC), in the context of its discussion of the regulation of commercial sex by means of prohibiting brothel-keeping (prohibited by subsections 3(b) and 3(c) of the Sexual Offences Act), the minority of the Constitutional Court (*per* O'Regan and Sachs JJ) considered the appellants' argument that these provisions amount to a constitutionally impermissible attempts to "legislate for a particular moral code" (§ 102). As did Sachs J in *National Coalition supra*, the minority asserted that the South African constitutional framework does indeed require the legislature to enact laws promoting morality, provided that such morality is founded on constitutional values (§§ 104-105). However, the minority clearly accepted that legislation with the underlying rationale of enforcing a particular moral position as an end in itself cannot be constitutionally justified. This purpose is characterised as "illegitimate" (§ 108), and at § 113 the following is said:

"There are textual indications in the [Sexual Offences] Act which make it plain that the Act was originally enacted to impose a particular view of morality – one which considered sexual intercourse other than between husband and wife to be 'unlawful carnal intercourse'. There are many people in our society who would support such a view today, and they remain free to conduct their lives accordingly and to urge others to do the same. *At the same time, it is quite clear that for the state to impose such views on everyone in our society would be in conflict with the values of the Constitution, were such to be enacted in the current era*" [emphasis added].

According to the minority, although the purpose of the legislation in question at the time when it was enacted, could very possibly be described as the enforcement of morality, it had changed over time. The minority viewed its rationale for modern society as being the controlling of commercial sex, and this was regarded as sufficiently important and legitimate to justify criminalisation, while not being "manifestly inconsistent with the values of our new order" (§ 114).

[153] An advocate of which appears to be Devlin, who argues in favour of enforcing morality by means of the criminal sanction in order to protect society from disintegration (*The Enforcement of Morals* (1965) 10). For an interesting alternative perspective on moral conservatism, also in the context of incest, see Johnson "Harm to the 'Fabric of Society' as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme From Ravin v State" 2003 *Seattle University LR* 41-74.

[154] *Harmless Wrongdoing* 67-68.

This according to Feinberg, legal moralism is almost always[155] an unconvincing liberty-limiting principle, and thus also an illegitimate reason for imposing the criminal sanction.

2 3 6 ***Evaluation***

Feinberg supports his argument on the justified use of state coercion by developing a system that categorises crimes according to their underlying rationale. His distinction between the four main grounds generally advanced for justifying criminalisation is a useful starting point for determining whether the *raison d'être* for a criminal prohibition is a worthy one or not. I support his conclusion that if particular conduct causes harm to others, or serious offence to others, this can be regarded as a decisive reason for the legitimate use of the criminal sanction. I also approve of his view that where conduct is immoral, although not harmful or offensive, there is a relevant, but virtually never decisive, basis for justifying criminalisation. For the reasons mentioned above,[156] however, I am not entirely convinced that criminal prohibitions based on legal paternalistic considerations may never be justified.

There are, however, other arguments for regarding Feinberg's analysis as an insufficient one for present purposes.

First, although he states clearly that all harmful or offensive conduct should by no means be the target of criminal punishment, he does not to any great extent explore the role of societal opinion – policy considerations or the *boni mores* – in deciding what particular harmful or offensive conduct should be criminalised.[157] Similarly, nowhere does he outline the possible practical consequences or implications of imposing and enforcing the criminal sanction on (some) conduct harmful or offensive to others, while leaving (other) harmful or offensive conduct, as well as self-harming or purely immoral conduct, situated within the personal sphere – beyond the scope of the criminal

---

[155] See, however, Feinberg's discussion of Irving Kristol's example of gladiatorial contests before consenting audiences discussed in *Harmless Wrongdoing* at 128-133 for a possible exception to the rule against legal moralism.

[156] § 2 3 4.

[157] He merely mentions that the risk of danger to others will more easily be justified where conduct is socially useful and relatively important (see discussion § 2 3 2 *supra*), and that the social value of offending conduct is a factor to be taken into account when determining the reasonableness of such offensiveness (see § 2 3 3 *supra*).

sanction. This is despite his recognition that the criminal sanction should only be resorted to as a last option, and the emphasis he places on the need for proportionality between crime and punishment. The fact that he neglects wider community interests somewhat is no doubt due to his preoccupation with individual liberty and autonomy, but it is a deficiency. Criminal law operates within a particular societal context, and this needs to be acknowledged and accommodated if a comprehensive set of guidelines for determining the appropriateness of criminalisation is to be formulated.[158]

Second, Feinberg's approach appears more suited to USA than South Africa and would need considerable adaptation for the present context. This is because his agenda is a liberal one, with personal autonomy of the individual being acknowledged as the ultimate good and most fundamental personal right. However, the value of autonomy as such has yet to be fully recognised in South African case law. In the context of an inquiry into the appropriateness of criminalising prostitution,[159] the Constitutional Court recently had to consider whether autonomy itself is a fundamental constitutional right. The submission of counsel for the appellants to support an argument based on "global concept of autonomy" comprising the rights to dignity, privacy and freedom[160] could have been a direct quote from Feinberg. It was argued that

> "the state should not be empowered to make judgments concerning the good or bad life, provided that the conduct in question does not harm others. Such conduct might be unworthy or risky, but if it is not harmful to others then the state can not [*sic*] interfere."[161]

The minority rejected this autonomy argument, holding that the right of persons to determine how to live their lives, including the right to make decisions and not merely the content of such decisions, should not be regarded as an independent right.[162] Thus it appears that sole reliance on the right to autonomy in present-day South Africa would be unconvincing and

---

[158] See also Van Zyl Smit 1986 *TRW* 187: "The 'correct' limits of the criminal sanction cannot be determined by armchair reflection as penal sanctions are interventions in the real world."
[159] *Jordan and Others v S and Others* 2002 6 SA 642 (CC).
[160] *Jordan supra* §§ 52-53.
[161] *Jordan supra* § 52.
[162] *Jordan supra* § 53.

fraught with uncertainties, given that such a right is not explicitly recognised in the Constitution.

Nevertheless, these deficiencies do not imply that Feinberg's liberal arguments should simply be dismissed. From a South African perspective it might be possible to contend that the right to human dignity has the same elevated role here as autonomy does in USA – it has been used by the Constitutional Court in the past as a "catch-all" right which may be relied upon in circumstances where there is uncertainty as to which particular right contained in the Constitution has been infringed upon, but where it is clear that the interests of justice require a constitutional remedy to be found.[163] Human dignity is surely inclusive enough to encompass the right of individuals not to be subject to state interference when making autonomous decisions that do not harm or offend others.

2 4 **Writers: Packer**

2 4 1 ***Introduction***

An essential component of any discussion of the proper use of the criminal sanction is Packer's seminal *The Limits of the Criminal Sanction*. Although it was first published in 1968, the majority of Packer's opinions on this topic are as relevant today as when the book was written. He devises certain "limiting criteria" for the optimal use of the criminal sanction, and proposes that these criteria be used in drawing up a priority list of conduct for which the legislature might consider making use of the criminal sanction. Although several of these guidelines overlap to a certain extent, the content of each and its implications for the appropriate use of criminal sanction will be discussed briefly.

---

[163] One of the first manifestations of this tendency was in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC), where the case concerned the right to family life and the right of spouses to cohabit, neither of which are explicitly recognised in the Constitution. Because there was no specific right protecting "individuals who wish to enter into and sustain permanent intimate relationships", O'Regan J held that the applicants could rely on the right to human dignity (§§ 27-39).

2 4 2 *The conduct must be prominent in most people's view of socially threatening behaviour, and must not be condoned by any significant segment of society*

Packer believes that the immorality of the conduct in question is a necessary, but insufficient, condition for criminalisation. He is of the view that it is undesirable to criminalise morally neutral behaviour, because this undermines one of the strengths of the criminal sanction – its quality of moral condemnation – and thus also the legitimacy of criminal law in the eyes of the public and those who enforce criminal law.[164] Although he acknowledges that it is difficult to ascertain whose morality we are talking about, if the majority of society does not condone the conduct in question, Packer regards this as sufficient for characterising the conduct as immoral.[165]

However, it is clear that Packer is opposed to the criminalisation of conduct "purely or even primarily because it is thought to be immoral."[166] An extra standard must be met: the conduct must also be harmful to others in the sense that it should threaten society's sense of security. However, even conduct that is immoral and harmful is not and should not inevitably be a crime. Due to limited resources, a weighing up of the benefits and disadvantages of punishing the conduct in question is required, with considerations such as the gravity (or seriousness) and remoteness of the harm playing a role in the decision whether criminalisation is appropriate in a particular case.[167]

2 4 3 *Subjecting the conduct to the criminal sanction must not be inconsistent with the goals of punishment*

Packer considers the justifications for criminal punishment at length,[168] and distinguishes between punishment as retribution (the idea of criminals receiving their just desert) and utilitarian justifications, which include

---

[164] *The Limits of the Criminal Sanction* 262-263.
[165] See also Rabie's concerns regarding the establishment of a moral consensus in a diverse society §§ 2 5 2 and 2 5 3 2 *infra*.
[166] *The Limits of the Criminal Sanction* 266-267.
[167] See also the discussion of quantitative strains on law enforcement § 2 4 6 *infra*.
[168] *The Limits of the Criminal Sanction* ch 3 and ch 4.

deterrence, intimidation, incapacitation and rehabilitation. He regards use of criminal sanction as inappropriate if its only purpose is to inflict suffering on the wicked. At least one of the utilitarian modes of prevention must also be effectively served, preferably involving a combination of deterrence and incapacitation – the criminal sanction is appropriate "where people are relatively likely to be deflected by the possibility of being caught *and* where punishment is likely to prevent the commission of further crimes."[169]

2 4 4 *Suppressing the conduct would not inhibit socially desirable conduct*

Packer regards it necessary to rank (criminal) conduct according to its remoteness from the ultimate harm that the law seeks to prevent. The aim is to determine the degree of likelihood that any preparatory conduct (which is not necessarily harmful in itself) will result in harm in the absence of the criminal sanction. Only where the risk of eventual harm is substantial, and the preparatory conduct cannot otherwise be justified as being socially useful, may criminal punishment be resorted to.[170] Another reason to refrain from criminalising preparatory conduct is that if the conduct in question is far removed from the ultimate harm apprehended, unconstitutional and invasive means would probably need to be resorted to to detect it and to apprehend suspects.[171] In order that personal freedom be maximised and strain on law enforcement minimised, Packer therefore advocates caution before a decision is made to criminalise preparatory conduct that is remote from harm.

2 4 5 *The conduct may be dealt with through even-handed and non-discriminatory enforcement*

According to Packer, the criminal sanction should not be used where its enforcement would be extremely difficult or sporadic. Sporadic enforcement is not only futile, but may also have indirectly harmful consequences such as diminishing respect for the law and leading to discretionary and arbitrary

---

[169] Packer *The Limits of the Criminal Sanction* 269.
[170] Packer *The Limits of the Criminal Sanction* 270-271.
[171] See § 2 4 6 *infra*.

enforcement.[172] Especially in cases where the crime is a consensual sexual offence, where the offence is "just barely taken seriously"[173] and enforcement is particularly erratic, there is also the danger that police or prosecutors may abuse their discretion in deciding whether or not to enforce the criminal prohibition.[174] In such situations the option of decriminalisation should seriously be considered.

2 4 6 *Controlling the conduct through the criminal process will not expose that process to severe qualitative or quantitative strains*

In cases where criminal conduct can only be effectively suppressed by extremely intrusive means that will also be time-consuming and expensive, time, money and manpower may be better utilised if the conduct in question is not criminalised, unless societal interests would be seriously threatened thereby. In Packer's view, the quantitative problem is purely pragmatic:

> "A rational legislator should not vote to subject previously legal conduct to criminal proscription unless he is prepared to say, first, that the conduct being proscribed is so threatening to important social interests that he is willing to see people who engage in it subjected to criminal punishment and, second, that he expects law enforcement to devote adequate resources to detecting, apprehending, and convicting violators."[175]

It is a reality that there is a limited law enforcement budget. To determine whether using the criminal law to suppress conduct is justified, it may be necessary to rank crimes in accordance with whether enforcement of the sanction is a budgetary priority. Only if socially threatening conduct is so undesirable that the apportioning of substantial resources is warranted to facilitate its detection and punishment, should it be subject to the criminal sanction. If suppression of a certain form of antisocial conduct is relatively low on this hierarchy, alternatives to the criminal sanction should possibly be made use of to ensure compliance instead,[176] or it may be necessary to consider the option of decriminalising altogether.

---

[172] Packer *The Limits of the Criminal Sanction* 286-290.
[173] Packer *The Limits of the Criminal Sanction* 290.
[174] Packer *The Limits of the Criminal Sanction* 290-292.
[175] *The Limits of the Criminal Sanction* 272.
[176] See also discussion of alternatives to the criminal sanction § 2 4 7 *infra*.

As regards qualitative constraints on law enforcement, Packer points out that it is paradoxical that the police are often most visible when they are doing their least important work, such as enforcing so-called "victimless" or consensual crimes,[177] for example crimes involving sexual deviance or drugs.[178] Since there is no victim to complain, the police would be more likely to make use of unsavoury detection practices[179] in order to apprehend culprits. Where law enforcement officials readily resort to "wide-spread and visible intrusion into what people regard as their private lives" in these instances,[180] they violate the offender's human dignity and privacy to a degree unwarranted by the gravity of the offence. If arbitrary and discretionary conduct by police and prosecutors is inevitable for a criminal prohibition to be enforced effectively,[181] this may also result in a lower quality of law enforcement.

2 4 7 *There are no reasonable alternatives to the criminal sanction for dealing with the conduct*

Packer's point of departure is that the criminal sanction should be used as a last resort, only where the social gains accruing from the successful prevention or reduction of the conduct in question outweigh the loss of human dignity and autonomy inherent in the imposition of the criminal sanction, and where the economic cost of enforcement is not disproportionate to its benefits. Criminalisation is uncalled for if there are "readily available alternatives that avoid or minimise the formidable battery of objections and obstacles"[182] inherent in use of the criminal sanction. For example, Packer is of the opinion that the criminalisation of trivial conduct should be avoided – only conduct that is regarded as worthy of being punished with imprisonment, as opposed to a

---

[177] *The Limits of the Criminal Sanction* 284. See also Devlin *The Enforcement of Morals* 18-19.

[178] A South African example is the tactics employed to enforce the provisions of the Immorality Act 23 of 1957 prohibiting consensual sexual relations across the colour bar. Police methods were often unsavoury and an infringement of privacy. See, for instance, *S v Boshoff and Others* 1981 1 SA 393 (T), where the police, acting on information received, kicked a hole in the complainant's front door and burst into her bedroom at 4 am to take photographs as evidence that an offence in terms of the Immorality Act was being committed. It was found by the magistrate that the police conduct was an unlawful invasion of privacy.

[179] Such as physical intrusion, electronic surveillance and decoys – see Packer 285-286.

[180] Packer *The Limits of the Criminal Sanction* 283.

[181] See discussion § 2 4 5 *supra*.

[182] Packer *The Limits of the Criminal Sanction* 250.

mere fine, or lesser sanction, should be criminalised. This will ensure that the criminal punishment is not resorted to indiscriminately, and the stigma inherent in the "mere fact that a [person] has been convicted of something called a crime"[183] will then remain sufficiently weighty for deterrence. In the case of crimes such as trivial public welfare offences, where there is no accompanying feeling of societal moral disapproval, it would be better to avoid the criminal sanction altogether. Packer suggests that the state use publicly instituted civil action for recovery of a monetary penalty instead.[184]

Even if after careful consideration it appears that there are no viable substitutes to punishing conduct as a crime, Packer regards it as necessary to consider the alternative of doing nothing, rather than simply rejecting it out of hand. If the costs of utilising the criminal sanction are greatly disproportionate to its benefits, doing nothing would probably be preferable, unless suppression of the conduct concerned was an absolute social priority.[185] Total decriminalisation must always be an option in appropriate cases.

2 4 8 *Evaluation*

If Feinberg's approach to the criminalisation problem is characterised as being theoretical and systematic, Packer's methodology is more practical and policy-orientated. What is especially relevant to him is that both criminal law and punishment need to be practically implemented in a broader social context. He does not regard it as sufficient merely to concern himself with what would be ideal – ie, under what circumstances criminal punishment may possibly be justified – but also with what is feasible, given the inherent limitations of the criminal justice system. Thus he acknowledges the importance of effective enforcement of a (theoretically) justified criminal prohibition.[186] If a criminal sanction cannot be successfully put into effect due to qualitative or quantitative constraints, and serves no utilitarian purpose that

---

[183] Packer *The Limits of the Criminal Sanction* 273.

[184] No more will be said at this stage about alternatives to the criminal sanction. See *The Limits of the Criminal Sanction* 273-275 for more details, as well as § 5 3 3 for possible alternatives to criminalisation in the context of incest.

[185] Packer *The Limits of the Criminal Sanction* 258.

[186] The constraints of the criminal justice system include a lack of financial resources, time, manpower, etc.

cannot also be achieved by using other (less costly) means, Packer is of the view that criminal punishment is inappropriate, even if the conduct sought to be discouraged is both harmful and socially undesirable.

His point is that the legislature needs to be discriminating when deciding whether it is worthwhile to criminalise. Punishment of many forms of only slightly harmful or offensive conduct may, objectively speaking, be justified, but if even minimally effective enforcement of all such (often trivial) criminal prohibitions presently in force were to be attained, the criminal justice system would crack under the strain. Thus, even if punishment is deserved, the legislature may need to compromise – and definitely to prioritise: should petty offences really be subject to the wrath of the law, or should more energy and money be devoted to detecting and punishing violent crime instead? Packer notes that in practice selective enforcement (especially of less serious offences) takes place anyway – why not legitimise this instinctive prioritisation by decriminalising the bulk of trivial offences altogether?

The only objection I have to Packer's approach is that, although inspired (and inspirational) he is rather haphazard and unsystematic. He fails to distinguish sufficiently between relevant reasons for criminalisation based on theory/principle, and those based on practical/policy considerations. The former criteria could be used to justify criminalisation irrespective of whether there were budgetary constraints on law enforcement, whereas the latter would be more directly dependent on the specific context or community in which they were applied. The logical question I would ask Packer, therefore, is: what if we lived in Utopia, where there was an unlimited budget made available for law enforcement, and each type of (indisputably morally wrong) conduct declared criminal by the legislature was invariably and successfully detected and punished? Would Packer then support extending the criminal sanction to consensual sexual conduct, or petty offences, etc in principle? His book does not give us clarity about his answer to this question. Packer's arguments, then, seem to lack Feinberg's theoretical strength, in that he does not differentiate between universally valid criteria for criminalisation that would continue to apply irrespective of the realities of law enforcement in any

particular society, and considerations that are merely pragmatic and context-bound in nature.

2 5 **Writers: Rabie**

2 5 1 ***Introduction***

In the book *Punishment: An Introduction to Principles*,[187] Rabie devotes a considerable number of pages to the problem of guiding criteria in the establishment of what conduct should be made criminal.

Rabie's starting point is to identify the ideal purpose of criminal law. According to him, criminal punishment should only be used as a drastic sanction of last resort to protect "*fundamental* interests or values without which society cannot exist, against *reprehensible* conduct which *seriously* threatens or impairs these values".[188] Significantly, he echoes Packer in recognising the important role of weighing up competing interests and values in deciding what conduct should be criminalised. Since human dignity and autonomy are undermined by over-zealous resort to the criminal sanction, the criminal sanction is an *ultimum remedium* that should be used with restraint only where alternative sanctions are unsuccessful in achieving the desired societal security.[189] According to Rabie, only interests that are so valuable that they are a prerequisite for a peaceful and orderly societal co-existence, should be protected by using the criminal sanction to punish those who disregard them.[190] If the state were to leave unpunished wrongful acts that seriously threaten or infringe fundamental social values such as life, limb and property, there is the danger that members of society would take the law into their own hands to exact retribution, which could threaten the peace and order of society as a whole.

---

[187] Rabie and Strauss 5 ed.
[188] *Punishment* 99 (emphasis in the original).
[189] See Rabie *Punishment* 100.
[190] See *Punishment* 102-103 for examples of such interests, and the corresponding crimes.

2 5 2 ***Protected interests***

It is important to Rabie that only harmful (or potentially harmful) human conduct that threatens or infringes values such as life, personal integrity, truth and order should be subject to criminal punishment.[191] However, he points out that not all harmful conduct is criminalised – other criteria must also be used to limit the reach of the criminal sanction. Rabie is also of the opinion that criminal law is not an appropriate tool to enforce certain moral standards; mere morality is not an interest that should be protected by means of the criminal sanction. Although upholding a particular standard of morality may be of importance to the society in question, and is even worth treasuring, in a heterogeneous society it would be difficult and contentious to determine the limits of criminal punishment of immorality, and enforcement of mere morality by means of the criminal sanction is therefore undesirable.[192]

2 5 3 ***Nature of the attack***

Although the value of the protected interest may play a role in deciding whether those who infringe it should be criminally punished,[193] this factor is not necessarily decisive – the nature of the attack upon the protected interest is another significant consideration. There are certain requirements with which the behaviour of the accused must comply before criminalisation can be resorted to.

2 5 3 1 *Dangerous*

Criminalised conduct must be dangerous, in that it must create a substantial risk of injury to a protected interest. The more fundamental the interest in question (for example life), the easier it would be to justify punishing

---

[191] Examples of such conduct include crimes of violence, crimes of fraud, crimes against peace, order and good government and crimes against property (*Punishment* 102).

[192] Rabie *Punishment* 103-104. He also points out (at 114) that there are more appropriate instruments than the criminal law that may be utilised for moral education, for example, schools, religious institutions and the media.

[193] Rabie *Punishment* 106-107.

conduct even remotely threatening it.[194] However, dangerousness is not inevitably a decisive criterion for criminalisation, according to Rabie.

In this context Rabie also briefly considers the question of whether the criminal sanction should be used to punish people endangering themselves – ie, whether paternalistic criminal provisions are justified. Since Rabie agrees with Bayles[195] that in harm-to-self situations there are usually alternatives to the criminal sanction that are more effective and less prejudicial to the person performing the action, he does not regard the use of the criminal sanction as warranted in these cases.[196]

2 5 3 2 *Reprehensible*

Rabie is of the view that before conduct may be criminalised, it must not only be dangerous, but also morally reprehensible. He shares Packer's concern that the criminalisation of morally neutral conduct could weaken respect for the law and lead to half-hearted enforcement of such offences.[197] Rabie disapproves of the expedient use of the criminal sanction in respect of petty public welfare offences. He regards immorality as a necessary condition for criminalisation, but holds that immorality should by no means be a sufficient reason for justifying criminalisation – not all immoral conduct should be subject to the criminal sanction. In addition, he acknowledges the difficulty of determining the extent of society's moral disapproval in today's pluralistic society. However, he takes the view that factors such as the proportion of the community that disapprove of the particular conduct, the intensity of their disapproval and "the qualitative nature of the majority and minority groups" could play a role.[198]

---

[194] Rabie *Punishment* 108.
[195] In Pennock and Chapman (eds) *The Limits of Law* 184, 187.
[196] *Punishment* 110.
[197] *Punishment* 112.
[198] *Punishment* 113, quoting Hughes 1962 *Yale LJ* 673.

2 5 3 3 *Blameworthy*

In addition to being dangerous and morally reprehensible, the state of mind of the person performing the criminal conduct is relevant. According to Rabie, only those who are deserving of punishment should be subject to the criminal sanction. Rabie opposes the notion of guiltless or strict liability (where the offender has no *mens rea*, or is at most negligent), being of the opinion that it is inappropriate to resort to the criminal sanction in these instances. There are alternative ways of dealing with such conduct.[199]

2 5 4 ***Effectiveness***

Another more practical criterion that Rabie proposes is what he calls effectiveness. Only if a criminal sanction achieves the overall purpose of criminal law – ie, it prevents deviation from certain rules of conduct – can the threat of punishment be regarded as effective. While conceding that absolute prevention of crime is impossible, and also that it is very difficult to determine how effective the criminal sanction is in encouraging persons to desist from undesirable conduct, Rabie says that it may be useful to examine the nature of the conduct in question as well as the kind of persons likely to engage in it to determine criminal punishment's degree of efficacy.[200]

And even if the criminal sanction can be shown to be effective, says Rabie, this should not invariably imply that it should be resorted to. There may be alternative means of social control that are as successful as the criminal sanction in regulating human conduct, while being less costly and harsh.[201] Once again, weighing up or balancing of interests is required: whether the criminal sanction is truly necessary can only be determined once it has been established "how important society considers the values to be protected through suppression of the conduct in question, in relation to the values that may be impaired by the proposed method of control."[202] The severe sanction of criminal punishment is clearly required where fundamental

---

[199] Rabie *Punishment* 125.
[200] *Punishment* 126-127.
[201] As has already been mentioned, the criminal sanction should be used only as a last resort.
[202] Rabie *Punishment* 131.

interests are at stake, but many forms of conduct presently criminalised, such as public welfare offences and some sexual offences, may well be regulated better by using other legal[203] (or even extra- or non-legal)[204] means. However, where the legislature deems it necessary to intervene, but chooses to use an alternative to criminalisation such as administrative action, Rabie believes that there still appears to be no substitute for the criminal sanction as coercive measure of last resort, in cases where "other sanctions are wilfully disobeyed."[205]

Another significant consideration when ascertaining the effectiveness of the criminal sanction is the extent and success of its practical enforcement. The criminal sanction is not an effective deterrent where the perceived risk of detection, apprehension and conviction is very low.[206] Like Packer, Rabie points out that consensual crimes will be much less effectively enforced in practice than crimes where there is an identifiable victim. The potentially harmful side effects of criminalising certain conduct, although difficult to predict, must also be taken into account.[207]

2 5 5 ***Indispensability***

It is only justified to resort to criminalisation where it is absolutely essential and where no other sanction is adequate. This is because the implementation of the criminal sanction has extremely prejudicial consequences for persons who are prosecuted and convicted, and all options must thus be considered before punishing those who infringe upon societal interests.[208]

---

[203] Rabie discusses various legal alternatives, for example administrative sanctions, at 132-138.

[204] The humiliation and social stigma resulting from being publicly exposed as someone who has committed bestiality, for example, may be a far more effective deterrent than any fine or period of imprisonment could be.

[205] *Punishment* 132.

[206] Rabie *Punishment* 140.

[207] See *Punishment* 141-142 as well as the discussion of Packer 2 4 5 *supra* and Packer *The Limits of the Criminal Sanction* 270-295.

[208] See also in regard to the criminal sanction being used only as a last resort, the Hogan quote in § 3 3 3 3 *infra*.

2 5 6 ***Evaluation***

By emphasising the potentially extremely harmful effects of criminal punishment, Rabie is mindful that the criminal sanction should be used only as a last resort, a view I strongly support. As regards what conduct should be deemed punishable, he agrees with Packer that moral reprehensibility alone is insufficient: there must also be a degree of harm in that the relevant conduct should seriously threaten or impair interests of fundamental importance to society. He also notes that even conduct harmful to society should only be criminalised if punishment will be effective and will be able to be enforced, and where use of the criminal sanction would be essential.

My objections to Rabie's approach overlap to a great extent with my criticism of Packer. Like Packer, Rabie does not separate reasons for opposing criminalisation which are practical (based on policy considerations) and theoretical arguments based on legal principle. Many of his reasons for limiting the use of the criminal sanction may therefore not be relevant in all circumstances. For instance, he opposes legal moralism on the basis that it would be very difficult to come to an agreement about what conduct is morally reprehensible enough to warrant criminalisation.[209] This implies that, should a foolproof method for determining moral consensus be developed, he would not oppose legal moralism as fundamentally unacceptable *per se*, as does Feinberg. Similarly, his only objection to legal paternalism is that sanctions less severe than criminal punishment are more suitable,[210] which suggests that in principle he would support the use of criminal coercion to protect persons from the consequences of their voluntary choices, if it were the only feasible option. He does not make a distinction between criteria for determining the desirability of criminalisation that would always apply, irrespective of the society in which they were utilised, and those that are context-specific. Such a distinction would facilitate the use of his proposed criteria in practice.

[209] See §§ 2 5 2 and 2 5 3 2 *supra.*
[210] § 2 5 3 1 *supra.*

3 PROPOSED TEST: DETERMINING WHETHER CRIMINALISATION IS APPROPRIATE

3 1 Introduction

The views contained in a cross-section of the sources useful for deciding when the criminal sanction should be used, have been discussed. While the criteria developed by such authors as Feinberg, Packer and Rabie form a convenient point of departure for further investigation, the guidelines proposed by each for determining the limits of the criminal sanction sometimes diverge and are even somewhat contradictory. At times it seems unclear whether they are each addressing the same issue, and it is difficult to see at first glance how the various viewpoints, most of which are valid and worth considering, could be integrated and systematised into a single simple method of determining whether conduct should be prohibited as a crime.

As has been shown, legal writers are not the only source of information for establishing criteria for when criminalisation would be appropriate. The legislature needs to look at the standards outlined in the Constitution when determining the desirability of enacting new criminal legislation, as do courts when evaluating the validity of existing criminal laws. The Constitution is, after all, the "supreme law of the Republic"[211] against which all law or conduct must be tested to determine whether it is valid or not and is the ultimate indicator of the values, rights and interests our society deems worthy of protection. It contains indispensable guidelines to assist in a determination of the circumstances under which fundamental rights protected in the Constitution may be limited in a manner that is constitutionally permissible. Since all criminal law prohibitions entail the infringement of the rights of the individuals subject to them to a greater or lesser extent,[212] it is thus vital that the implications of the limitations clause, section 36 of the Constitution, be considered. Section 36(1) of the Constitution reads as follows:

> "The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;

[211] S 2 of the Constitution.
[212] See additional discussion § 2 2 *supra* and §§ 3 2 1 and 3 2 2 *infra*.

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

This study proposes to utilise the limitations clause as the underlying starting point for developing a reliable two stage test that can be used by the legislature or courts in the criminal law context to solve the problem of what conduct is a proper subject of criminal punishment. Although the basic structure of section 36 of the Constitution will be used as a framework for the suggested test, the various views of the writers already discussed, as well as my own views, will also be incorporated into this outline. It is interesting to note that it is surprisingly easy to reconcile the views of the writers concerning what criteria may be useful in determining the appropriateness of the use of the criminal sanction, with the considerations regarded as relevant in section 36.[213] Factors, guidelines and criteria that seemed contradictory or unclear suddenly form a coherent whole that is easy to understand and apply in practice.

3 2 **Preliminary issues**

3 2 1 ***Section 36(1) – Limitation in terms of a law of general application***

Before the limitations clause can be applied, it must of course be established that one or more of the rights in the Bill of Rights has been limited or infringed upon. In the case of a criminal prohibition this is a fairly easy task.

---

[213] This includes not only the three writers already discussed in detail, but others such as Bentham who, in *Principles of Morals and Legislation* (158-159), advocated a utilitarian approach to criminal law. He was of the view that, even in instances where conduct was immoral, the criminal sanction should be used extremely sparingly because "all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."
According to Bentham, then, there are certain situations where punishment ought not to be inflicted:
"1. Where it is *groundless*; where there is not mischief for it to prevent; the act not being mischievous upon the whole.
2. Where it must be *inefficacious; where it cannot act so as to prevent the mischief.*
3. Where it is *unprofitable* or too *expensive*; where the mischief it would produce would be greater than that it prevented.
4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate" [emphasis in the original].
See also Hughes 1962 *Yale LJ* 663.

Accused or convicted persons, who in practice would also be the persons with the *locus standi* to challenge the criminal sanction's constitutionality, need merely to show limitation of one or more of their constitutional rights. As has been noted above,[214] criminal sanctions always entail some limitation of the rights of the person accused or convicted of a crime. It is submitted that not only is there a *prima facie* indication that all criminal sanctions limit fundamental rights, but that, in many cases, the activities of accused or convicted persons impaired by government imposition of criminal punishment "fall within the sphere of activity the right[s were] intended to protect".[215] Feinberg agrees, emphasising that the invasion of the interest in liberty (a harm) is a necessary consequence of every legal prohibition, since such prohibitions narrow the options of those subject to them.[216] All criminal prohibitions have prejudicial consequences for the persons they affect – at the very least there is (potential) limitation of the rights to human dignity[217] (due to the stigma attached to the criminal sanction) and physical freedom (if the person should be found guilty and sentenced to a term of incarceration).[218]

---

[214] See preliminary discussion of the role of the Constitution § 2 2.

[215] Chaskalson *et al Constitutional Law of SA* 12-17. It may be argued that the sphere of activity protected by freedom or human dignity would not extend to the freedom to rape, but the freedom to engage in consensual sexual intercourse with the partner of one's choice may indeed be protected as falling within the scope of the right to dignity (see discussion of this right's infringement by the incest prohibition § 5 2 1 *infra*). However, even if it is incorrect to submit that criminal prohibitions always limit at least some activities that fall within the applicable rights' sphere of protected activity, there is no doubt that all criminal sanctions *prima facie* infringe upon "activit[ies] which could notionally fall within the ambit of a [particular] right" (see Chaskalson *et al Constitutional Law of SA* 12-17 to 12-18 for more on this distinction and its implications). It is submitted that, for present purposes, the distinction is one without substance, since it would not influence the end result of applying the proposed test to determine whether criminalisation is appropriate.

[216] *Harm to Others* 217.

[217] S 10 of the Constitution. See also *S v Makwanyane* 1995 3 SA 391 (CC), where Chaskalson CJ states (at § 142):
"Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity."
See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) § 28 and §§ 120-129, where it was held that the common law of sodomy also violated the right to human dignity.

[218] S 12(1) of the Constitution, which *inter alia* guarantees the right to physical liberty. As stated by De Waal *et al The Bill of Rights Handbook* 250, "arrest or imprisonment are the clearest cases of limitation of freedom". In addition, if there is no convincing justification or rationale for the existence of the crime in question, it may be argued that deprivation of freedom is arbitrary and without just cause (s 12(1)(a)) – see for example Snyman's argument (*Criminal Law* 4 ed (2002) 361) in the context of bestiality.

Depending on the particular crime that the person is being charged with, other rights may also be at stake and could be relied upon by the accused.[219]

The limitation of such rights as human dignity and freedom, which are inevitable if the criminal sanction is utilised, also invariably occurs in accordance with a law of general application – either a statutory or a common law criminal prohibition. Thus it is clear that it is necessary to examine the factors mentioned in the limitations clause in more detail to establish the reasonableness and justifiability of the limitation of the rights of the accused person.

3 2 2 ***Nature of the right***

It has been mentioned that although the some of the rights of the accused person are necessarily limited by all criminal sanctions, the nature of the particular rights affected is determined to a great extent by the specific crime being challenged. As will be discussed in more detail later,[220] criminal sanctions may restrict behaviour warranting constitutional protection in three distinctive ways: first, the conduct proscribed might be of such a nature that prohibiting it effectively prevents law-abiding individuals from realising constitutionally-protected aims;[221] second, the specific punishment imposed may undermine the exercise of fundamental human rights, either due to its nature or its duration;[222] and third, the methods necessary to apprehend a person suspected of a particular type of crime may be more likely to be unacceptable and to require unconstitutional conduct on the part of law enforcement officers.[223]

As regards the nature of the right specifically, in all likelihood the right to human dignity will be at issue when the constitutionality of a criminal prohibition is challenged,[224] as will the right to freedom and security of the

---

[219] See discussion § 3 2 2 *infra* as well as n 226 to n 232.
[220] At § 3 3 3 1 1 *infra*.
[221] This would be contrary to s 7(2) of the Constitution, which provides: "The state must respect, protect, *promote and fulfil* the rights in the Bill of Rights" [emphasis added]. See also n 255 *supra*.
[222] If the duration is out of proportion with the crime committed.
[223] Especially in the case of consensual crimes, where there is no complainant.
[224] See n 217 *supra*.

person in the case of a crime where the person's punishment may be imprisonment.[225] Other rights that may be relevant include the right to equality,[226] the right to privacy,[227] the right to freedom of religion, belief and opinion,[228] the right to freedom of expression,[229] the right to freedom of trade, occupation and profession,[230] property rights[231] and children's rights,[232] to name but a few.

In the criminal law context, therefore, the nature of the right as a relevant factor for determining the constitutionality of the right's limitation is not decisively useful in formulating general guidelines or principles, since the rights at stake vary, depending on the content of the criminal prohibition in question. It is clear, however, that since important rights such as human dignity, equality and freedom are usually implicated, this will tend to add weight to an argument that criminal prohibitions are *prima facie* unjustified and/or unreasonable.

---

[225] See n 218 *supra*.

[226] S 8 of the Constitution – see *National Coalition supra* §§ 15-27 and §§ 108-114 and *Jordan and Others v S and Others* 2002 6 SA 642 (CC) §§ 8-20 and §§ 57-73.

[227] S 14 of the Constitution – see *National Coalition supra* §§ 29-32 and §§ 110-119 and *Jordan supra* §§ 27-29 and §§ 76-84.

[228] S 15(1) and s 31(1)(a) of the Constitution – see *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) §§ 37-39 and §§ 110-113.

[229] S 16 of the Constitution would be implicated if, for instance, the common law crimes of criminal defamation or *crimen iniuria* were being challenged.

[230] See *Jordan supra* §§ 23-26 and §§ 54-56, where the argument that the right to economic activity (s 26 of the Constitution) was implicated was considered and rejected.

[231] S 25 of the Constitution would be at issue if a person who is found guilty is fined rather than imprisoned.

[232] See *S v Williams* 1995 3 SA 632 (CC) § 18, where the constitutionality of corporal punishment for youths was considered and the punishment was declared unconstitutional. Another punishment declared unconstitutional was the death penalty – see *S v Makwanyane* 1995 3 SA 391 (CC) § 151.

3 3 **Proposed test**

3 3 1 ***Introduction***

In formulating this proposed test, the assumption is that any criminal sanction entails a significant *prima facie* infringement of important constitutional rights of the accused. Thus the real question to be answered is: can the state show that there is a sufficiently good and worthwhile reason for limiting such rights? There are two separate matters that need to be considered in answering this question. The first is what I call the ***justification (or principle) question***, where the inquiry is: ***may*** the criminal sanction be used in a specific case? It is submitted that this justification question is a threshold one: where the rationale for criminalisation is unconvincing, the criminalisation inquiry ends then and there.[233] However, if this question is answered in the affirmative, the investigation as to the desirability of the criminal sanction is not yet complete. A second issue must still be borne in mind – what I call the ***reasonableness (or policy) question***: even where the use of the criminal sanction may theoretically be justified, this does not necessarily imply that it ***should*** be used in a particular case. Separate factors need to be taken into account in determining whether using a criminal prohibition is practically desirable and feasible.

Before the state may successfully discharge its onus of proving that the limitation of the accused's rights is constitutionally permissible, the criminal prohibition must be shown to be not only justifiable, but also reasonable.

---

[233] This approach is supported by Chaskalson *et al SA Constitutional Law* 12-49. In the context of the limitations clause, it was said (at 12-50): "If the objective or purpose of the limitation does not serve [the values of openness, democracy, human dignity, freedom, equality and the other values which underlie the Bill of Rights and the Constitution as a whole] in a manner which justifies the infringement of an express fundamental right, then the party seeking to uphold the limitation loses and our limitation inquiry ends."

3 3 2 *First stage: justifiability*

3 3 2 1 *Importance of the limitation's purpose: introduction*

It has generally been recognised that the only true *justification* for the imposition of criminal punishment is retribution or just desert, in the sense that persons being punished must be regarded as deserving of punishment (and should be punished in proportion to the crime that they have committed).[234] Since the underlying rationale for all punishment is to appease the community's feelings of anger and indignation, and to restore the moral balance of society,[235] resorting to the criminal sanction may only be regarded as warranted if the conduct engaged in is reprehensible, frowned upon by society, and engaged in by persons who were aware that their conduct was wrong.[236] This view is echoed by Packer, who emphasises that it is only socially threatening behaviour that is not condoned by the majority of society that may be criminalised.[237] If morally neutral conduct is prohibited, this reduces the stigma inherent in being convicted of a crime, which may be detrimental to the criminal justice system as a whole. Similarly, Rabie is of the view that only where a person engages in dangerous, reprehensible and blameworthy conduct that seriously threatens fundamental societal interests or values may the use of the criminal sanction be justified.[238] The focus at this stage, then, should be on identifying what types of conduct society deems deserving of punishment – it must be established what behaviour is regarded as bad or wrong enough for the state to impose the ultimate sanction, namely criminal punishment.

---

[234] See Snyman *Criminal Law* 24 and Burchell & Milton *Principles of Criminal Law* 48-49. The utilitarian punishment theories can help us determine the purpose of punishment in a particular instance, but since they do not presuppose proportionality between the crime and punishment, they need to be supplemented by the idea of punishment being deserved. See also Packer *The Limits of the Criminal Sanction* 35-70 for a detailed discussion of the link between specific punishment theories – what Packer calls the "justifications for criminal punishment" – and the proper use of the criminal sanction. He is of the view that conduct must be characterised as blameworthy before use of criminal penalties is permissible (62).

[235] Burchell & Milton *Principles of Criminal Law* 39; 41.

[236] It is doubtful whether the punishment theory of just desert can truly be applicable in cases where the community does not feel sufficiently aggrieved – for example, where the "crime" committed consists of conduct that is morally neutral or non-harmful.

[237] *The Limits of the Criminal Sanction* 273.

[238] *Punishment* 99 and §§ 2 5 1-2 5 3 3 *supra.*

If what has been said above is particularised, it is apparent that the purpose of the initial justification stage is to identify the underlying rationale for resorting to the criminal sanction in a particular case, and to decide whether this is a good enough reason for resorting to criminalisation. There is a close connection between this stage and **section 36(1)(b)** of the Constitution, which advocates that the "**importance of the purpose of the limitation**" is a factor to be taken into account when determining whether the right in question may be limited. Only where the reason for criminalisation is compellingly important, in the sense that imposing a criminal sanction serves a worthwhile and important purpose in a constitutional democracy, will the justifiability threshold be met.[239]

The justifiability stage of the proposed test has much in common with an approach such as Feinberg's. Since it is doubtful whether either Packer or Rabie would condone criminal punishment if the conduct in question is merely morally wrong, or harmful only to the perpetrators themselves, I will limit my discussion about the underlying rationale to Feinberg's views, since his guidelines for determining the justifiability of criminalisation are more satisfactory for the justifiability stage of the test in that they are clear and systematised. His concern is not so much the practical feasibility of imposing the criminal sanction, but its theoretical permissibility.

As seen above,[240] Feinberg distinguishes between four basic reasons that are advanced for justifying criminal punishment, namely harm to others, offence to others, legal paternalism and legal moralism. While the first two are, in principle, good and worthwhile justifications for criminalisation, legal paternalism and moralism are of insufficient value to justify inflicting criminal punishment to safeguard them. Thus if Feinberg's four categories are used as a point of departure, once the criminal prohibition's reason for existence has been adequately identified, it should be a relatively straightforward task to determine whether such a rationale is worthy of protection. Where the overriding justification for use of the criminal sanction is shown to be to prevent harm or offence to others, the state will have met its burden of proof in

[239] De Waal *et al The Bill of Rights Handbook* 162.
[240] § 2 3.

relation to justifiability – it will have shown that, in principle, suppression of the conduct concerned is a sufficiently weighty reason to warrant the imposition of the criminal sanction. However, where the only reason for criminalising the conduct in question is to protect actors from the consequences of their informed choices (paternalism) or to enforce private morality, these must be regarded as inadequate reasons for imposing the criminal sanction.

3 3 2 2 *Problems*

However, there may be situations where it is virtually impossible to say with certainty what the underlying reason is for criminalising a specific type of conduct,[241] especially in most of the borderline cases that would tend to give rise to a legal dispute. The *raison d'être* for a crime may be contested or doubtful in a number of senses:

First, it may be unclear what the rationale for the crime in question is, and the court may in the absence of evidence have to guess or presume a rationale itself.[242] If this is the case, the courts must be especially vigilant. According to Labuschagne,[243] the *lex certa* rule of the principle of legality requires the definition of a crime to have a rationale that is clear and easy to establish.

---

[241] See also § 2 3 4 *supra*.

[242] This appears to have been the case in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC). There was no evidence in favour of retaining the crime, simply because none of the respondents opposed the application to declare the crime invalid and thus did not seek to justify its retention. When considering whether the clear infringement of the right to equality entailed by criminalising sodomy could be justified, the majority (*per* Ackermann J) concludes that "there is nothing which can be placed in the other balance of the scale" (§ 27). Elsewhere in the judgment, however, Ackermann J makes his views about the underlying rationale for criminalising sodomy very clear when he refers to the purported purpose of the limitation of the rights of those effected by the criminal sanction as being: "to criminalise conduct which fails to conform with the moral or religious views of a section of society" (§ 26). Ackermann J also examines whether the rationale for criminalising sodomy is to punish "male rape", and comes to the conclusion that it is not. Rather, "[t]he sole reason for [the crime of sodomy's] existence was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which [the Court] found to be flagrantly inconsistent with the Constitution" (§ 69). Clearly, in the absence of evidence, Ackermann J is forced to draw his own conclusions. Although this is not necessarily a bad thing, I am of the view that the Constitutional Court as court of final instance might have benefited from counter-arguments, possibly advanced by an *amicus curiae* if parties to the dispute were reluctant to do so.

[243] "Die Legaliteitsbeginsel in die Strafreg en die Groeiende Geregtigheidsbehoefte aan Abstrakte Misdaadomskrywing: 'n Regsantropologiese Perspektief" 2001 *Obiter* 57 66 and 72.

Second, the *raison d'être* for the crime suggested by the state may be an ostensible one, differing from the real (less acceptable) reason. This could be a problem, particularly in instances where there appears to be more than one underlying reason for imposing the criminal sanction. Understandably, it would be in the state's interest to emphasise the more legitimate-seeming reason(s) for criminalisation, while downplaying the less savoury one(s), thus (deliberately or otherwise) misleading the court.[244]

Third, it may be difficult for the court to evaluate the validity of the crime's rationale as advanced by the state, or the court might be unwilling to do so. This could result in the court merely accepting the state's purported reason as correct without itself delving into the matter sufficiently in order to satisfy itself that the state rationale is indeed the true one. This difficulty may arise when the person applying to have the crime declared unconstitutional accepts the state's justification without question, thus depriving the court of the "other side of the story".[245]

Fourth, the rationale for criminalisation may genuinely be a mixed one, with some reasons being satisfactory and others being unacceptable. The court might find it difficult to know whether to accept the justification as legitimate or not.[246]

---

[244] It will be seen at § 5 2 2 *infra* that incest is an example of a crime where legitimate-seeming justifications mask less acceptable ones. See discussion of *Jordan and Others v S and Others* 2002 6 SA 642 (CC) n 246 *infra* for more on this problem.

[245] For example, in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), the state's contention that the prohibition on the smoking of dagga had a legitimate purpose was not contested by the appellant (at § 35). The court also accepted that prohibiting the use of harmful dependence-producing drugs is always a worthy aim, and failed *suo moto* to even consider the possibility that it might be a less than convincing justification.

[246] Eg, in *Jordan supra* various rationales for criminalising prostitution were advanced by the state, some of which were contested by the applicants. Some of the underlying reasons for suppressing commercial sex, as advanced by the state and accepted by the court, were the following (n 11 of the judgment):

- prostitution breeds violent crime and drug abuse;
- prostitution leads to the exploitation of women and children;
- prostitution leads to trafficking in children; and
- prostitution leads to the spread of sexually transmitted diseases.

In addition, the minority judgment (§ 86) refers to a number of other reasons advanced by the state in favour of curbing prostitution, including:

- prostitution *per se* is degrading to women; and
- prostitution is a frequent and persistent cause of public nuisance.

Fifth, there is a distinct possibility that the underlying reason for imposing the criminal sanction may have changed over time. It may be that the initial reason for criminalisation would have been deemed objectionable, whereas the contemporary justification advanced by the state is regarded as a good one.[247] Labuschagne[248] is of the view that the interests of justice place a duty on the legislature to amend the limits and content of a criminal sanction. The interests protected by criminalising particular conduct are dynamic, and may thus change in response to new scientific (or other) evidence or the evolution in society's system of values.

Although South African case law creates the impression that establishing the rationale of criminal prohibitions is a task fraught with difficulties, pitfalls and uncertainties, I am of the view that these problems are more apparent than real. The chief obstacle is not so much that it is impossible to ascertain the true justification for criminalisation, as it is that both the parties to disputes of this nature, as well as the courts adjudicating them, do not sufficiently

---

The Gender Commission, appearing as *amicus curiae*, alleged that the true reason for criminalising prostitution was the enforcement of morals, implying that the reasons advanced by the state were merely ostensible ones (§ 88).

It is clear that some of the above rationales are legitimate grounds that may justify a resort to the criminal sanction (ie, where the harm to others or offence to others principles are implicated), while others are not, being based purely on paternalistic or moralistic considerations. Disappointingly, the court chose to accept the reasons advanced for criminalising prostitution *in toto*, without considering each one individually to assess whether it is truly legitimate. The minority states (§ 94): "The state argued that it chose to criminalise prostitution for a series of purposes – *all of which are legitimate and important*" [emphasis added]. The majority also accepts the importance and legitimacy of criminalising prostitution unconditionally without considering the need to distinguish between the various reasons for criminalisation advanced by the state (§ 15). To my mind, many of the justifications outlined above are unconvincing, to say the least. Most, if not all, are inapplicable, unproven, purely emotive, or fall far short of the required harm or offence to others standard. In addition, the conduct being prohibited is very remote from much of the ultimate harm envisaged.

[247] In the context of its discussion of the regulation of commercial sex by means of prohibiting brothel-keeping (prohibited by subsections 3(b) and 3(c) of the Sexual Offences Act), the minority in *Jordan supra* considers the appellants' argument that these provisions amount to a constitutionally impermissible attempts to "legislate for a particular moral code" (§ 102). As does Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) (§ 139 of that case), the minority asserts that the South African constitutional framework does indeed require the legislature to enact laws promoting morality, provided that such morality is founded on constitutional values (§§ 104-105). It is submitted that adherence to constitutional values would require that the criminal sanction be used only as a last resort. Conduct should not merely be morally wrong, but also harmful or very offensive before criminalisation may be resorted to. Indeed the minority in the *Jordan* case do accept that legislation with the underlying rationale of enforcing a particular moral position as an end in itself cannot be constitutionally justified (§ 113). According to the minority, however, the rationale of the legislation for modern society is to control commercial sex, and this is regarded as sufficiently important and legitimate to justify criminalisation. See also n 152 *supra*.

[248] 2001 *Obiter* 72.

emphasise the importance of a systematic approach to the issue of determining whether a particular criminal sanction may theoretically be justified. If in every case the state outlined (with sufficient clarity) the reasons relied upon to justify retention of a criminal sanction, it would assist the court in making a well-informed decision about whether use of criminal punishment was justified in that situation. Naturally, it would then also be easier for the party challenging the criminal sanction to formulate counter-arguments contesting the state's allegations in this regard.

Similarly, courts have largely been unaware of the value of identifying the criminal provision's rationale clearly in their judgments, and, if applicable, of giving reasons why the rationale is regarded by the court as sufficiently important and legitimate. If the courts were to do so, such guidelines would facilitate the task of the state should it attempt to justify the *raison d'être* of a particular criminal provision in future cases, since the state would know what reasons had been accepted as legitimate in the past.

Where there is more than one justification advanced by the parties, the court should have the discretion to decide which rationale it regards as being of overriding importance. If sufficient evidence is before the court, this should be a relatively simple task.[249] As is the case in all criminal law matters, in cases where there is reasonable doubt as to whether the justification is a worthy one or not, the benefit of the doubt should be given to the party seeking to challenge the criminal prohibition in question, not the state.

3 3 2 3 *Conclusion*

If our point of departure is that criminal punishment should be deserved before its use can be justified, it is submitted that harm or serious offence to others are in principle worthwhile reasons for using the criminal sanction. Although there is little South African case law on this subject to date, it appears that our courts do implicitly support the view that preventing harm, or serious offence, to others is a legitimate and important state goal that may

[249] As explained above, where the justification relied upon promotes the prevention of harm or offence to others, it is should *prima facie* be regarded as legitimate, whereas the opposite is true where the legislation's underlying rationale is paternalist or moralist in nature.

justify the use of the criminal sanction. But whether these are regarded as the only legitimate reasons is questionable. Although the Constitutional Court has stated in no uncertain terms that the enforcement of morality alone is not a sufficient justification for the imposition of the criminal sanction,[250] there is uncertainty about the status of legal paternalism as a justified rationale for resorting to criminalisation. Insofar as the Constitutional Court has uncritically accepted (hard) legal paternalism as a worthy reason for criminalising conduct,[251] it is submitted that a more nuanced approach may be preferable.

3 3 3 ***Second stage: reasonableness***

Even if it has been established that the criminal sanction *may* be resorted to – ie, that there is sufficient theoretical justification for the criminal sanction – this does not conclude the inquiry into the appropriate use of criminal punishment. Although it is a relevant reason in support of criminal prohibition that society regards the conduct concerned as deserving of punishment in that it violates an interest worthy of protection by causing harm or offence to others, this is not a decisive or sufficient condition for state coercion to be appropriate – a second key question still needs to be asked. This question explores the issue of whether utilising the criminal sanction is practically desirable or feasible – reasonable – in the circumstances.

3 3 3 1 *Nature and extent of limitation of the rights of the accused*

The first step of the reasonableness inquiry corresponds with **section 36(1)(c)** of the Constitution. A relevant factor to be considered, according to this provision, is the **nature and extent of the limitation** of the right. In the present context, when the suitability of the criminal sanction is being

---

[250] See, eg, *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) §§ 37-38; *Jordan and Others v S and Others* 2002 6 SA 642 (CC) §§ 113-114.

[251] In *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), "harm to self" was the clear rationale for the prohibition on the use of dagga, and this was not disputed by either the appellant or the court. At § 35, the court states that
"the case was approached on the footing that the prohibition contained in the impugned provisions served a legitimate government interest. Indeed, there was no suggestion either in the papers or in the argument that the objective pursued by the prohibition was not laudable."

determined, the right(s) being limited are those of the accused or sentenced person, and it is the state's utilisation of criminal punishment that results in such infringement. As has already been outlined above,[252] the use of a criminal sanction necessarily limits to a certain extent fundamental rights of the person who is charged with and found guilty of a crime, although the particular individual rights infringed (the nature of the right) as well as the seriousness of harm suffered by the accused as a result of imposition of criminal punishment (the extent of the limitation) may vary from crime to crime.

3 3 3 1 1 ***Nature of the right***

Something has already been said about the nature of the rights implicated by criminal punishment, and it has been concluded that the rights concerned are important ones. The investigation is somewhat more complex than it first appears, however, since ascertaining the nature of limitation of rights in the criminal law context is an inquiry that operates on at least three levels:[253]

First, by prohibiting specific conduct, criminal sanctions dissuade law-abiding citizens from engaging in conduct that they might otherwise have chosen. According to Feinberg,[254] this means that the freedom interest in having as many open options as possible with respect to what one is allowed to do is always invaded to some degree by criminalisation. It is submitted that a criminal prohibition that explicitly denies persons the opportunity to exercise constitutionally-protected rights by prohibiting the exercise of rights on pain of

---

[252] §§ 3 2 1 and 3 2 2 *supra*.

[253] For another approach, see Bentham *Principles of Morals and Legislation* 163, where he divides the "evil of punishment" into four branches, namely:

(1) the "evil of coercion or restraint" suffered by a person observing the law who is deterred from committing the particular act on pain of punishment;
(2) the "evil of apprehension" that is felt by those who anticipate being punished once they have disobeyed the law;
(3) the "evil of sufferance", or the pain felt when undergoing punishment; and
(4) the pain of sympathy and other derivative evils suffered by those closely connected to the original sufferers.

Bentham notes that the extent of the first evil will depend on the nature of the act from which the party is restrained, while the second and third evils will vary according to the nature of the punishment prescribed for a particular offence.

[254] *Harm to Others* 213.

punishment, should be viewed with suspicion. Especially where the conduct criminalised has a constitutionally-protected status, the criminal proscription may limit human rights to a greater extent than a mere restriction of autonomy.[255] Feinberg proposes that the nature of the limitation imposed by a criminal sanction may be determined by ascertaining the degree to which the prohibition in question reduces an individual's alternatives.[256] On the one hand, a criminal prohibition that closes many key options indirectly by closing a given option directly may be unreasonable,[257] while on the other, the closing of an option may indeed be acceptable if the option closed is not a "fecund" one.[258] This is linked with Feinberg's opinion that the more useful (or valuable, or constitutionally-protected) the dangerous conduct is for the actor and others, the harder it will be for the state to show that criminalisation is reasonable.[259] Packer has much the same idea when he states that the criminal sanction should not be used to inhibit socially desirable and useful conduct.[260] He views it as objectionable to reduce an individual's alternatives to an unacceptable extent by prohibiting (preparatory) conduct very remote from any ultimate harm.

Second, the purpose of criminal sanctions is not only to prevent individuals from acting in a particular manner that they would otherwise have chosen, but also to punish those who are not deterred by the threat of punishment. The degree to which human rights are limited by punishment also depends on the nature of the punishment imposed,[261] which in turn is

---

[255] For example, criminalising sodomy prevents homosexuals from giving expression to their sexual orientation, thereby affecting their ability to achieve self-identification and self-fulfilment (*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) § 28 and §§ 120-129). A crime that prohibits free assembly, free speech, religious freedom (see *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) §§ 37-39 and §§ 110-113), etc would be automatically suspect. The crime of prostitution, that denies prostitutes the right to carry on their trade or profession without the risk of criminal prosecution, would also fall in this category (*Jordan and Others v S and Others* 2002 6 SA 642 (CC) §§ 23-26 and §§ 54-56). In contrast, the criminalisation of rape closes off one small limited unfruitful option that is not constitutionally protected, namely the option of having non-consensual sexual intercourse. See also n 221 *supra*.

[256] *Harm to Others* 207.

[257] See n 255 *supra*.

[258] Feinberg *Harm to Others* 214 and n 255 *supra*.

[259] *Harm to Others* 216 and §§ 2 3 2 and 2 3 3 *supra*.

[260] *The Limits of the Criminal Sanction* 270-271.

[261] For example, imprisonment, a fine, community service, correctional supervision, a suspended sentence, etc. Corporal punishment and the death penalty have already been declared unconstitutional (see n 232 *supra*).

dependent on the particular conduct criminalised. More serious crimes tend to be punished more severely and by means of punishment that is invasive and unpleasant to a greater degree than that imposed on persons guilty of trivial offences. There is thus a more extreme violation of human rights that will be harder for the state to rationalise convincingly. However, it may also be argued that the lighter the sentence is, the less the perceived need to subject the conduct in question to criminal punishment in any event. Packer argues that the threshold for determining whether criminalisation is reasonable in this sense should be whether the legislature is willing to impose a prison sentence of longer than three months on those who are convicted of the particular offence, rather than a mere fine or lesser punishment.[262] According to him, "we ought to purge from the criminal calendar all offenses [*sic*] that we do not take seriously enough to punish by real criminal sanctions".[263]

Third, the methods necessary to enforce a particular prohibition may also play a role in determining the nature of infringement of fundamental rights entailed by criminalisation. Especially in the case of so-called "consensual" crimes[264] that are "just barely taken seriously",[265] enforcement is extremely sporadic anyway. Packer believes that this creates the danger of a discriminatory abuse of the exercise of the discretion to enforce such criminal prohibitions.[266] In addition, where the crime is a consensual one with no complainant to lay a charge, enforcement may require police to resort to underhand and unsavoury tactics to secure evidence for convictions. This involves further human rights violations, such as unwarranted invasion of privacy and human dignity.[267]

Taking the content of the prohibition itself, the punishment prescribed or the method used to enforce the crime (or a combination of the three) into

---

[262] *The Limits of the Criminal Sanction* 275-276 *supra.*
[263] *The Limits of the Criminal Sanction* 273 and § 2 4 7 *supra.*
[264] For example, prostitution and offences involving deviant sexual practices.
[265] Packer *The Limits of the Criminal Sanction* 290.
[266] *The Limits of the Criminal Sanction* 286-287 and § 2 4 5 *supra.*
[267] Unsavoury methods include physical intrusion, electronic surveillance and the use of decoys. See also Packer *supra* 282-286 and § 2 4 6 *supra*, as well as the facts of *S v Jordan and Others* 2002 1 SA 797 (T) 799B, where the third appellant admitted to performing a pelvic massage for reward "on a person who later proved to be a police agent". See also n 178 *supra*, where enforcement of the Immorality Act in South Africa is discussed in this context.

consideration, it should be possible to establish the nature of the human rights that infringed upon by the imposition of the criminal sanction in any specific case.

3 3 3 1 2 ***Extent of the limitation***

What still needs to be considered is the extent of the violation – whether criminal punishment has a considerably severe negative effect on the fundamental rights of accused or convicted persons, or whether the impact is a relatively minor and benign one. It is submitted that the degree of violation of the accused's human rights may only be determined in relation to the good (for society, the victim of the crime, if any, etc.) resulting from the imposition of the criminal sanction. Thus the extent of the harm resulting from criminalisation cannot be determined in isolation – a comparison is required. It is necessary to weigh up the benefits of criminalisation against the harm caused by imposition of criminal punishment. The rationale for criminalising an offence may give an indication of the harm that imposing criminal sanction seeks to prevent. Where it is a worthy and important one, for example the protection of human life, a particularly severe degree of impairment of human rights inherent in the use of the criminal punishment chosen will be required before the sanction may be regarded as unreasonable. Conversely, where the justification for criminalisation is theoretically justifiable, but otherwise unconvincing,[268] it will be a difficult task for the state to justify even a slight infringement of individual rights.

Factors relevant in the determination of the nature of individual rights infringed have already been discussed above. Depending on the degree to which the prohibition itself, its punishment and the methods of enforcement of the crime violate human rights, the rights of the individual accused will weigh more or less heavily in the balance. For instance, if the criminal punishment has a serious impact on fundamental rights, such as where it prevents persons from exercising constitutionally protected rights, or infringes on the right to life as is the case with the death penalty, the limitation will extremely

[268] Eg, where a minor degree of offence to others is at issue.

hard to justify, while in cases where criminal punishment is light and rights are impaired to a very slight extent, the state's reason for prohibiting the conduct in question on pain of punishment need not be quite so compelling.[269]

If the harm caused by the commission of the crime is less severe than the harm caused by criminal punishment, the criminal sanction is likely to be regarded as unreasonable, since the good envisaged by the criminal sanction is outweighed by the bad. Thus where the proportionality inquiry reveals that the harm of imposing a criminal sanction is disproportionate to its benefits, criminalisation will be undesirable.[270]

3 3 3 2 *Relation between the limitation and its purpose*

Once it has been established what purpose a particular criminal sanction is designed to serve (with reference to its underlying rationale), the next stage in the reasonableness inquiry is to ask whether such criminal prohibition is in fact effective in achieving its purported purpose. There must be a sufficiently rational connection between the objective of the criminal sanction and the manner in which it attempts to achieve such objective. This stage of the investigation corresponds with **section 36(1)(d)** of the Constitution, which advocates that the **relation between the limitation of rights and its purpose** is a relevant factor to be considered when determining the reasonableness of an infringement of a fundamental right.

At this point it is necessary to say a few words about the general goals of punishment in establishing whether criminal punishment can be regarded as being reasonable. The punishment theory of just desert has already been mentioned in the context of emphasising the importance of deserved punishment, and it was mentioned that deserved punishment is often regarded as the true *justification* for punishment.[271] Like the just desert theory, the present stage of the inquiry underlines that it is crucially important

---

[269] See also Feinberg's discussion of factors to be considered when deciding whether harm or offence to others are serious enough to warrant criminal punishment (§§ 2 3 2 and 2 3 3 *supra*).

[270] See also § 3 3 3 2 *infra* for a closer look at how to undertake a cost-benefit analysis in the context of determining whether there is a rational connection between the function of a criminal sanction and the means employed to achieve its stated goals.

[271] At § 3 3 2 1 *supra*.

for there to be "proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve" before a limitation of rights will be regarded as reasonable.[272]

However, quite apart from just desert as general justification for punishment, there may be a myriad of other *reasons* or *purposes* served by punishment in a particular case, that take into account not only the interests of society and the crime committed, but also the individual circumstances of the accused. Packer is of the view that in situations where criminal punishment serves only to punish the wicked (ie, where it is deserved), it should not be resorted to. According to him, there should be evidence that imposing the punishment is also likely to have a deterrent effect and preferably also to prevent the commission of further crimes.[273] Although it is extremely difficult to prove that the threat of punishment deters people from committing crimes,[274] Packer's view that the role of criminal law is not merely to punish evil is to be commended. Criminal punishment should in addition have some other positive social value such as incapacitation, deterrence or rehabilitation before it may be used. If a criminal prohibition fails to serve such purposes as it is designed to achieve, or achieves them only to a very minor extent, criminalisation is ineffective and should not be resorted to.

The purpose of criminalising conduct may be explained on two levels. On a primary level, criminal penalties are backward-looking, aimed at punishing those who have already violated rights and interests that are worthy of protection.[275] On a secondary level, the purpose of criminal punishment is forward-looking, not focused on the punishment of past offences, but on the avoidance of future ones. It is especially this second level that is relevant when the question is asked whether there is a rational connection between the purpose of a criminal sanction and the manner in which this purpose is achieved.

---

[272] De Waal *et al The Bill of Rights Handbook* 161.

[273] See *The Limits of the Criminal Sanction* 269 and § 2 4 3 *supra*.

[274] See for example *S v Makwanyane* 1995 3 SA 391 (CC) § 127, where Chaskalson CJ refused to accept the contention of the attorney-general that the death penalty was a greater deterrent than life imprisonment, citing lack of evidence.

[275] This level corresponds with the rationale for punishment, which has already been discussed at § 3 3 2 *supra*.

Whether a criminal prohibition achieves the secondary purpose of preventing crime is a question concerned with its efficacy. Rabie supports this argument, suggesting that a criminal prohibition's efficacy may be determined by establishing the extent to which it prevents deviation from certain rules of conduct.[276] Simply put, the question is: does the mere threat of criminal punishment cause people to refrain from prohibited conduct? If so, this could indeed be an indicator of the prohibition's value. Although it is clear that no criminal sanction could ever be a completely successful deterrent, the validity of deterrence as a rationale for punishment depends largely on the perception[277] that there is a relatively good chance that a person committing the crime in question will be apprehended, tried, convicted and punished.[278] Thus it would appear that the extent and success of practical enforcement of a criminal sanction are very good indicators of whether there is a sufficient relation between the intended aim of such sanction and the extent to which this aim is actually achieved in practice.

Packer agrees with the view that the practical enforceability of a criminal sanction is of decisive importance. A criminal sanction will not tend to serve the purpose of preventing individuals from causing harm or offence to others if its deterrent effect is negligible. Unsatisfactory deterrent value may be due to a variety of reasons, including:

- enforcement that is extremely sporadic at best;
- the nature of the crime resulting in an increased risk of discriminatory enforcement;
- effective enforcement only being possible if over-intrusive detection methods are used;[279]
- it being necessary to allocate and expend a disproportionate amount of resources such as time, money and energy to ensure the enforcement of an offence generally perceived as relatively trivial;[280] and

---

[276] *Punishment* 126 and § 2 5 4 *supra*.
[277] Both of members of society in general and of those who have already committed crimes.
[278] See also *S v Makwanyane supra*, where Chaskalson CJ stated at § 122: "The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished."
[279] See discussion of Packer §§ 2 4 5 and 2 4 6 *supra* for more on qualitative strains on law enforcement.
[280] See discussion of Packer § 2 4 6 *supra* for more on quantitative constraints on the criminal process.

- the undermining of the moral legitimacy of the criminal sanction (and thus its deterrent value) due to its overuse or abuse.[281]

It is submitted that this stage of the inquiry requires a cost-benefit analysis, a weighing up of the competing rights, values and interests at stake – state objectives, societal priorities and interests, the rights of those accused and convicted of crimes, as well as obligations towards those directly harmed by crime. The state has a legitimate interest in prohibiting certain conduct that results in harm of serious offence to members of society. However, if in so doing, the state "imposes costs or burdens on the rights-holder(s) which far outweigh the benefits said to flow to other members of society",[282] then the decision to criminalise is a questionable one. In the present context, it may be argued that severely limiting the rights of accused and convicted persons may indeed be beneficial to (potential) victims of crime and to the community in general, since the consequence could well be the more effective deterrence and prevention of crime – but at what cost? In instances where the rights of accused and convicted persons are restricted in a manner disproportionately harsh in relation to the interests that the particular criminal sanction seeks to protect, the link between achieving state aims and the means employed to do so may be sufficiently tenuous to make such sanction unreasonable.

A criminal prohibition that is relatively unsuccessful in deterring people from committing crimes – ie, one whose application in practice does not achieve its stated goals because the (perceived) risk of detection, apprehension and conviction is comparatively low – should be viewed as suspect because the relation between the limitation and its purpose in such a case would probably be too unconvincing to be regarded as rational. Such misgivings about a criminal sanction would be exacerbated where the means necessary to enforce the prohibition severely and unreasonably prejudice the rights of those subject to it. Thus if there are clear indications that a criminal proscription is for whatever reason being ineffectively enforced in practice, or

---

[281] See Packer § 2 4 7 *supra* for more on the idea of moral legitimacy. Over-use or abuse of the criminal sanction will lead to individuals feeling entitled to engage in criminalised conduct with impunity since it is not widely viewed as reprehensible. In addition, enforcement of the crime will be less than satisfactory, since even those responsible for enforcement will be reluctant to ensure compliance with an extremely trivial criminal proscription.

[282] Chaskalson *et al SA Constitutional Law* 12-51.

may only be enforced by resorting to disproportionately expensive, harsh or unsavoury means, this is an indication that decriminalisation is an option that should be taken seriously.

3 3 3 3 *Less restrictive means to achieve the purpose*

In the words of Hogan,[283] "[t]here is often more than one way to skin a cat, and flaying the hide off it with the criminal law is not always the most efficacious." The last factor to be considered in determining whether use of the criminal sanction would be reasonable – namely, whether criminalisation is strictly necessary to reach the envisaged goals of the state – is one that has long been neglected by both the legislature and the courts. By considering **section 36(1)(e)** of the Constitution, the question is asked whether the aims sought to be reached by utilising the criminal sanction could possibly be achieved by **less restrictive means**. As has been mentioned already, all criminal prohibitions are restrictive of rights *per se*. In the criminal law context, then, considering resorting to less restrictive means could refer to a variety of different aspects:

First, the criminal provision defining the prohibited conduct may be over-broad, including both objectionable and unobjectionable conduct within its ambit. It may be necessary to limit the scope of the prohibition to ensure that it only proscribes conduct truly deserving of punishment and nothing else.[284]

Second, the punishment prescribed for a crime may be too severe. Even punishment that is in itself not unconstitutional may be regarded as unreasonable if its nature or degree is disproportionate to the prohibited

---

[283] "On Modernising the Law of Sexual Offences" in *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Glazebrook ed) (1978) 176.

[284] Such a process could amount to severance or reading down. A similar argument was advanced in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC). The appellant did not dispute the state's contention that the aim of prohibiting the use of dagga was a legitimate one. What he did dispute, however, was that the means used to achieve this aim were necessary. He contended that the state could achieve its stated goal equally effectively without restricting his right to religious freedom. Thus the Constitutional Court had to decide whether or not the impugned provision was overbroad – ie, "whether the granting of the religious exemption would undermine the objectives of the prohibition" (§ 47). The majority was of the view that permission given to Rastafari to possess dagga would undermine the general prohibition against such possession (§ 141) and dismissed Prince's appeal.

conduct in question or if the goals of punishment may be satisfactorily achieved by lesser means.[285]

Third, the existence of the crime in its entirety may be at issue. Decriminalisation, including both the use of the many readily available and viable alternatives to the criminal sanction as well as the valid option of doing nothing,[286] has received comparatively little attention from legislature and courts alike.[287] It is submitted that this approach should be reconsidered. Section 36(1)(e) places a constitutional imperative on courts to consider whether there are less restrictive means to achieve the aim that may be realised by criminalisation, and to take such alternatives seriously. Unfortunately, our courts have thus far been loath to do so.

---

[285] Our courts have considered the constitutionality of specific punishments on various occasions. In *S v Williams* 1995 3 SA 632 (CC), the Constitutional Court held that there were many sentencing alternatives to corporal punishment that would achieve the aims of punishment just a successfully, if not more so. It was held (at § 91) that "[i]t has not been shown that there are no other punishments which are adequate to achieve the purposes for which [corporal punishment] is imposed." In *S v Makwanyane* 1995 3 SA 391 (CC), a factor that weighed heavily with the court in its decision to abolish the death penalty was the existence of a satisfactorily severe alternative to the death penalty that was less restrictive of prisoners' rights, namely life imprisonment (§ 145). The principle that a less severe punishment should be preferred, provided that the goals of punishment is still adequately achieved thereby, may apply not only when the consideration is whether to abolish a particular form of punishment altogether, but also where the suitability of the use of a specific type of punishment in a particular case is at issue.

[286] See especially Packer *The Limits of the Criminal Sanction* 258 and § 2 4 7 *supra*.

[287] As mentioned earlier, a detailed exposition on alternatives to the criminal sanction will not be considered here. Suffice it to say that alternatives such as regulation, the use of administrative sanctions, and extra-legal sanctions such as social disapproval, etc, exist and may well be as effective as the criminal sanction in coercing individuals to refrain from harming or offending others. Several such arguments have been advanced in our courts, but have been unsuccessful.
For example, it was argued in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) that it was not necessary to impose a blanket ban on the sacramental use of dagga by criminalising the possession and use of dagga by Rastafarians. The court was divided on this issue. The minority, *per* Ngcobo J, was of the view that the religious use of cannabis could indeed be accommodated, for example by means of a permit system coupled with the necessary administrative guidelines and infrastructure. The majority, *per* Chaskalson CJ, Ackermann and Kriegler JJ, disagreed. According to the majority, the granting of a limited exemption for the religious use of dagga was not a competent remedy since it might interfere with the state's ability to enforce its legislation. I submit that this argument is unconvincing. With the correct infrastructure in place an exemption could indeed be a workable option. I would like to go so far as to argue for the decriminalisation of the use and possession of dagga altogether, but such an argument is beyond the scope of this thesis.
Another instance illustrating the Constitutional Court's reluctance to consider decriminalisation as an option was *Jordan and Others v S and Others* 2002 6 SA 642 (CC). Although various workable alternatives to the criminal sanction were submitted to the court, it refused to consider "whether the interests of society would be better served by legalising prostitution than by prohibiting it". The majority *per* Ngcobo J held that this policy decision (concerned with the desirability of the prohibition) was beyond the scope of what the court was permitted to do, and should be left to the legislature (§ 30). The minority echoed this sentiment, holding that the legislature had the choice to decide whether it wished to prohibit prostitution, regulate it or abstain from addressing it at all (§ 92). I disagree.

3 4 Conclusion

It cannot be denied that the South African criminal justice system is inadequately funded. Our criminal justice system does not have sufficient resources to enforce even criminal prohibitions pertaining to serious crimes against life and limb, with more than a modicum of success. This vital task is considerably hampered by the simultaneous diversion of time and resources for the enforcement of a proliferation of trivial, non-priority offences contained in virtually every piece of legislation that is enacted. In an ideal world it would indeed be possible to criminalise all forms of dangerous and reprehensible conduct that threaten to harm or offend others, without considering the budgetary implications. However, that is simply not feasible in our society. Packer is perfectly correct, then, when he says that the legislature should not subject conduct to criminalisation unless it is prepared to subject offenders to criminal punishment *and* to make adequate resources available for enforcement of the prohibition.[288]

The state needs to take the option of decriminalisation seriously. I would go so far as to say that the state has a constitutional obligation to prioritise the allocation of its criminal justice budget instead of spreading it so thin that enforcement cannot possibly be effective. This implies that criminal penalties should be reserved only for those who violate the values deemed most precious by society.[289] Less restrictive (and expensive!) alternatives should be used wherever possible, provided that alternative options would adequately achieve legitimate state aims. In many circumstances the criminal sanction is far from indispensable. With the will to decriminalise and a creative approach to the consideration of alternatives to criminal punishment, I am convinced that feasible and acceptable options could be developed and applied. Crimes that are low on the hierarchy of conduct that is regarded as threatening and harmful enough to warrant the intervention of the criminal law should simply be decriminalised, freeing up money that could be far better spent elsewhere.[290] Thus a shift away from the focus on criminal punishment

---

[288] *The Limits of the Criminal Sanction supra* 272.

[289] Ie, cases of conduct resulting in serious harm or offence to others.

[290] See also the motivation for this study § 1 2 for more details on why large-scale decriminalisation is a worthwhile option to be considered.

as the only effective means for social control would benefit not only those (formerly) subject to criminal sanctions, but would also be to the advantage of the state and society in general. The legitimacy of the criminal justice system would be enhanced if extra resources were available to combat priority crimes, instead of being diverted to enforce trifling ones.[291]

Only once all alternatives to criminalisation, including the option of doing nothing, have genuinely been considered and it has been decided that the criminal sanction is a sanction of last resort that is absolutely essential and indispensable in the circumstances, can it be said that resorting to the criminal sanction is truly both justifiable and reasonable.

[291] As noted by Van Zyl Smit 1986 *TRW* 188: "penal sanctions cannot be limited only to the enacted criminal law." He illustrates this by using a negative example. He notes that the repeal of the colonial Masters and Servants laws by means of the Second General Law Amendment Act 94 of 1974 had little if no practical effect on those it was meant to benefit. Referring to farm labourers in the Western Cape, he points out that after 1974 they were just as strictly controlled, and their "crimes" as heavily penalised, as before the repeal of the laws in question. Conduct such as disobedience, drunkenness, using abusing language, etc was no longer formally criminalised, but farmers still had the power to punish infringements despite not having the "formal backing of the enacted criminal law".

4 WHAT IS INCEST?

4 1 Definition of the crime

Common law incest[292] is defined as the unlawful and intentional sexual intercourse between (male and female) persons who may not marry each other because they are related within the forbidden degrees of consanguinity, affinity or adoptive relationship.[293] It is a dynamic crime, in the sense that its definition corresponds with the private law rules relating to the degrees of consanguinity and affinity within which a man and a woman may not marry each other (as well as any statutory provisions regarding when marriage between two persons in an adoptive relationship is forbidden).[294] The category of persons between whom incest is possible is expanded or contracted as the category of persons who are prohibited from marrying due to close blood, marriage or adoptive relationships is added to or diminished.[295]

4 2 Elements

4 2 1 *Sexual intercourse*

At present, sexual intercourse (defined narrowly as penetration[296] involving the male inserting his penis into the female's vagina) is the only conduct punishable as incest. Marriage within the prohibited degrees, without proof of intercourse, is insufficient, although an inference of sexual intercourse

---

[292] No reference will be made in this study to conduct criminalised as incest in terms of South African customary law. For more information on this topic, see Olivier NJJ, Olivier NJJ (jr) & Olivier WH *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3 ed (1989) 10-15 and Labuschagne "Die Bloedskandeverbod in die Inheemse Reg" 1990 *TRW* 35. See also Nel "The Constitutionality of 'Affinity' Incest: An Argument Based on the Recognition of Customary Marriages Act" 2002 *Stell LR* 331 for a constitutional perspective on the incest prohibition in the context of customary law.

[293] Snyman *Criminal Law* 355; Milton *SA Criminal Law & Procedure: Common Law Crimes* 239; De Wet and Swanepoel *Strafreg* 4 ed (1985) 279; *LAWSA VI Criminal Law* § 222.

[294] *Contra R v Blaauw and Blaauw* 1934 SWA 3 6-10.

[295] *LAWSA supra;* Snyman *Criminal Law supra*; Milton *SA Criminal Law & Procedure: Common Law Crimes* 240. See also *S v Shasha* 1996 2 SACR 73 (Tk) 76: "The common-law crime of incest is therefore not a self-contained crime, but is coupled with marriage law. If the degree of relationship as impediment to marriage is either enlarged or decreased by way of legislation, the category of persons with whom incest is possible is correspondingly enlarged or decreased."

[296] See § 4 3 4 2 1 *infra* for the SA Law Commission's proposals relating to an extended definition of penetration.

can be drawn from the fact that the parties have lived together after the celebration of a (putative) marriage.[297]

4 2 2 ***Prohibited degrees***

Where marriage is prohibited for reasons other than close blood, marriage or adoptive relationship, for example because the one party is already married, intercourse does not amount to incest.[298] In determining whether parties are related within the forbidden degrees of consanguinity or affinity, no distinction is made between children born in wedlock and those born out of wedlock. Similarly, it makes no difference whether the parties are related in the half blood or in the full blood.[299]

4 2 2 1 *Consanguinity*

Consanguinity or blood relationship exists between parties who have an ancestor in common. Consanguinity can be either in the direct line or in the collateral line. Persons who are ascendants (ancestors) or descendants (offspring) of each other (for example father and daughter or grandfather and granddaughter) are related in the direct line, while all other blood relatives (for example uncle and niece, siblings or cousins) are collaterals.[300] Blood relations who are ascendants and descendants in the direct line *ad infinitum* may not intermarry, and thus commit incest if they engage in sexual intercourse with each other.[301] Sexual intercourse between collaterals, where either collateral is related to their common ancestor in the first degree of descent, is incest.[302]

---

[297] Milton *SA Criminal Law & Procedure: Common Law Crimes* 239-240; Snyman *Criminal Law* 356.
[298] Milton *SA Criminal Law & Procedure: Common Law Crimes* 214; Snyman *Criminal Law* 356.
[299] Milton *SA Criminal Law & Procedure: Common Law Crimes* 241; Snyman *Criminal Law* 357.
[300] *LAWSA XVI Marriage* § 25; Snyman *Criminal Law* 357.
[301] This category of incest includes father and daughter (eg *S v M* 1999 2 SACR 548 (SCA)); mother and son (eg *S v A* 1962 4 SA 679 (E))
[302] Thus this category includes brother and sister (eg *R v Troskie* 1920 AD 466); uncle and niece (but only where they are related by blood – see *R v D* 1957 2 SA 74 (E)) or grandniece (eg *R v M* 1957 2 SA 73 (E)) and aunt and nephew, but excludes first cousins.

4 2 2 2 *Affinity*

Affinity relationships come into existence between a person and the blood relatives of their spouse.[303] In spite of customary unions purportedly being placed on the same footing as civil marriages for all purposes in terms of sections 2(1) and 2(2) of the Recognition of Customary Marriages Act 120 of 1998,[304] it appears that the only marriages that create a relationship of affinity are legally recognised civil law marriages. This is due to section 3(6) of the above Act, which stipulates that "[t]he prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law."[305]

Relations by marriage in the ascending and descending line *ad infinitum*[306] may not marry and sexual intercourse between them is therefore incest, even if the marriage is ended by death or divorce.

There is some uncertainty about the legal position as far as marriage relations in the collateral line are concerned. On the one hand, it is clear that the Roman-Dutch law position has been abolished prohibiting marriage between a man and the *consanguines* of his (deceased or divorced) wife whom she would not have been permitted to marry had she been a man (and *vice versa*).[307] On the other hand, where a person has sexual intercourse with a collateral relative by affinity before their marriage to their spouse is terminated by death or divorce, strictly speaking such intercourse amounts to incest.[308] However, it may be argued that such conduct should merely be

---

[303] De Wet and Swanepoel *Strafreg* 281. See also *S v Shasha* 1996 2 SACR 73 (Tk) 78, where it is stated that the affinity incest prohibition is "founded on the fiction that upon marriage a man and wife become one flesh."

[304] Section 2(1) provides that: "A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage." Section 2(2) reads as follows: "A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage."

[305] See Nel 2002 *Stell LR* 331 for more details on this argument. See also in this regard *R v Tshipa* 1958 2 SA 384 (SR).

[306] For example, a man and his (former) daughter-in-law or mother-in-law, or a man and his (former) step-daughter or step-mother.

[307] By s 28 of the Marriage Act 25 of 1961, quoted at n 357 *infra*. Examples of such relatives are "his deceased wife's sister or any female related to him through his deceased [or divorced] wife in a more remote degree of affinity than her sister, other than an ancestor or descendant of the deceased [or divorced] wife." – Snyman *Criminal Law* 357. See also §§ 4 3 3 and 4 3 4 1 *infra*.

[308] See cases quoted in n 359 *infra*.

regarded as (non-criminal) adultery rather than incest.[309] Such view is supported by Snyman[310] and Milton.[311] It is submitted, then, that the incest prohibition relating to *affines* only applies to those in the ascending and descending line, and not to collaterals.[312]

4 2 2 3 *Adoptive relationship*

Section 20(4) of the Child Care Act 74 of 1983 prohibits adoptive parents from marrying their adopted children. The implication of this provision is that sexual relations between such parties constitute incest.[313] There is, however, no prohibition on marriage (or sexual intercourse) between adopted children and the relatives of their adoptive parent(s).[314]

4 2 3 ***Unlawfulness***

Sexual intercourse within the forbidden degrees must be unlawful – ie, no ground of justification must be present. An example of a defence excluding unlawfulness applicable in the case of incest would be duress (a form of necessity). Consent is, however, not a defence to a charge of incest – on the contrary, consent indicates that the sexual intercourse will indeed be punishable as incest, as opposed to rape, which would be committed if the woman[315] had not consented.[316]

---

[309] See *R v Delport* 1901 18 SC 355 where it was said at 361 that "[t]he existence of the marriage tie [where intercourse between a man and his wife's sister takes place before his wife's death] made the intercourse adultery, but that is very different from saying that the fact that the wife of the accused was alive, not dead, made it incest." See also *R v V* 1959 3 SA 621 (T), where it was held that intercourse between a man and his wife's brother's wife was not incest.

[310] *Criminal Law* 358. He notes that where such conduct is punished as a crime, the punishment is in any event so light as to indicate that the "moral reprehensibility" of such conduct is slight, referring to *R v Paterson* 1907 TS 619, where the "sentence" was imprisonment until the rising of the court.

[311] *SA Criminal Law & Procedure: Common Law Crimes* 243.

[312] See also *LAWSA VI* § 224 n 19.

[313] *S v M* 1968 2 SA 617 (T) 621.

[314] For example, intercourse between an adopted daughter and the biological son of her adoptive parents is not incest. See §§ 4 3 1 and 4 3 4 1 *infra* for more on the historical development of the incest prohibition between adoptive parents and adopted children.

[315] See also § 4 3 4 2 for more on the SA Law Commission proposals suggesting that the crimes of incest and rape be made gender neutral – the implication would be, eg, that if two men related within the forbidden degrees engaged in sexual penetration, the conduct would be punishable as incest if both consented, and as rape if the penetration was non-consensual.

Although the following point has seldom been raised, it is submitted that sexual intercourse between an adult and a child below sixteen and related to the adult within the forbidden degrees, should never be prosecuted as incest. Our law recognises that consent to sexual intercourse obtained from a girl under twelve is in any event invalid,[317] while if consent to sexual intercourse is obtained from a girl between the ages of twelve and sixteen, the male partner can still be held criminally liable.[318] The male partner to "consensual" incestuous sexual intercourse with a girl under twelve should be charged with rape,[319] or where the girl is between the ages of twelve and sixteen, a charge of statutory rape should be preferred.[320]

I propose that it would be both appropriate and in the interests of justice for an incestuous male partner to be charged with rape whenever there is any doubt as to whether the sexual intercourse was truly consensual, whether due to the age of the female party or any other factor. Characterising such sexual conduct as rape rather than incest would more accurately reflect the true nature and seriousness of the offence.[321] Incest is a competent verdict on a charge of rape.[322] Thus if lack of consent cannot be proven beyond

---

[316] See also Snyman *Criminal Law* 358; Milton *SA Criminal Law & Procedure: Common Law Crimes* 239; *LAWSA VI* § 223.

[317] *R v M* 1950 4 SA 101 (T) 102; *R v Z* 1960 1 SA 739 (A) 742; *S v A* 1990 2 SACR 266 (ZS) 267e-f.

[318] S 14 of the Sexual Offences Act 23 of 1957; Snyman *Criminal Law* 363; Labuschagne "Ouderdomsgrense en die Bestraffing van Pedofilie" 1990 *SACJ* 10 15-16.

[319] Where the girl is below the age of 12. This is in accordance with the common law rule that girls under 12 are not capable in law of consenting to sexual intercourse, a rule that is also recognised in s 3(5)(*f*) of the SA Law Commission's proposed Sexual Offences Bill, which reads: "The circumstances in which a person is incapable of appreciating the nature of an act which causes penetration [and where the penetration is therefore rape] ... include circumstances where such person is, at the time of the commission of such act – … below the age of 12 years."

[320] In terms of s 14 of the Sexual Offences Act 23 of 1957, which prohibits "unlawful carnal intercourse" with children between 12 and 16 years old. Defences include mistake as to age and the accused being under 21. S 14 is similar to the new offence proposed in s 10 of the Sexual Offences Bill, namely "[a]cts which cause penetration or indecent acts with certain children with their consent". S 10 provides for the criminalisation of consensual sexual penetration or indecent acts with children under 16 where the accused is 16 years and above and at least 3 years older than the child victim. See also Bailey & McCabe 1979 *Crim LR* 759-760.

[321] See, for instance, *S v Abrahams* 2002 1 SACR 116 (SCA), where the court increased the accused's sentence for raping his 14-year-old daughter from 7 to 12 years, stating at § 17:
"Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense."

[322] See s 261(1)(*d*) of the Criminal Procedure Act 51 of 1977 which states: "If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape,

reasonable doubt, but sexual intercourse within the prohibited degrees is proven, an incest conviction would still be possible.

Although a person charged with rape may be convicted of incest, the opposite does not apply, since a court would not consider finding a person guilty of a more serious offence than that with which they have been charged. This means that if incest is the only charge against an accused, it is not open to a court to find such person guilty of rape instead, even if the facts support such a finding. The state should always include a charge of rape as well as incest in appropriate instances. Less than competent drawing up of the charge sheet may explain the anomalous case law supporting the view that the male partner to an incestuous sexual relationship with a girl under sixteen can be convicted of incest instead of rape.[323]

It is apparent, then, that it would be preferable to reserve the incest charge for cases where both parties related within the prohibited degrees are sixteen years of age and above. Even in instances where the family members in question are capable in law of giving valid consent, it must be ascertained whether both did in fact consent. It may be that much of the conduct presently punished as incest should rather be included within the ambit of the crime of rape instead – branded as non-consensual sexual intercourse, rather than as intercourse within the forbidden degrees. This argument is of even more force in the context of the South African Law Commission's redefinition of rape.[324]

---

but – … the offence of incest … the accused may be found guilty of the offence so proved." See also *S v B* 1996 2 SACR 543 (C).

[323] See for instance *S v M* 1999 2 SACR 548 (SCA), where it was assumed that a man could be found guilty of incest, rather than rape, where he had sexual intercourse with his daughter over a period of 4 years when she was aged 14 to 17 years old. Although the accused's conviction was overturned for lack of evidence, the Court clearly does not view it as incongruous in the slightest to convict a person of incest where *de iure*, if not *de facto*, consent is in all likelihood lacking. Melunsky AJA states at § 3: "As I understand the complainant's evidence, she was shocked and upset by the appellant's sexual demands. *Although she did not resist, she was never a completely willing participant*" [emphasis added]. See also *S v D* 1972 3 SA 202 (O) (sexual intercourse between a man and his 14-year-old daughter) for another instance of dubious consent to incestuous conduct.

[324] See § 4 3 4 2 2 *infra* for more on the impact of the new definition of rape. For instance, in *S v S* 1995 1 SACR 267 (A), the court found (at 273) that there was, if not a total absence of consent, at the very least both "abuse of power" and "betrayal of trust" by a father who was found guilty of committing incest with his 17-year-old daughter. Acquittal on a charge of rape would not have been so easy had the proposed Sexual Offences Bill been in force.

4 2 4 *Intent*

Intention is an element of the crime of common law incest. Not only must both parties intend to have sexual intercourse, but they must also be aware of the fact that they are related within the forbidden degrees of blood, marriage or adoptive relationship.[325] Ignorance or mistake about the relationship giving rise to the prohibition, even if unreasonable, excludes criminal liability.[326]

4 3 Origin/ history of South African incest prohibition

The South African common law crime of incest is of Roman-Dutch origin, uninfluenced by English law.

4 3 1 *Roman law*

It appears that sexual relations or intermarriage between close relatives were disapproved of from earliest times.[327] A distinction was made between incest punished as a crime and incest in the context of religion.[328] Early statutory provisions such as the *lex Iulia de Adulteris* (18 BC) were merely aimed at preventing marriage between blood relations. Roman law distinguished between *incestus iuris gentium*,[329] prohibited on the grounds that such conduct was in conflict with feelings of morality, and *incestus iuris civilis*,[330] which was merely forbidden by the *ius civilium*.[331] As in modern South African law, *incestus* consisted of sexual intercourse between persons who were not permitted to marry due to their close degree of relationship. Marriages between ascendants and descendants, irrespective of whether they

---

[325] *R v Pieterse* 1923 ELD 232.

[326] Milton *SA Criminal Law & Procedure: Common Law Crimes* 244; Snyman *Criminal Law* 358; *LAWSA VI* § 223.

[327] Even the ancient Greeks viewed incest as undesirable. Euripides (480-406 BC) viewed the lack of a law prohibiting incest as a feature of barbarian societies. This view was echoed by Lacantius (+-250-317 AD), who denounced incestuous sexual practices as being characteristic of pagan societies. (Brundage *Law, Sex and Christian Society in Medieval Europe* (1987) 14; 63).

[328] See discussion at § 4 3 2 *infra*.

[329] This form of incest included sexual intercourse between parents and children, step-parents and step-children, parents-in-law and children-in-law and brothers and sisters.

[330] Sexual intercourse between adoptive parent and adopted child was punished as *incestus iuris civilis*.

[331] See Labuschagne 1985 *THRHR* 435 435-437 and the authorities quoted there.

were blood relations (*cognatio*) or related by adoption (*agnatio*) were prohibited. *Collaterales* who were related within four degrees of one another where each was removed from a common ancestor by two degrees or less, were not allowed to marry.[332] These rules applied to blood relations, those related by adoption and relations by marriage (*adfinitas*).

As regards other elements of the crime, intent was required, which included knowledge that the other party was related within the forbidden degrees.[333] Only persons over the age of puberty (which was twelve years for girls and fourteen years for boys) could be convicted of incest.[334]

Incest was a serious crime. Initially, it was punished by death. Both parties could be charged, and if the incest concerned was punishable by the *ius gentium*, the woman was punished as severely as the man. Punishment was less harsh where incest was committed within an unlawful marriage, since the crime of extra-marital sexual intercourse (*adulterium* or *stuprum*) was not also committed. In addition, incest had prejudicial private law consequences, both for the parties to incest and children born as a result of incest.[335]

4 3 2 *Influence of the Church: Medieval Europe*

As mentioned above in § 4 3 1, it is necessary to distinguish between incest punished as a crime and incest committed in contravention of the law of the Church, canon law. The Old Testament[336] forbade certain consanguineous sexual relations, as well as some forms of sexual intercourse between *affines*. When developing its concept of marriage, the Christian Church used these prohibitions as a starting point, but also extended the

---

[332] Labuschagne 1985 *THRHR* 436.

[333] See also Milton *SA Criminal Law & Procedure: Common Law Crimes* 237 and the Roman-Dutch authorities quoted there.

[334] Labuschagne 1985 *THRHR* 437.

[335] See Labuschagne *supra* for more details.

[336] Leviticus 18: 6-18. The following incestuous unions were prohibited: those of son and mother; of a man with the wife of his father (Lev. 28:8; Deut. 27:20); with the mother of his wife (Deut. 27:23); with his granddaughter or his wife's daughter or granddaughter (Lev. 28:10, 17); with his sister or half-sister (Lev. 28:9; Deut. 17:22, but see Gen. 20:12); of a nephew with his aunt (Lev. 18:12-14; Exod. 6:20); and of a man with his daughter-in-law or his sister-in-law (Lev. 18:15-16; 20:21). Penalties for incest were death (Lev. 20:11-17), excommunication (Lev. 18:29) and being cursed (Deut. 27:20; 22-23), eg by being childless.

category of relationships prohibited as incest considerably.[337] The incest prohibition enforced by the Roman emperors from the fourth century AD and thereafter was partly a reaction against the attachment to pagan customs, as there was a perception that pagans were more inclined to forms of sexual perversion and licentiousness such as incest.[338] Brundage also speculates[339] that laws against incest were designed to benefit the Church financially. The incest prohibition made it less probable that wealthy persons would use intrafamilial marriage alliances to keep control of familial estates within the kinship group, thus increasing the likelihood that the Church would inherit property from them.

By the eighth century AD, the *Responsa Gregorii* written by Pope Gregory the Great defined new criteria for consanguinity and affinity, prohibiting marriage between blood kin within seven degrees of relationship.[340] In addition, since Christian marriage was viewed as a "oneness" of the spouses, this led to the idea that blood relatives of the respective spouses were considered to be related to each other by consanguinity and were thus subject to the prohibition against marrying.[341] The ban extended to marriage between godparents and godchildren, as well as between godparents and all adult members of the godchild's family and between godparents of the same child.[342] Interestingly, even unwitting incest, where the parties were unaware that they were related within the forbidden degrees, was forbidden.[343] Once the parties were married, however, the clerically imposed doctrine of dissolubility of marriage meant that divorce on grounds of consanguinity or affinity was rarely authorised by the Church.

By the eleventh century, the ecclesiastical emphasis on exogamous marriage (and correspondingly the view that marriage between related groups

---

[337] Milton *SA Criminal Law & Procedure: Common Law Crimes* 238.

[338] Brundage *Law, Sex and Christian Society* 88. This idea was echoed in the 14th and 15th centuries, when there was a widespread belief that loose sexual habits, including incest, were habits peculiar to heretics, who did not consider incest a sin, but natural enjoyment of the pleasures of paradise" (Brundage *Law, Sex and Christian Society* 493).

[339] *Law, Sex and Christian Society* 88.

[340] Brundage *Law, Sex and Christian Society* 141. It was only in 1215 after the Fourth Lateran Council that the forbidden degrees were reduced to four (Brundage *supra* 356).

[341] Milton *SA Criminal Law & Procedure: Common Law Crimes* 238.

[342] Brundage *Law, Sex and Christian Society* 140.

[343] Decided by the Council of Verberie (750-756) – see Brundage *Law, Sex and Christian Society* 140.

of families should be eliminated) became even more pronounced.[344] Church reformers felt strongly that it was necessary to take vigorous steps towards preventing endogamous unions and nullifying marriages between close relatives. The contravention of divine law resulting from consanguineous unions was punished by ecclesiastical penalties such as excommunication, *infamia* and penances.[345] However, Brundage is of the view that worldly interests also played a role in prohibiting such marriages. Marriage prohibitions restricted the capacity of families to create extensive webs of interrelations through marriage. Thus bequests of land to the Church were safeguarded against the legal claims of numerous relatives to residual interests in the donor's estate. The ecclesiastical ban on intermarriage between members of the same clan was aimed at breaking up the concentrations of landholdings that supported the economic and political power of the feudal nobility. By demanding that families marry outside their own clan, the Church attempted to free itself from the power of the grand noble clans, and thus to increase its own authority.[346]

By the late twelfth century, the Church courts had secured jurisdiction over marriage and related matters both in England and on the Continent. Secular judges were considered to lack competence to determine issues such as who had committed incest by marrying within the forbidden degrees, and what an appropriate punishment would be.[347] It would be 1908 before the criminal courts obtained jurisdiction over those committing incest in England.[348]

---

[344] This position was reinforced by Gratian's *Decretum* in +-1140 AD (Brundage *Law, Sex and Christian Society* 183 and 238).

[345] Brundage *Law, Sex and Christian Society* 192.

[346] This was probably why canonistic prohibitions on marriage were extended to include not only unions between those closely related by blood, marriage or adoptive relationship, but also relationships between godparent and godchild or between godparents – the godparent bond was a "significant social linkage" (Brundage *supra* 194).

[347] Brundage *Law, Sex and Christian Society* 319.

[348] See discussion of English law position § 4 4 2 *infra*.

4 3 3 *Roman-Dutch law*

Incest remained an ecclesiastical offence in Holland until the Political Ordinance 1 of April 1580 came into operation. This Ordinance and the Elucidatie of 21 May 1664 form the basis of the common law crime of incest recognised today[349] – the prohibited degrees corresponded to a large extent with what is presently criminalised as incest. Incest was defined as sexual intercourse between two persons who were prohibited from intermarrying due to consanguinity or affinity.[350] Intermarriage between blood relatives in the direct line was prohibited *ad infinitum*, while marriage between collateral *consanguines* related to a common ancestor within the first degree of descent was forbidden.[351] Relations by affinity were not allowed to marry the relatives that their spouse would have been prohibited from marrying, had such spouse been of the opposite sex.[352]

It appears that sexual intercourse was an element of the crime, although some writers viewed mere marriage as sufficient.[353] It is uncertain whether knowledge of the prohibited relationship was a requirement – some aver that a person who lacked such knowledge due to *iustus error* would not be held liable.[354] The punishment for committing incest varied according to the degree and nature of the relationship, and ranged from death to corporal punishment and banishment.[355]

---

[349] See *LAWSA XVI* § 25 and the authorities quoted there in n 2-4.

[350] Note that unlike under Roman law, adoptive relationship did not seem to be a ground for marriage prohibition or the commission of incest – Milton *SA Criminal Law & Procedure: Common Law Crimes* 238 n 44.

[351] Milton *SA Criminal Law & Procedure: Common Law Crimes* 238-239. Also see in this regard Labuschagne 1985 *THRHR* 437-439.

[352] S 9 of the Political Ordinance of 1580 prohibited marriage between a man and his stepdaughter or her descendants or a woman and her stepson or his descendants, conduct that is not prohibited as incest today (Labuschagne 1985 *THRHR* 439). The only other notable amendment of this original position is as regards relations by affinity in the collateral line, where the position is regulated at present by s 28 of the Marriage Act 25 of 1961. In addition, the Roman law position regarding a prohibition on sexual relations between adopted parents and adopted children has been revived by s 20(4) of the Child Care Act 74 of 1983. See also § 4 2 2 *supra* and § 4 3 4 *infra*.

[353] Milton *SA Criminal Law & Procedure: Common Law Crimes* 238, especially the authorities quoted in n 45 and n 46.

[354] See Labuschagne 1985 *THRHR* 439, especially the authorities referred to in n 42 of that article, as well as Milton *SA Criminal Law & Procedure: Common Law Crimes* 238.

[355] Labuschagne 1985 *THRHR* 438.

4 3 4 *South African law: modifications*

4 3 4 1 *Changes from original Roman-Dutch law position*

The South African law definition of incest received from Roman-Dutch Law, the source of which was the Political Ordinance 1 of April 1580, has been modified only slightly over the years. The categories of persons for whom it is incest to have sexual intercourse with each other have been both added to and diminished.

While the prohibited degrees of consanguinity have remained the same,[356] the prohibition on sexual intercourse between affines has been slightly narrowed by the Marriage Act 25 of 1961. Although sexual intercourse between relations by marriage in the direct line *ad infinitum* is still prohibited, section 28 of the Marriage Act[357] stipulates that a widower may marry the sister of his deceased wife and *vice versa*, which was not the position in terms of common law.[358] There is still uncertainty as to whether intercourse between a person and a person of the opposite sex related to them by collateral affinity during the subsistence of the marriage creating the affinity, amounts to incest. The weight of judicial authority seems to support the view

---

[356] See § 4 2 2 1 *supra*.

[357] S 28 provides as follows:

"**Marriage between person and relatives of his or her deceased or divorced spouse**

Any legal provision to the contrary notwithstanding it shall be lawful for -

(a) any widower to marry the sister of his deceased wife or any female related to him through his deceased wife in any more remote degree of affinity than the sister of his deceased wife, other than an ancestor or descendant of such deceased wife;

(b) any widow to marry the brother of her deceased husband or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, other than an ancestor or descendant of such deceased husband;

(c) any man to marry the sister of a person from whom he has been divorced or any female related to him through the said person in any more remote degree of affinity than the sister of such person, other than an ancestor or descendant of such person; and

(d) any woman to marry the brother of a person from whom she has been divorced or any male related to her through the said person in any more remote degree of affinity than the brother of such person, other than an ancestor or descendant of such person."

[358] See discussion § 4 3 3 *supra*.

that it is,[359] but it is submitted that, at most, such conduct should amount to adultery, which is not a crime.[360]

An example of an extension of the crime of incest is the prohibition on marriage (and sexual intercourse) between adoptive parents and their adopted children. The first modification was in terms of section 79(a) the Children's Act 31 of 1937, which provided that an adoptive parent was not allowed to marry their adopted child, if such child was under the age of 21 years. Section 82 of the Children's Act 33 of 1960 substituted an absolute prohibition for the qualified one in the 1937 Act, as well as expressly indicating that sexual intercourse between adoptive parent and adopted child is a crime. This provision was re-enacted as section 20(4) of the Child Care Act 74 of 1983.[361]

4 3 4 2 *Proposed amendments to the crime: SA Law Commission recommendations*

4 3 4 2 1 ***Evaluation of SA Law Commission proposals concerning incest***

For a number of years the South African Law Commission has been engaged in the process of investigating the present sexual offences with a view to codification. This process involved a number of discussion papers[362] and culminated in a *Sexual Offences Report*, which was published in December 2002. This latest *Sexual Offences Report* contains the most recent proposed legal developments relating to sexual offences, including incest.

---

[359] *R v Hattingh* 1899 ECD 141; *R v Van Wyk* 1931 TPD 41; *R Chavendera* 1939 SR 218; *R v Botes and Botha* 1945 NPD 43; *R v Mulder* 1954 1 SA 228 (E); *S v Shasha* 1996 2 SACR 73 (Tk). *Contra R v Abraham Mentoor* 1897 11 EDC 125; *R v Delport* 1901 18 SC 355.

[360] See also Snyman *Criminal Law* 357-358; Milton *SA Criminal Law & Procedure: Common Law Crimes* 242-243.

[361] S 20(4) reads: "An order of adoption shall not have the effect of permitting or prohibiting any marriage or carnal intercourse (other than a marriage or carnal intercourse between the adoptive parent and the adopted child) which, but for the adoption, would have been prohibited or permitted." See also Milton *SA Criminal Law & Procedure: Common Law Crimes* 243.

[362] *Sexual Offences: The Substantive Law* Project 107 Discussion Paper 85 published 1999-08-12; *Sexual Offences: The Substantive Law* Project 107 Discussion Paper 102, published in December 2001, closing date for comment 2002-02-28.

From the outset, it was clear that the South African Law Commission envisaged no material changes to the crime of incest. The latest proposal recommends that incest should remain a common law crime. The only suggested amendment to the common law crime is that the present requirement of sexual intercourse should be replaced by a wider range of penetrative sexual conduct.[363] The main thrust of this change is that incest would become a gender neutral crime.

The reluctance of the South African Law Commission to engage in a complete overhaul of the crime of incest is to be regretted. Making the crime gender neutral merely addresses some of the criticisms levelled against the crime.[364] The proposed amendments fall woefully short of isolating incestuous conduct deserving of criminalisation, since harmful and non-harmful conduct alike is punished.

First, only penetrative sexual acts are punishable as incest *per se*, not other forms of sexual molestation that may be non-penetrative in nature.[365] Non-consensual, non-penetrative sexual acts with a family member may be just as harmful and traumatic to the victim as penetrative ones.[366]

---

[363] S 14 of the proposed Sexual Offences Bill provides for the "[e]xtension of common law incest", stating that "[f]rom the date of the promulgation of this Act an act which causes penetration as contemplated in sections 3, 4, and 5 of this Act applies to the common law offence of incest."
S 3 of the Bill ["Act"] prohibits as rape the conduct of "[a]ny person who unlawfully and intentionally causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person" or who "causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act".
S 4 defines a new crime, sexual violation, stating: "Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation."
S 5 defines a crime called oral genital sexual violation, criminalising the conduct of "[a]ny person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person".

[364] Such as the criticism that the common law crime punishes neither homosexual incestuous conduct nor sexual penetration other than vaginal intercourse. See for instance Snyman *Criminal Law* 356 at n 4. It must, however, be kept in mind that same-sex penetrative incestuous conduct as well as all non-penetrative incestuous conduct is still punishable in terms of the common law as indecent assault, where it is non-consensual.

[365] Non-penetrative non-consensual incest is still punishable as indecent assault – see n 364 *supra*.

[366] See, for instance, Renvoize *Incest: A Family Pattern* 1982 7-20 for an account of a woman who was sexually abused by her father over a long period of time. The fact that the abuse was never penetrative did not diminish the victim's distress.

Second, if the Law Commission's ostensible aim in retaining incest as a separate crime was to protect children from sexual harm in the family context, why not merely criminalise such conduct, while leaving other incestuous conduct unpunished? It seems odd that, while recognising "that what adults and adult family members do in the privacy of their bedrooms is their business and their business only" and that the criminal law has no role to play in such circumstances,[367] the Law Commission still supports the retention of the present overbroad (but simultaneously under-inclusive)[368] incest prohibition that punishes incestuous conduct irrespective of the age of the participants.

Third, even if the common law crime of incest is amended as proposed, it still dismally fails to serve its purported purpose of preventing family members from abusing children sexually. There are already other crimes proposed in the Bill that criminalise such sexual abuse of children more than adequately. It has been mentioned in § 4 2 3 that incestuous sexual relations with children under twelve amount to the more serious crime of rape, rather than incest, in any event. In addition, consensual sexual offences with children under sixteen are criminalised separately in the Sexual Offences Bill, where the overlap between such offence and incest is explicitly recognised.[369]

Last, where intra-familial sexual relations are not consensual, it will be shown that the new definition of rape proposed by the Law Commission in the Sexual Offences Bill overlaps with incest to so great an extent that incest's reason for existence as a separate crime must be seriously in doubt. It will become even more apparent in chapter five below that the only conduct that is punished by the crime incest alone, is precisely that which the Law

---

[367] *Sexual Offences* Discussion Paper 85 § 3 6 1 2 5.

[368] See the criticism that non-penetrative acts are not included *supra* as well as § 5 3 2 4, where it is argued that the incest prohibition is also under-inclusive in that only sexual relations between blood, marriage and adoptive relations are prohibited, instead of criminalising sexual relations between all members of the same household unit.

[369] See s 10 of the Bill. In s 10(1) provision is made for the crime of sexual penetration with a consenting child between the ages of 12 and 16. In terms of s 10(2), an accused can rely on the defence that the child deceived them into thinking that such child was over 16, or that the accused reasonably believed that this was the case. However, according to s 10(3), where "the accused is related to such child within the prohibited incest degrees of blood or affinity", the s 10(2) defences do not apply. Thus it is clear that those who commit incestuous sexual penetration with children under 16 may be charged in terms of s 10, and the additional protection of the incest prohibition is superfluous in these cases.

Commission said it would decline to interfere with – consensual sex between adult family members!

4 3 4 2 2 ***Incest v rape***

One of the most positive aspects of the South African Law Commission's recommendations is, it appears, an inadvertent one. As explained above, the Law Commission intended to increase the types of conduct criminalised as incest by employing a broad definition of sexual penetration. However, it will be shown that, while not dispensing with the requirement that the prosecution prove its case beyond a reasonable doubt, the Sexual Offences Bill has actually made it considerably easier for the state to secure rape convictions in situations where the state would presently be hard pressed to prove lack of consent and thus ensure a conviction of common law rape. Since a guilty finding on a charge of rape is facilitated by the Bill, persons formerly convicted of incest due to the state's inability to prove lack of consent beyond reasonable doubt, may now be convicted of rape instead. In situations of sexual conduct between relatives related within the forbidden degrees, a conviction on the more serious charge, rape, would be preferred to the lesser charge of incest.[370] It will become apparent, then, that in practice this development would lead to a simultaneous limitation of the exclusive scope of application of the incest prohibition.

As has already been argued, it would in any event be preferable to punish sexual intercourse (or gender neutral sexual penetration) between an adult and a child under the age of sixteen not as incest, but as rape, statutory rape or penetration of a child with their consent, as the case may be. However, the uncertainty about "consensual" incestuous sexual relations between an adult and a child of sixteen years and older has not adequately been addressed. According to common law, both parties would be guilty of incest. This would be the case even if there was uncertainty as to the validity

[370] See, also, § 4 2 3 for more on the submission that it is preferable for a person committing incestuous rape to be found guilty of rape rather than incest.

of the more vulnerable family member's consent, but where absence of consent could not be proven beyond reasonable doubt.[371]

The Law Commission's proposals regarding rape have effectively ended such debate. A statutory presumption of unlawfulness where sexual conduct takes place in certain situations means that sexual intercourse between parents and children, that was formerly unquestioningly punished as incest by the courts regardless of the age of the child or whether it was consensual or not,[372] may in terms of the Bill much more readily be found to be unlawful and punished as rape.

Rape is defined in section 3(1)[373] as intentional and unlawful sexual penetration. Section 3(2) outlines circumstances where sexual penetration would be presumed to be unlawful ("*prima facie* unlawful"). Included is sexual penetration that takes place "in any coercive circumstance". Section 3(3)(c) of the Sexual Offences Bill defines "coercive circumstances" as incorporating

> "any circumstances where ... there is an abuse of power or authority to the extent that the person in respect of whom the act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act".[374]

It appears that section 3(3)(c) contains an implicit legislative indication that, where it has been established that power was used in a sexual relationship to obtain consent to sexual penetration, a court should presume that intentional sexual relations under such circumstances are unlawful, unless there is evidence to the contrary.[375] If the accused remains passive,

---

[371] See, eg, *S v S* 1995 1 SACR 267 (A) also discussed at n 324 *supra* and n 385 *infra*.

[372] See eg *S v M* 1999 2 SACR 548 (SCA); *S v S* 1995 1 SACR 267 (A) and *S v D* 1972 3 SA 202 (O) for instances of dubious or non-existent consent to incestuous conduct.

[373] S 3(1) of the Bill reads: "Any person who intentionally and unlawfully commits an act of sexual penetration as defined in section 1 with another person, or who intentionally and unlawfully compels, induces or causes another person to commit such an act, is guilty of the offence of rape."

[374] According to s 6 of the Bill, the circumstances of *prima facie* unlawfulness outlined in s 3 also apply to s 4 and s 5 of the Bill (the crimes sexual violation and oral genital sexual violation – see n 363 for the complete text of s 4 and s 5).

[375] In *S v Steenberg* 1979 3 SA 513 (B) 517-518 the court held that accused persons have an evidentiary burden ("weerleggingslas") in situations where the state has presented evidence that would necessarily lead to such persons being found guilty in the absence of any evidence to the contrary. In such circumstances, accused persons merely have to adduce evidence that is reasonably possibly true and that raises a reasonable doubt as to their guilt for the court to be obliged to acquit them. In the present context, there would be an evidentiary burden on the accused to raise reasonable doubt as to the unlawfulness of their conduct where sexual penetration had taken place in the circumstances outlined in s 3(2) of the Bill. See also Van der Merwe "Re-defining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus?" 2001 *SA Journal of Criminal Justice* 60-70,

doing nothing to raise reasonable doubt as to the unlawfulness of the sexual penetration, the *prima facie* proof may become proof beyond reasonable doubt. However, it should be kept in mind that the court must still be satisfied that the prosecution has proved guilt beyond reasonable doubt, since the burden of proof remains with the prosecution.[376]

Thus to avoid running the risk of being convicted, the accused person who has committed a sexual act in coercive circumstances cannot merely remain silent.[377] Such party has an evidentiary burden to adduce evidence or establish through cross-examination that it is reasonably possibly true that the sexual penetration was lawful, notwithstanding the fact that the parties were in an unequal power relationship that might have inhibited the more vulnerable partner from indicating resistance. For instance a person accused of incestuous rape may bring evidence or establish through cross-examination that it is reasonably possibly true that the sexual act was consensual, or that it took place in a situation of necessity,[378] and so discharge the evidentiary burden.

The conclusion that the accused is compelled by the evidentiary burden to raise reasonable doubt as to unlawfulness once the presumption of unlawfulness has been activated by sexual penetration taking place in coercive circumstances, is in no way undermined by section 3(9) of the Bill. Section 3(9) reads:

> "Nothing in [section 3] may be construed as precluding any person charged with the offence of rape from raising any defence at common law to such charge, nor does it adjust the standard of proof required for adducing evidence in rebuttal."

This section makes it clear that the state is still required to disprove beyond reasonable doubt any defence raised by the accused.

---

an article commenting on the Law Commission's first draft of the Sexual Offences Bill and suggesting that an evidentiary onus on the accused, as opposed to an onus of proof, must be what is intended by this provision.

[376] For more on the distinction between a burden of proof and an evidentiary burden, see Schwikkard *Presumption of Innocence* (1999) 19.

[377] In *S v Manamela and Another (Director-General of Justice Intervening)* 2000 3 SA 1 (CC); 2000 5 BCLR 491 (CC), the majority held (at §§ 23; 37; 38 and 49) that on the facts, an evidentiary burden's infringement of the constitutional right to remain silent may indeed be a reasonable and justifiable one. It is submitted that the same reasoning applies in the context of s 3(2) of the Bill.

[378] For instance, where the accused was forced by a third party to engage in the sexual conduct on pain of death.

It is submitted that the operation of the presumption of unlawfulness in section 3(2) means that it is possible to effectively exclude from the exclusive definition of incest, a large number of the categories of sexual penetration occurring between family members in an unequal power relationship.[379] For instance, if a seventeen-year-old daughter agreed to have sexual intercourse with her father due to respect for his authority, such intercourse would fall within the scope of coercive circumstances as defined in the Bill, and would be *prima facie* unlawful.[380] Since the conditions under which intercourse between parent and child takes place are inherently exploitative,[381] it should be a relatively straightforward task for the state to show that the sexual penetration was *prima facie* unlawful, thus making it necessary for the accused to respond by raising reasonable doubt as to the unlawfulness of sexual penetration to avoid the presumption of unlawfulness becoming proof of unlawfulness beyond reasonable doubt. It is submitted that a father accused of incestuous rape in coercive circumstances would be hard-pressed to raise reasonable doubt as to the unlawfulness of his conduct by relying on a defence such as consent.[382] As is well established in our law, mere submission is not consent.[383] Especially in cases where the child is still economically and emotionally dependent on a parent, such child would be inclined to agree to sexual relations without overt intimidation being necessary, but such agreement would not necessarily amount to *de iure*

---

[379] It is suggested that in a large number of cases, sexual relations between parent and child would amount to rape as defined above, rather than incest, regardless of the age of the child. Not only sexual penetration between parents and children, but also, depending on the circumstances, other intra-familial sexual relations – between (adult) siblings, uncle and niece, step-father and step-daughter, for instance, especially when there is a considerable age difference – could well fall into this category where sex is *prima facie* unlawful.

[380] The recognition of the need to punish incestuous conduct *only* where abuse of power is an issue is not a new one. Labuschagne (1985 *THRHR* 454-455; 1990 *TSAR* 425; "Strafbaarheid van Seksuele Uitbuiting van 'n Gesagsverhouding" 1993 *De Jure* 443-446) has long advocated that, while incest between affines and siblings should be decriminalised, older family members who exploit descendants under their authority or control for sexual purposes should be guilty of a new crime, namely sexual exploitation. The rationale for criminalisation, then, is not the fact that the parties are related within the forbidden degrees, but rather the exploitive nature of the relationship.

[381] See, eg, Labuschagne "Seksuele Misbruik van Kinders en die Vraagstuk van Verjaring van Misdade" 1997 *TRW* 98 107 where it is stated that: "In gevalle van 'n groot ouderdomsverskil sal dit egter selde gebeur dat misbruik en benadeling nie plaasvind nie." See also the authorities quoted in n 66 of the above article and Bailey & McCabe 1979 *Crim LR* 760.

[382] See also Renvoize *Incest: A Family* Pattern 145 quoted at n 470 *infra* for more about why children cannot truly consent to sexual acts initiated by their parents.

[383] See, for instance, *S v S* 1971 2 SA 591, where the court held that a white policeman who used his "oorheersende gesag" to obtain a black woman's submission to sexual intercourse, had indeed committed rape.

consent.[384] If the father were unable to show that it was reasonably possibly true that the daughter, as the more vulnerable party to the sexual act, nevertheless gave real consent, or that the conduct was lawful for some other reason, he would run the risk of being convicted of rape. As our law presently stands, such a father could also be found guilty of rape, but without a statutory presumption assisting the prosecution in establishing the *prima facie* unlawfulness of the conduct, it would in many instances be considerably more difficult for the state to prove unlawfulness beyond reasonable doubt, in addition to the other elements of the crime.[385] Thus by facilitating *prima facie* proof of unlawfulness where sexual penetration occurs in coercive situations, and consequently requiring the accused's active participation in rebutting the presumption of unlawfulness, section 3(2) of the Bill effectively facilitates rape, as opposed to incest, convictions in cases of sexual relations between family members in an unequal power relationship.

The operation of the statutory presumption in section 3(2) has several benefits. On the one hand, the likelihood of the "victim" of incest being charged with the crime as an equal partner is considerably decreased. On the other, the right of consenting adults to freely choose their sexual partners is also not infringed to an unacceptable degree. This is because where the intra-familial sexual relationship is truly consensual, it should be a fairly straightforward task for the accused to indicate to the court that no rape has taken place by raising reasonable doubt as to the unlawfulness of the sexual penetration.

Temkin[386] expresses the fear that "[m]any coercive and exploitative incestuous acts will not fall within the narrow legal definition of rape" and that it is therefore vital to retain incest as a separate crime. Should the Sexual Offences Bill come into operation, it is submitted that this argument would be less than convincing in a South African context.

---

[384] See, further, the sources referred to in n 381 *supra*.

[385] See for instance *S v S* 1995 1 SACR 267 (A), referred to in n 324 and n 371, for an instance where an accused was acquitted of common law rape due to lack of proof beyond reasonable doubt that the intercourse was non-consensual and found guilty of incest instead, but where he would in all likelihood have been able to be convicted of rape as defined in the Sexual Offences Bill.

[386] 1991 *Current Legal Problems* 193.

4 3 4 2 3 *"Affinity" incest?*

Another indication that South African law may be moving towards making the crime of incest obsolete is to be found in the South African law Commission's Report on the Review of the Marriage Act 25 of 1961 (Project 109), published in May 2001. *Inter alia*, it recommends the amendment of section 28(1) of the Marriage Act to make specific provision for a list of the forbidden degrees of blood and affinity relationship that would lead to a marriage between such parties being void.[387] However, where intermarriage between affines is concerned, it is interesting to note that the marriage prohibition is not an absolute one. According to the proposed amendment of section 28(2) of the Marriage Act,

> "[w]here both parties have reached the age of 18 years they may apply to the Minister [of Home Affairs] for his or her consent to their marriage if they are not within the degrees of consanguinity (relationships between blood relatives) but are within the degrees of affinity (relationships created by marriage) prohibited by section 28A(1)."[388]

The proposed Marriage Amendment Bill contained in the same report states the matter somewhat differently, although the crux is the same:

> "A Provincial or Local Division of the High Court shall have jurisdiction to consent to a marriage between a man or a woman and the direct descendant of his or her deceased spouse if both parties have reached the age of 18 years and they are not related to each other by blood."[389]

The above proposals indicate that it may in future be possible for a man to obtain consent to marry a relation by marriage such as a stepdaughter or daughter-in-law. Since, as has already been noted,[390] the category of relationships where sexual relations are prohibited as incest is identical to the conduct prohibited in terms of the private law rules regarding capacity to marry, the implication of the implementation of the Law Commission's

---

[387] The SA Law Commission recommends that s 28(1) be amended as follows:
"Subject to the provisions of section 28(2) and (3) a marriage between the following parties shall be void –
(a) a man and – his grandmother; grandfather's wife; wife's grandmother; father's sister; mother's sister; mother; stepmother; wife's mother; daughter; wife's daughter; son's wife; sister; son's daughter; daughter's daughter; son's son's wife; daughter's son's wife; wife's son's daughter; wife's daughter's daughter; brother's daughter; or sister's daughter"
(§ 2 21 30). This provision would also apply *mutatis mutandis* to a woman.

[388] See SA Law Commission *Report on the Review of the Marriage Act* § 2 21 30.

[389] At 216.

[390] At § 4 1 *supra*.

suggestions would probably be that "affinity" incest would cease to be a crime for all purposes, even if the parties did not wish to marry.[391]

While this point is not explicitly mentioned in the Law Commission's report, the only way of retaining "affinity" incest as a crime would be for the law to distinguish between forbidden degrees for marriage purposes and those applicable where the crime of incest is concerned. Although this would be a departure from the present position in South Africa, the prohibited degrees applicable for marriage and criminal purposes are by no means necessarily co-extensive. There are many jurisdictions where they do not overlap.[392] However, where the incest prohibition does not coincide with the marriage prohibition, the prohibited degrees applicable to the crime of incest tend to be stricter, not more extensive, than those applicable to marriage. It is submitted that it would be indefensible (not to mention nonsensical) to charge affines who had not obtained the required consent to marry with incest, while not prosecuting those who had such consent. If South Africa were to retain "affinity" incest as a crime subsequent to the coming into operation of the proposed Marriage Amendment Bill, our law on this point would be anomalous and irrational.

[391] See Nel 2002 *Stell LR* 331 for more on the decriminalisation of "affinity" incest.

[392] Eg, although sexual intercourse between an uncle and niece, or an adoptive parent and an adopted child, is not a crime in England, such parties may not marry each other. In Scotland, too, the forbidden degrees for the purposes of criminal law and marriage law do not overlap completely. For example, although certain affines may not marry, sexual intercourse between them is not prohibited as incest. For more details see Norrie "Incest and the Forbidden Degrees of Marriage in Scots law" 1991 *Journal of the Law Society of Scotland* 216 217.

4 4 Comparative law perspective

4 4 1 *Introduction*

As has already been noted, the content of the incest prohibition is far from static. What is regarded as incest is dynamic, differing not only from culture to culture, but also within academic disciplines, and even within various branches of the same discipline. As regards incest as crime, its definition varies from legal system to legal system, as well as changing over time.[393] The aim of critically evaluating the legal position in other countries will be to determine the underlying rationale of the incest prohibition in modern society. As will be shown below, the types of conduct punished as incest are extraordinarily disparate, even within a single country. Similarly, the rationales for criminalisation range from the sensible prevention of harm to children to the outmoded condemnation of immorality. By comparing the South African crime of incest with its foreign counterparts, it will not only be possible to establish whether the South African common law position is in line with current trends, but also to propose an amendment of the common law position that would avoid the pitfalls encountered in foreign jurisdictions.

Numerous examples of the way in which other countries criminalise incest (or not) will be discussed below. The English law prohibition on incest will be discussed in rather more detail than the other jurisdictions referred to. This is because English law is a good illustration of the shift away from incest as crime against morality to being a prohibition focusing on protecting children against the harmful consequences of a broadly-defined category of intra-familial sexual contact. Aspects of the English approach could well be emulated in South Africa.

---

[393] See Labuschagne "Die Insestaboe in 'n Regstaat: Regsantropologiese Kantaantekeninge" 1999 *SAfrJ Ethnol* 60.

4 4 2 *English law*

4 4 2 1 *History*

Prior to 1908, all relatives in or within the third degree of consanguinity or affinity were forbidden to marry, and sexual intercourse between them was regarded as incest.[394] From 1835, according to common law such marriages were void *ab initio*, but the Church of England had jurisdiction to punish incest until the Matrimonial Causes Act came into operation in 1857. This Act provided that a woman could divorce her husband on the grounds of "incestuous adultery", which was adultery within the prohibited degrees of consanguinity and affinity. In 1907 marriage with a deceased's wife's sister was legalised in terms of the Marriage with a Deceased Wife's Sister Act, although intercourse with a living wife's sister was still included as a ground based on which a woman might divorce her husband.

Incest was not a criminal offence in England until the inception of the Punishment of Incest Act 1908, which criminalised sexual intercourse between parents and children, siblings, and a man and his granddaughter. The punishment was between three and seven years' penal servitude or a maximum of two years' imprisonment with or without hard labour.[395]

The rationale for criminalising incest, and in particular the limited number of blood relatives included in this prohibition, is somewhat obscure. Interestingly, it is doubtful whether the generally-accepted assumption that the basis of punishing incest is eugenic[396] played a role at all in the decision to make incest a crime.[397] Not only were the possible genetic effects of inbreeding disputed, affording "no very convincing justification for imposing a harsh new penalty", but incest as a possible cause of physical degeneration or weak-mindedness was scarcely mentioned in the Parliamentary Debates on

---

[394] Wolfram 1983 *Crim LR* 312.
[395] Wolfram 1983 *Crim LR* 308.
[396] Ie, concerned with the (harmful) genetic effects of inbreeding, deriving from the Greek meaning "well-born" – see Bratt 1984 *Family LQ* 267 n 58.
[397] See Wolfram 1983 *Crim LR* 308; Bailey & Blackburn "The Punishment of Incest Act 1908: A Case Study of Law Creation" (1979) *Crim LR* 708 716. *Contra* Hogan *Reshaping the Criminal Law* 188-189.

the Punishment of Incest Bill.[398] In addition, if the primary reason for criminalising incest was the possible harmful effects for the offspring of an incestuous union, why were sexual relations between an uncle and niece, or aunt and nephew, not included in the prohibition?

So what was the true *raison d'être* for resorting to the criminal sanction in the case of incest? Bailey and Blackburn[399] speculate that the principal reason for subjecting incest to criminal punishment was a moral one, since the National Vigilance Association, which led a campaign to "repress all criminal vice and public immorality", was instrumental in securing the passing of the Act. Thus, according to them, incest was criminalised in England as "a public affirmation of the moral values associated with reactionary vigilance work on behalf of social purity" – the symbolic significance of legal prohibition was paramount, rather than its practical or instrumental effect.[400]

According to Wolfram, there is no single convincing reason for punishing incest, although various theories explaining its prohibition have been mooted over the years. The biological justification that is often mentioned as being an overwhelmingly convincing basis for punishing consanguineous incest, is an ostensible reason. It is merely one of a "category of myths, which are not uncommonly employed by societies ... to supply a rationale for problematic customs."[401]

4 4 2 2 *Present prohibition*

A very limited category of consanguineous forms of incest is presently prohibited in England in terms of the Sexual Offences Act of 1956. Section 10 of this Act prohibits intentional sexual intercourse[402] between a man and his granddaughter, daughter, sister or mother.[403] Section 11 is very similar in that it punishes incestuous conduct by a woman who intentionally consents to

---

[398] Wolfram 1983 *Crim LR* 308, 310; Bailey & Blackburn 1979 *Crim LR* 716.
[399] 1983 *Crim LR* 711-713.
[400] Bailey & Blackburn 1979 *Crim LR* 717-718.
[401] 1983 *Crim LR* 316.
[402] Vaginal sexual intercourse is required.
[403] It is irrelevant whether the relationship is in the full or half blood, and whether it is traced through lawful marriage.

sexual intercourse with her grandfather, father, brother or son. Additionally, section 54 of the Criminal Law Act 1977 criminalises inciting a girl under the age of sixteen to have incestuous intercourse.

4 4 2 3 *Future developments*

Significantly, there is presently an attempt to increase the forms of sexual abuse within the family context that are deemed punishable. It was recently decided to criminalise family sexual abuse separately from other forms of abuse due to the additional element of abuse of trust inherent in such behaviour. The chief concern was thus to prevent harm to children, rather than to condemn immoral or taboo conduct because of the incestuous nature of the relationship.[404] The Sexual Offences Bill [HL], introduced into the House of Lords on 28 January 2003, creates a range of new familial sexual offences with the child as victim.[405] Although it is beyond the scope of this thesis to discuss the Bill in detail, it is interesting to note that a wide range of sexual activity[406] with a child[407] family member is criminalised, and that the interpretation of "family member" is particularly extensive. It includes not only the blood relations referred to in the 1956 Act, but also uncles, aunts, step-parents, adoptive parents and foster parents. In addition, a second category of offenders includes those who live or have lived with the child in the same household or where the offender has been "regularly involved in caring for, training, supervising or being in sole charge of the child", as well as instances

---

[404] See for more on the history of the Sexual Offences Bill, Ch 5 of "Setting the Boundaries Volume 1: Reforming the law on sex offences", a July 2000 Home Office discussion document on this issue available at http://search2.openobjects.com/kbroker/hoffice/kbsearch?qt=incestandsr=0andha=6andnh=10andcs=iso-8859-1andsc=hoandmt=1andgo.x=6andgo.y=10 (2003-05-12)

[405] S 28-32 of the Bill. The complete Bill is available at http://www.publications.parliament.uk/pa/ld200203/ldbills/026/2003026.htm (2003-05-12).

[406] The punishable conduct referred to in the Bill is sexual touching. "Touching" includes touching with any part of the body, with anything else, through anything, and in particular includes touching amounting to penetration (s 81 of the Bill). Touching is "sexual" if, "from its nature, a reasonable person would consider that it may (at least) be sexual, and a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations" (s 80 of the Bill).

[407] Under 18 years.

where such person is also the past or present partner of the child's parent, partner of the child's aunt or uncle, or cousin of the child.[408]

The Bill envisages substituting these crimes for the present statutory crime of incest, since provision is made for the repeal of sections 10 and 11 of the 1956 Sexual Offences Act. The new offence is not called incest, but "sexual activity with a child family member".

Interestingly, sexual abuse in the family context is criminalised separately from offences related to sexual abuse by those in a position of trust, despite the rationale for punishing family members separately ostensibly being because of the aggravating abuse of trust element present in intra-familial cases.[409] This apparently reflects the view of the framers of the Bill that incestuous-type relationships should be distinguished from other forms of sexual abuse of children where abuse of trust is at issue. The only possible reason for such a distinction must be because abuse within the family is regarded as inherently more worthy of condemnation.

On the one hand, then, there is a praiseworthy shift away from punishing incest as taboo, immoral conduct, to focusing instead on criminalising only those forms of incest that cause harm to others, especially where consent of one of the participants is less than voluntary or lacking due to youth. To this extent the British approach is to be supported. On the other hand, it is submitted that there is no compelling reason to criminalise "incestuous" conduct separately from other forms of sexual abuse or rape involving abuse of trust. The distinction between incestuous and other child abuse can only be explained in terms of a perspective that regards sexual relations between close family members as intrinsically immoral. It is clearly objectionable to use the criminal sanction to enforce such a view. All sexual abuse of children should be treated on an equal footing, regardless of whether the abuse was (technically speaking) incestuous. The circumstances of the particular case, including such factors as whether there was abuse of trust or authority, should be relevant in determining the blameworthiness of the conduct in each instance, possibly by being taken into account in aggravation of sentence. It

[408] See s 30 of the Bill.
[409] In ss 18-27 of the Bill.

is unnecessary to resort to referring to the formalistic classification of the relationship between the parties to establish the seriousness of the offence.[410]

4 4 3 *Other countries: criminalisation of incest*

4 4 3 1 *Netherlands, Belgium, France, Luxemburg, Portugal, Turkey, Japan, Argentina, Brazil*

Incest is not criminalised as such in any of the above countries, whose criminal law is based on the French *Code Pénal*.[411]

4 4 3 2 *Scotland*

Scotland's incest prohibition is contained in the Criminal Law (Consolidation) (Scotland) Act 1995 (C 39).[412] In section 1, provision is made for criminalisation of sexual intercourse between a fairly extensive category of blood relatives[413] and between adoptive parents and (former) adopted children. Defences to a charge of incest include reasonable ignorance of the degree of relationship, lack of consent and lawful marriage that is recognised in Scotland although entered into in another jurisdiction. The maximum punishment is anything from three months (in cases where proceedings are brought on summary complaint before the sheriff) to life imprisonment, if the accused is convicted on indictment.[414] No other reason than moral disapproval of the conduct in question can justify the prohibition, since the age of the parties is irrelevant and consent is an element of the crime. In addition, protection of the family must at most be a secondary consideration, since it is

---

[410] See also the discussion of the Sexual Offences Bill proposed by the SA Law Commission at § 4 3 4 2 2 *supra*, where it is suggested that harmful sexual conduct could be punished as rape, etc, while leaving non-harmful forms of sexual expression, including that between close relations, uncriminalised. See also § 5 3 3 *infra* for more on the alternatives to he incest prohibition in its present form.

[411] Labuschagne 1999 *SAfrJ Ethnol.* 60, quoting Klöpper *Das Verhältnis von Art 173 StGB zu Art 6 Abs 1 GG* (1995) 13-15. See also Labuschagne 1985 *THRHR* 442.

[412] http://www.worldlii.org/uk/legis/num_act/cla1995342/s1.html (2003-05-14).

[413] Including between a person and their mother, father, daughter, son, grandmother, grandfather, grand-daughter, grandson, sister, brother, aunt, uncle, niece, nephew, great grandmother, great grandfather, great grand-daughter and great grandson.

[414] S 4 of the Criminal Law (Consolidation) (Scotland) Act *supra*.

not only sexual conduct between members of a nuclear family that is prohibited.[415] That adoptive relationships are included within the prohibition is indicative that eugenic concerns did not play a decisive role in the decision to criminalise incest. Another motivation for the argument that the purpose of criminalising incest in Scotland is chiefly to punish immorality, is that separate provision is made for declaring intercourse between step-parents and (former) step-children to be a crime.[416] The rationale in this instance appears to be prevention of sexual exploitation of step-children, since such conduct is only a crime where the step-child is under 21, or where the accused and the step-child had lived in the same household as parent and child before the step-child was eighteen. It is also a crime for a person in a position of trust in relation to a child under sixteen to have sexual intercourse with such child.[417] The reason for criminalising this conduct would once again be to prevent sexual abuse of authority.

Norrie[418] is of the view that:

> "[Scots] rules on incest and the forbidden degrees of marriage are unnecessary and distasteful nonsenses, which do not stand up to rational analysis, which are not needed to achieve the proper policies of the law, and which deal with situations that, in the criminal law, are dealt with by other means and, in matrimonial law, do not need to be dealt with at all."

4 4 3 3 *Germany*

Section 173 of the German Criminal Code (*Strafgesetzbuch*) concerns sexual relations between relatives, and states the following:

> "(1) Whoever completes an act of sexual intercourse with a consanguine descendant shall be punished with imprisonment for not more than three years or a fine.
>
> (2) Whoever completes an act of sexual intercourse with a consanguine relative in an ascending line shall be punished with imprisonment for not more than two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who complete an act of sexual intercourse with each other shall be similarly punished.
>
> (3) Descendants and siblings shall not be punished pursuant to this provision if they were not yet eighteen years of age at the time of the act."

---

[415] See n 413 *supra*.
[416] S 2 of the Criminal Law (Consolidation) (Scotland) Act *supra*. The crime is not incest, but intercourse with a step-child.
[417] S 3 of the Criminal Law (Consolidation) (Scotland) Act *supra*.
[418] 1992 *Journal of the Law Society of Scotland* 216.

The forms of incest prohibited are restricted to sexual intercourse between consanguine ascendants and descendants, and siblings. The ascendant is punished more severely than the descendant, and conduct criminalised is limited to persons over the age of eighteen. The crime does not appear to be a particularly serious one, since the maximum punishment is a mere three years' imprisonment or a fine. Although incest is officially classified as a "crime against personal status, marriage [or] the family",[419] it may be speculated that the rationale for the crime is primarily to punish immorality, since intra-familial child abuse is punished separately and attracts more severe penalties.[420]

It is claimed by Klöpper[421] that the prohibition on incest is contrary to section 6(1) of the German Constitution (*Grundgesetz*), which provides that "marriage and the family shall enjoy the equal protection of the state." This right is not so much a right to equality as a right to autonomy. Section 6(1) protects individuals from state intervention in the private family sphere, which, it is argued, includes the right to choose a marriage and sexual partner without interference by the state.

4 4 3 4 *Canada*

Incest is criminalised in terms of Part V of the Canadian Criminal Code, which concerns "sexual offences, public morals and disorderly conduct". The relevant provision reads:

> "Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person."[422]

---

[419] See heading to ch 12 of the *StGB*. See also discussion at § 5 2 2 4 *infra*, where it is suggested that characterising a crime as being necessary to protect the family unit or marriage as institution is veiled legal moralism – alternative definitions of "family" are rejected and such "family" members punished.

[420] S 174 and s 176 of the *StGB* provide for punishments for sexual abuse of children ranging from a maximum of 5 years (sexual acts with wards, including with natural or adopted children under 18) to a minimum of 1 year to a maximum of 10 years (serious sexual abuse of children under 14).

[421] 1995 55-57; 71-90, referred to in Labuschagne 1999 *SAfrJ Ethnol* 61-62.

[422] S 155(1) of the Canadian Criminal Code found at http://laws.justice.gc.ca/en/C-46/40930.html (2002-05-01)

Incest is punishable with imprisonment of up to fourteen years,[423] suggesting that the crime is viewed as a serious one. Restraint, duress and fear are regarded as defences, indicating that the crime's aim is to punish consensual conduct.[424] The rationale for criminalising incest is not to penalise sexual abuse of children, which is criminalised elsewhere in Part V.[425] Interestingly, the maximum punishment for incest exceeds that imposed for child abuse! The criminal sanction's purpose may be construed as a purely eugenic one, since only sexual relations between consanguines are criminalised. However, it is more likely[426] that the Canadian incest prohibition can be characterised primarily as a crime against morality, as is also alluded to in the heading to Part V.[427]

4 4 3 5 *USA*

According to Labuschagne,[428] the incest prohibition in the USA generally overlaps with the marriage prohibition, although the conduct criminalised as incest in the USA varies from state to state.[429] That the decision to criminalise incest is often arbitrary is well illustrated if the various statutes in the USA punishing incest are examined. In some states[430] only consanguines are included within the scope of the forbidden degrees, whereas others[431] include

---

[423] S 155(2) *supra*.
[424] S 155(3) *supra*.
[425] See s 150-s 153 of the Canadian Criminal Code.
[426] See § 5 3 2 3 *infra* for more on the (unconvincing) eugenic rationale for criminalising incest.
[427] See *supra*.
[428] 1985 *THRHR* 440.
[429] See also Grossman "Should The Law Be Kinder To 'Kissin' Cousins'?: A Genetic Report Should Cause A Rethink Of Incest Laws" 2002 *Findlaw* at http://writ.corporate.findlaw.com/grossman/20020408.html (2003-05-01). Grossman states that "[c]riminal laws prohibit marriage *and* sexual relationships based on the same ties (with the necessary consanguinity and affinity usually defined the same way as in the marriage laws) [emphasis in original]."
[430] Eg Alaska (Alaska Statutes Title 11 Ch 41 S 450) found at http://www.touchngo.com/lglcntr/akstats/Statutes/Title11/Chapter41/Section450.htm , California (California Penal Code Title 9 Ch 5 Sec 285) at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=penandgroup=00001-01000andfile=281-294 (2003-05-01); Arizona (Arizona Revised Statutes Title 13 Ch 36 S 3608) at http://www.azleg.state.az.us/ars/13/03608.htm (2003-05-01), Idaho (Title 18 Ch 66 Sec 6602 of the Idaho Statutes) at http://www3.state.id.us/cgi-bin/newidst?sctid=180660002.K (2003-05-01) and Kansas (Kansas Statutes Vol 2A Art 36 3602 and 3603) at http://www.geocities.com/CapitolHill/2269/kansas.html#Incest (2003-05-01).
[431] Eg Alabama (Code of Alabama s 3A-13-3) at http://www.legislature.state.al.us/CodeofAlabama/1975/13A-13-3.htm (2003-05-01); Georgia (Title

non-blood relations, such as step-children and adopted children, although few jurisdictions were identified where sexual intercourse between parents-in-law and children-in-law was criminalised.[432] Unlike in many other jurisdictions,[433] including England at present,[434] incest prohibitions in the USA normally extend beyond the close family circle of parents, grandparents and siblings to include aunts and uncles and even cousins.[435] The conduct criminalised ranges from sexual intercourse in the conventional sense[436] to sexual conduct in the widest sense of the word, including indecent exposure.[437] Some states place an age limit on those who can be convicted of incest,[438] while many make no mention of age.[439]

In general, incest appears to be regarded as a fairly serious crime. In all jurisdictions investigated, incest is a felony, and many states make specific reference to imprisonment as punishment; where prison terms are referred to, they are fairly harsh,[440] implying that the commission of incest is not taken lightly. The rationale for punishing incest is by no means always apparent, but there are indications that eugenic considerations play a role in at least some

---

16 Ch 6 S 22), at http://www.geocities.com/CapitolHill/2269/georgia.html#Incest (2003-05-01); Missouri (Missouri Revised Statutes Ch 568 S 568.020 at http://www.moga.state.mo.us/statutes/C500-599/5680020.HTM (2003-05-01); Nebraska's Sex Laws (s 28-702) at http://www.geocities.com/CapitolHill/2269/nebraska.html (2003-05-01) and Utah (Utah Criminal Code Title 76 Ch 7 S 102) at http://www.livepublish.le.state.ut.us/lpBin20/lpext.dll?f=templatesandfn=main-hit-h.htmand2.0 (2003-05-01).

[432] See Bratt 1984 *Family LQ* 298-308 for a complete exposition of the legal position of each of the states of the USA as regards criminal and civil sanctions for incest.

[433] See for instance the discussion of the Australian incest prohibitions at § 4 4 3 6 *infra*.

[434] See § 4 4 2 2 *infra* for the extent of the present English law incest prohibition.

[435] See n 441 *infra* as well as also Grossman 2002 *Findlaw*, who cites other examples of prohibitions on marriages between first cousins (which appear to be for eugenic reasons) and notes that marriages between cousins are prohibited in 24 states, while only 19 states permit such marriages without restriction.

[436] Eg Alabama (n 431 *supra*).

[437] See, for instance, the Kansas incest prohibition (n 430 *supra*), which includes as incest marriage, sexual intercourse, sodomy and unlawful sexual acts, for example "the exposure of a sex organ in a public place, or in the presence of a person who is not the spouse of the offender and who has not consented thereto, with the intent to arouse or satisfy sexual desires of the offender or another."

[438] For example, both Alaska and Kansas criminalise incest only where the offender and other party are 18 years or older.

[439] Eg California (n 430 *supra*) and Georgia (n 431 *supra*).

[440] In Georgia the punishment for incest ranges from a year to 20 years imprisonment, while in Idaho a maximum prison term of 10 years is stipulated.

instances,[441] while incest is generally characterised as a sexual offence[442] or a crime against the family.[443]

4 4 3 6 *Australia*

In the Australian Capital Territory incest is classified as a sexual offence and is punishable in terms of section 62 of the Crimes Act 1900.[444] It appears to be regarded as a serious offence, with punishments ranging from ten years to 20 years, depending on the age of the "victim".

The conduct criminalised in terms of the Victoria incest prohibition[445] is similar to that in ACT.[446] Punishment varies from 25 years for incest between a person and their lineal descendants under eighteen, to five years imprisonment for sibling incest or incest with a lineal ascendant where the "victim" is above eighteen years old.

The rationale for criminalisation in both ACT and Victoria is uncertain. Since incest between adults (over the age of sixteen and eighteen respectively) is also punishable, preventing child abuse is not a central consideration. Prohibited relationships include not only blood relations (for instance lineal descendants, (half-) sisters and (half-) brothers, but also stepchildren, which indicates that eugenic motivations are likewise not a primary concern.

Sections 78A and 78B of the New South Wales Crimes Act 1900[447] criminalise only incest between close blood relations, where both parties are above sixteen years old. The maximum punishment is seven years'

---

[441] See, eg, the Arizona incest prohibition (Title 25 Ch 1 Art 1 s 101 at http://www.azleg.state.az.us/ars/25/00101.htm (2003-05-01)), which allows for marriage (and sexual relations without criminal prosecution – see n 430 *supra*) between "first cousins … if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce."

[442] See Idaho and Alaska n 430 *supra*.

[443] See Missouri and Arizona n 431 *supra*.

[444] At http://www.legislation.act.gov.au/a/1900-40/current/pdf/1900-40.pdf (2003-05-01).

[445] S 44 of the Crimes Act of 1958, at http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/del/consol%5fact/ca195882/s44.html?query=%7e+incest (2003-05-15).

[446] See *infra*.

[447] http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/vic/del/consol%5fact/ca195882/s44.html?query=%7e+incest (2003-05-12).

imprisonment. As child abuse is not of significance in such cases, the aim of the crime must be either eugenic or to condemn immorality.

In Queensland incest is criminalised in terms of section 222 of chapter 22 of the Criminal Code contained in the Criminal Code Act 1899.[448] Conduct criminalised is consensual carnal knowledge between closely-related consanguines, as well as between step-parents and step-children, foster-parents and foster children and adoptive parents and adopted children. Incest is characterised as a crime against morality and is regarded as a very serious offence, evidenced by the fact that it is punishable with life imprisonment. The rationale for this prohibition is unashamedly the enforcement of morality, since harm considerations such as eugenics or child abuse are not convincing (or applicable) reasons for punishing such a wide range of conduct so severely.

In the Northern Territory incest between close blood relatives is a crime punishable with fourteen years imprisonment if the accused is male, and seven years if the accused is female.[449] Once again, the punishment is harsh enough for the crime to be characterised as a serious one. In this case the purpose for punishment may be eugenic. However, if this is so, there is no clear reason why a man who commits incest should be punished more severely than his female counterpart.

---

[448] http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s222.html (2003-05-12).

[449] See s 134 and s 135 of the Criminal Code of the Northern Territory of Australia at http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nt/consol%5fact/ccotntoa498/s134.html?query=%7e+incest and http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nt/consol%5fact/ccotntoa498/s135.html?query=%7e+incest (2003-05-12).

4 4 4 *Conclusion*

As is no doubt apparent from this comparative overview, it is impossible to generalise about the use of the incest prohibition in other jurisdictions. The conduct punished as incest is extremely disparate. Although a considerable number of countries criminalise only sexual relations between close consanguineous family members, many also define as incest sexual relations between a much more extensive group of relatives, including distant blood relations, affines such as step-parents and step-children and relatives by adoption. The specific conduct criminalised also ranges from heterosexual sexual intercourse to gender neutral sexual touching which falls far short of penetration.

There are some similarities between the incest prohibitions in various countries. All the jurisdictions investigated where incest is criminalised, regard sexual relations between close blood relations as incest. Even countries where incest is not a crime prohibit marriage between consanguines such as parent and child and brother and sister.[450] In general, in countries where it is criminalised incest seems to be viewed as a serious offence, as is evident from the relatively severe maximum punishments prescribed in most jurisdictions.[451] However, it is uncertain to what extent such penalties are merely symbolic of the moral condemnation of incest, as opposed to being a true reflection of punishments imposed regularly by the courts in practice.

The universally accepted rationale for punishing incest, if indeed there is one, remains obscure. The incest prohibitions of other countries assist very little in establishing a persuasive reason for subjecting incest to criminal prohibition. Most often, legislators prefer to characterise incest as a sexual crime or a crime against the family, neither motivation being entirely convincing. Consent is no defence to a charge of incest, which undermines the argument that incest is aimed at punishing the infringement of sexual

---

[450] For instance, according to Labuschagne "Bestaan daar 'n Behoefte aan Strafregtelike Beskerming van die Gesin en van Intieme Assosiasies?" 2002 *Obiter* 233 245-246, incest is not criminalised in the Netherlands, although the traditional prohibition on incestuous marriages is maintained by private law.

[451] According to Packer (*The Limits of the Criminal Sanction* 314), the differential penalties often prescribed for incest, whereby father-daughter incest would be punished more severely than aunt-nephew incest, reflect the "relative heinousness" of the various varieties of incest.

integrity in a similar manner to rape. As for the incest prohibition protecting the family unit, this line of reasoning does not have persuasive force unless the only conduct punished as incest is sexual contact between nuclear family members living together, which is not the case.[452] An argument based on the genetic risk of inbreeding may explain punishment of incest in a handful of instances,[453] but incest prohibitions tend to include within the forbidden degrees, sexual intercourse between non-blood relations such as step-children or adopted children as well as consanguines. Many laws criminalising incest contain wide definitions of penetration or punish non-penetrative conduct, which also weakens the eugenic argument. Although occasionally the legal moralist argument for criminalising incest is overtly referred to, it appears that legislators in other jurisdictions are squeamish to admit there is only one rationale for the criminalisation of incest that applies in all cases, namely the enforcement of morals.

[452] See also § 5 2 2 4 *infra* for objections to protection of the family unit as rationale for criminalisation.
[453] Although, as will be elaborated on in § 5 3 2 3 *infra*, there is no satisfactory proof that inbreeding is necessarily dysgenic.

5 ASSESSING INCEST IN TERMS OF CRITERIA PROPOSED IN CHAPTER THREE

5 1 Introduction

If incest is first and foremost a crime against morality, this would have far-reaching consequences for the legitimacy of incest as a crime. This chapter will focus on the rationale for criminalising incest in a South African context. An attempt will be made to establish whether there are relevant and important reasons for prohibiting incest on pain of punishment that are convincingly justifiable, or whether the criminalisation of incest is aimed merely at punishing those who violate a societal taboo by exhibiting sexual preferences disapproved of by the moral majority. Any worthy reasons for punishing incest identified will then be examined further, to establish whether criminalising incest *per se* is an effectual and reasonable means of achieving legitimate state goals. By applying to incest the test proposed in chapter three for determining when the criminal sanction should be resorted to, it is hoped to formulate a decisive answer to the question of whether it is both justifiable and reasonable to retain incest as a crime.

5 2 First stage: justifiability

5 2 1 *Rights limited by criminalising incest*

As has already been explained above at §§ 3 2 2 and 3 3 3 1, all criminal prohibitions necessarily limit, to a not insignificant degree, human rights such as human dignity and freedom. Compared to most other crimes the infringement of the right to human dignity is even more pronounced in the case of incest, since the stigma attached to incest, and consequently to an incest conviction, is considerable.[454]

[454] A large proportion of society views incest as the ultimate taboo. Milton *SA Criminal Law & Procedure: Common Law Crimes* 236 states that "our society has an intense moral abhorrence for sexual relations between close relatives."

However, the limitation of rights where incest is at issue extends more widely than the mere negative consequences of criminal punishment in general. According to Klöpper,[455] the right to choose one's marriage or sexual partner is also infringed by criminalising incest. He argues that the state has a duty to protect the private sphere[456] of the family and not to interfere with the personal choices of consenting adults[457] regarding selection of marriage partners. Although the right to family life and to choose a marriage or sexual partner is not explicitly recognised in the South African Constitution, the Constitutional Court has held[458] that these rights are included as part of the right to human dignity. An analogous argument is that the incest prohibition prevents persons from being a party to the sexual relationship of their choice without state intervention, whether or not the parties wish to marry or have a family. This issue was dealt with by the Constitutional Court in the context of the decriminalisation of consensual sodomy, where Ackermann J emphasised the degradation and devaluation of those who "are at risk of arrest, prosecution and conviction ... simply because they seek to engage in sexual conduct which is part of their experience of being human."[459] In other words, the criminalisation of incest denies people the right to exercise certain constitutionally-protected rights on pain of punishment. In Feinberg's terms,[460] prohibiting incest not only directly closes the limited option of

---

[455] 1995 *Das Verhältnis von Art 173 StGB zu Art 6 Abs 1 GG* Franz Vahlen: München, as quoted by Labuschagne 1999 *SAfrJ Ethnol* 61-63 and mentioned at § 4 4 3 3 *supra.*

[456] For more on the right to privacy and its role in protecting adults from state intervention in the sphere of sexual behaviour generally, see Coleman "Who's Been Sleeping in My Bed? You, Me and the State Makes Three" 1991 *Indiana LR* 399-416.

[457] This argument only refers to incest between two persons legally capable of consenting, who have given real, informed and voluntary consent. Where a particular incestuous act is also criminalised as rape, etc, this reasoning would naturally not apply.

[458] See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) § 36-37.

[459] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) § 28. The idea that laws prohibiting certain forms of sexual expression place a burden on (potential) offenders that is more severe than other prohibitions is echoed by Hart *Law, Liberty and Morality* 22: "[Laws enforcing sexual morality] may create a misery of quite a special degree. For both the difficulties involved in the suppression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from an "ordinary" crime. Unlike sexual impulses, the impulse to steal or to wound or even kill is not, except in a minority of mentally abnormal cases, a recurrent and persistent part of daily life. Resistance to the temptation to commit these crimes is not often, as the suppression of sexual impulses generally is, *something which affects the development or balance of the individual's emotional life, happiness and personality*" [emphasis added].

[460] See also § 3 3 3 1 *supra.*

engaging in sexual intercourse with close relatives, but also has indirect repercussions for the free exercise of other more "fecund" options of the individuals concerned, such as the right to choose a marriage partner, to exercise the rights to private family life without state intrusion and to "establish and nurture human relationships without interference from the outside community".[461] For this reason alone, the incest prohibition should be viewed with suspicion.

However, there is at least one other way in which the crime of incest infringes on fundamental rights. Not only does criminalising and punishing the particular conduct concerned necessarily entail the limitation of human rights, but enforcement of the prohibition may also have negative human rights implications. Especially where incest is committed between two consenting parties in private, there will be no victim to complain by laying a charge. Sexual intercourse needs to be proved before a person may be found guilty of incest. Should police wish to obtain such evidence for a conviction, it would often be required of them to resort to unsavoury and invasive law enforcement methods that would very likely involve an unconstitutional invasion of the incest suspect's privacy.[462] A strong possibility of arbitrary, discriminatory or sporadic enforcement can also not be ruled out in incest cases.[463]

There is sufficient reason for calling the incest prohibition into question, since it infringes on various fundamental rights that are worthy of protection. This *prima* facie violation of rights is unconstitutional unless it can be established that there are good grounds for retaining incest as a crime.

---

[461] See *National Coalition v Minister of Justice supra* § 32.

[462] Where a child is born of the incestuous union, incest may be proved by DNA evidence that parties related within prohibited degrees were the parents of the child. Even this is invasive of the privacy of the parties involved, though perhaps not as invasive as some other means of obtaining evidence.

[463] See also n 178 *supra*, which mentions an example of the extreme privacy-invading methods used to enforce the Immorality Act 23 of 1957, an Act which also criminalised (private) consensual sexual behaviour.

5 2 2 *Justification stage: rationale for criminalising incest*

Various rationales for punishing incest may be identified, and it has generally been taken for granted that there is a need to prohibit incest as a separate crime in order to protect certain important state goals. But is this conclusion correct? A critical examination of the purported reasons for criminalising sexual relations between close family members is necessary to determine whether there are indeed sufficiently worthy reasons to justify the continued existence of the crime – what is the importance of the purpose of limiting the incest suspect's rights to, *inter alia*, human dignity, freedom and security of the person, privacy and family life? It has already been submitted in § 3 3 2 1 above that, should the overriding justification for use of the criminal sanction in the case of incest be shown to be to prevent harm or serious offence to others, the state will have met its burden of proof with regard to justifiability – it will have shown that, in principle, suppression of the conduct concerned is a suitably weighty consideration to warrant the imposition of the criminal sanction. However, if the chief reason for criminalising incest appears to be to protect actors themselves from the consequences of their informed choices (paternalism) or to enforce private morality, these would be inadequate reasons for imposing the criminal sanction.

Before examining the incest rationale in detail, it is necessary to distinguish between two forms of incest, namely that which is non-consensual and that which occurs with consent. The former category includes all incestuous sexual conduct which takes place between an adult and a child under sixteen[464] where, although there may be *de facto* consent, *de iure* consent is absent, as well as all non-consensual sexual penetration between parties related within the forbidden degrees. The latter category includes only incest between two persons who are capable of giving valid consent to sexual intercourse, and who do, indeed, give real, informed and voluntary consent to

[464] In accordance with the common law rule that girls under 12 are irrebuttably presumed to be incapable of consenting to sexual intercourse, sexual intercourse with a girl below the age of 12 is common law rape. Where a child is between the age of 12 and 16, consent will not exclude the criminal liability of their (opposite sex) sexual partner, who may be charged with an offence in terms of s 14 of the Sexual Offences Act 23 of 1957. See also § 4 2 3 *supra* and n 469 *infra* for more on age limits.

sexual relations. Parties must therefore be at least sixteen years old and the intercourse must not take place under coercive circumstances and/or without consent.[465] The practical implications of this distinction will be discussed in §§ 5 2 2 1 1 and 5 2 2 1 2 below.

5 2 2 1 *Good reasons: harm to others*

5 2 2 1 1 ***Harm to others: where sexual relations are* de facto *and* de iure *non-consensual***

Justifying the criminalisation of non-consensual intra-familial sexual intercourse is a fairly straightforward task. Where such conduct amounts to rape (defined as non-consensual sexual intercourse either between adults or between an adult and a child), there is a clearly identifiable victim to which harm – sexual violation – is done. Preventing and punishing sexual violence, whether the victim is an adult or a child, is of course an important and legitimate government objective. However, the harm caused by incest that is indistinguishable from rape between non-family members will not be discussed in detail, as it has already been noted that it would be preferable in such cases to charge with and convict the offender of rape instead of incest.[466]

---

[465] A detailed discussion of (at least *de facto*) consensual incestuous conduct between children under 16 (usually brothers and sisters) is beyond the scope of this work. It is certainly a contentious issue. There are those who argue that it tends merely to amount to sexual experimentation at a young age, and, as such, it is unjustifiable and nonsensical to label such children as criminals (eg Labuschagne 1985 *THRHR* 454); adolescent sexual conduct would be "best dealt with by other means than the criminal law" (Bailey & McCabe 1979 *Crim LR* 764). However, there are also those who are of the view that sibling incest should not be decriminalised as being relatively harmless. Temkin (1991 *Current Legal Problems* 194-198) submits that, especially where there is a substantial age gap between siblings, the elder may be using the younger as a "sexual guinea pig" and cites studies showing that harm may indeed result. See also Labuschagne "Bestraffing van Geslagsomgang tussen Kinders" 1992 *SALJ* 584-587. Although this is a fascinating topic, and well worth further research, it has been decided to limit the scope of investigation to cases of incest that are either non-consensual (irrespective of the age of the parties) or where at least one of the parties is 16 years or older.

[466] See also discussion at §§ 4 2 3 and 4 3 4 2 2 *supra* as well as § 5 3 2 1 *infra*.

5 2 2 1 2 *Harm to others: where sexual relations are only* de facto *consensual*

Only non-consensual sexual relations, which may legitimately be criminalised since harm (or potential harm) is caused to the non-consenting victim, have been mentioned thus far. A related issue is whether the "harm to others" rationale may be relied upon where there is *de facto* consent, but where one of the parties to incestuous sexual relations is in a relatively vulnerable position due to such party being a child (under sixteen years of age).

This matter is somewhat more complicated. It may be asked whether it is correct to assume that the rationale for criminalising underage sex is to prevent harm to the child "victim", or whether the criminal prohibition should rather be classified as one relying on legal paternalism. According to Selfe and Burke[467]

> "the key rationale would appear to be that society regards sexual intercourse with girls of a certain age as socially, morally and possibly medically undesirable, and that the age of 16 represents the arbitrary age at which the limit has been set."

Thus it initially appears as if criminalising (consensual) sexual intercourse between adults and children may be included under what Feinberg labels "presumptively non-blameable paternalism".[468] This is where the criminal sanction is used to protect relatively helpless or vulnerable persons from consented-to danger, including harm caused by other people. Although *de facto* consent is given, the state refuses to recognise it on policy grounds – the law presumes that immaturity deprives the child of the capacity to truly comprehend the nature and consequences of the "harm" consented to.[469] In the words of the Canadian Law Commission:

---

[467] *Perspectives of Sex, Crime and Society* (1998) 117.

[468] See discussion at § 2 3 4 *supra*.

[469] The question whether the (arbitrary) policy decision to make the age of 16 the age of consent for sexual intercourse is a correct and appropriate one will not be discussed here. Suffice it to say that I am of the view that if it were to be shown that a girl younger than 16 was in fact capable of understanding the nature and consequences of her decision to engage in sexual relations, and she had done so, it would seem to serve no legitimate state purpose to punish her sexual partner. It is submitted that a more nuanced and individualistic approach to the age of consent problem would be preferable – although, it is admitted, impractical. See too in this regard Labuschagne "Ouderdomsgrense en Strafregtelike Aanspreeklikheid weens Seksuele Misbruik van Kinders" 1998 *Obiter* 340 343 and "Strafregtelike Aanspreeklikheid van Kinders: Geestelike of Chronologiese

> "Our society believes, and justly so, that the law must protect those who have not yet attained full sexual autonomy or who have not yet achieved [the] equilibrium [between body and mind and between biological development and mental and emotional maturity]. Children must therefore be protected from sexual exploitation and corruption until they have arrived at a degree of maturity which will enable them to foresee the consequences of their acts and take important personal decisions with full and clear appreciation of the facts, or at least until they come to the age at which that degree of maturity should be presumed."[470]

Although criminalisation of sexual acts with young persons is sometimes labelled as a form of legal paternalism, it is submitted that it is probably more accurate to describe the motivation for criminalisation as being to prevent harm to the child concerned.[471] While children of fourteen or fifteen may not regard themselves as "victims", the risk of exploitation is high. The sexual conduct is never truly consensual in the strict sense of the word, since it is recognised that adult-child sexual relationships are intrinsically abusive, with the adult exploiting the dependence of the child.[472] The adult party may be charged with rape or statutory rape, as the case may be.[473]

Thus there are legitimate reasons justifying the state's resorting to the criminal sanction in cases where intra-familial sexual intercourse takes place without consent or with a young person incapable of giving legally recognised consent. The matter of whether it is necessary to criminalise this conduct as incest has been briefly touched upon, and will be elaborated on below at §§ 5 3 2 and 5 3 3.

Ouderdom?" 1993 *SALJ* 148-152, where he supports a more flexible approach to the issue of age limits. West "Thoughts on Sex Law Reform" in Hood (ed) *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (1974) 469 476-477 advocates complete abolition of the concept of an age of consent, arguing that non-consenting behaviour is in any event criminalised.

[470] Law Reform Commission of Canada *Sexual Offences* (1978) 7 referred to by Labuschagne 1990 *SACJ* 14. See also Renvioze *Incest: A Family Pattern* at 145, where it is stated that:
"sex is only legitimate when it is between two freely consenting people, and children are incapable of giving their true consent to an incestuous relationship because: (a) they have no means of knowing what sex is really about; (b) they have no conception of what their feelings will be about any incestuous childhood experiences when they are grown up; (c) they cannot as yet begin to comprehend the importance of social pressures, and (d) it is almost impossible for them to deny their fathers, even if the request is made gently and without any obvious coercion … And there is no way in which a young child can be said to have truly consented to a sexual act initiated by an adult."

[471] There is much well-documented evidence of the harm that child abuse causes its victims. See for instance Smith "Incest and Intrafamilial Child Abuse: Fatal Attractions or Forced and Dangerous Liaisons?" 1991 *Journal of Family Law* 833 857-858; Cook & Millsaps "Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest" 1991 *U Rich L Rev* 1-40.

[472] Bratt 1984 *Family LQ* 258. See also Labuschagne 1990 *SACJ* 23.

[473] See also §§ 4 2 3, 4 3 4 2 1 and 4 3 4 2 2 *supra*.

5 2 2 1 3 ***Incest-specific harm to others***

Regardless of whether the incestuous conduct in question also amounts to rape or is consensual, it is often argued that incest is criminalised to prevent various forms of harm that apply to intra-familial sexual relations only.

5 2 2 1 3 1 *Eugenic reasons*

One of the most common (and more recent)[474] reasons advanced for punishing incest is that there is a greater likelihood that children born of incestuous unions will suffer from mental and physical defects than the general population.[475] Thus incest should be criminalised to prevent harm to potential offspring of an incestuous union. This argument is not entirely persuasive for a number of reasons that will be outlined in § 5 3 2 3 below.

However, even if it were conceded that the risk of genetic damage may be considerable in cases where close blood relatives have children, it is still possible to maintain, as Bailey and McCabe do, that "it is no business of the criminal law to seek to prevent injury to the children of individual liaisons".[476] It will be argued at § 5 3 3 below that there are more effective measures of preventing such harm than resorting to the criminal sanction.

---

[474] Wolfram 1983 *Crim LR* 315. See also Renvoize *Incest: A Family Pattern* 33, where she points out that, since primitive man had little understanding of how a child was conceived in the first place, it is doubtful whether genetic problems had much effect on forming the taboo. This view is supported in Hughes "The Crime of Incest" 1964 *Journal of Criminal Law, Criminology and Police Science* 322 at 327, where he refers to White's view that the biological degeneration theory "would certainly have been beyond the comprehension of primitive peoples who held to strong incest taboos." See also Labuschagne 1990 *TSAR* 415.

[475] Milton *SA Criminal Law & Procedure: Common Law Crimes* 235; Temkin 1991 *Current Legal Problems* 190-193; Wolfram 1983 *Crim LR* 308; Bailey & Blackburn 1979 *Crim LR* 715-717; Bailey & McCabe 1979 *Crim LR* 757-758; Labuschagne 1999 *SAfrJ Ethnol* 60-61; Labuschagne 1985 *THRHR* 452; Labuschagne 1990 *TSAR* 424-425; Renvoize *Incest: A Family Pattern* 149-150; 33; Smith 1991 *Journal of Family Law* 858-860; Zellick "Incest" 1971 *The New Law Journal* 715; Hughes 1964 *Journal of Criminal Law, Criminology and Police Science* 328; *Sexual Offences: The Substantive Law* (1999) 134 at § 3 6 1 2 7.

[476] 1979 *Crim LR* 758.

5 2 2 1 3 2 *Protection of individual family members*

According to the South African Law Commission,

> "[i]t is clearly vital to the actual security of all members of the family unit that certain boundaries are set and preserved within such family. Of these boundaries the sexual one is the most fundamental. If criminal law has indeed a role to play in regulating incestuous behaviour, it must seek to protect ... the individual within the family from the family. In a changing society with confused and often exploitative attitudes towards sexuality and sexual relationships, it could be argued that the prohibition of the practice of sexual relations within the family unit more than ever needs the force of law behind it."[477]

Temkin states the matter as follows:

> "The home can be a dangerous place and the family an oppressive institution. Within both, parents and some other relatives may enjoy a power which they do not have in the outside world. The temptation to abuse it is always there. The unique opportunity for abuse which the family affords and the devastating consequences for victims which this may entail argue the case for a separate incest offence. Such a crime sets the seal of disapproval on such conduct and signals to society the restraints on power within the family that the state will impose."[478]

A second aspect of family security may be destabilised by incest. Labuschagne[479] mentions the idea that the incest prohibition creates order and solidarity within the family in that it prevents the undermining of the structure of family authority. In the same vein, Wolfram[480] notes that one of the reasons advanced for criminalising incest is to prevent the disruption of the family caused by sexual rivalries, a view echoed by Milton,[481] who observes that peace and trust is promoted by "preventing sexual jealousy and rivalry between members of the family competing for the sexual companionship of other members." Renvoize asks: "Has not parental authority already so declined that an acceptance of incest would ... perhaps ... lead to the breakdown of all authority?"[482] Interestingly, however, this family rivalry, if it exists, does not appear to result in the break-up of the family unit – quite the contrary. There is strong evidence that incest has the effect of making the family exceptionally tight-knit. Incest serves to keep the family

---

[477] *Sexual Offences: The Substantive Law* (1999) 141 § 3 6 7 2, paraphrased from Temkin 1991 *Current Legal Problems* 187-188 and 190.
[478] 1991 *Current Legal Problems* 199.
[479] 1990 *TSAR* 422; 1985 *THRHR* 453, where it is argued that the structure of family authority is irreconcilable with sexuality, since, for instance, a mother would be unable to maintain authority over her daughter if they were competing for the father's sexual favour.
[480] 1983 *Crim LR* 316.
[481] *SA Criminal Law & Procedure: Common Law Crimes* 236.
[482] *Incest: A Family Pattern* 3 and 33-34.

"[bound] together with ropes of mutual, dependence fear of separation, and secrecy, and if any one member tries to break away the bonds are ruthlessly tightened."[483] Family rules are strict and there tends to be extreme dependence on the rest of the family unit.

Hughes[484] suggests that incestuous activities "pervert the individual's capacity for ordinary social relationships" as well as disorganising the family relationships themselves. Incest produces a confusion of roles within the family, with, for instance, the father or brother becoming husband or lover. The argument is that this produces confusion and tension, which makes control of rebellious children more difficult and changes the natural protective relationship between parents and children.

Renvoize[485] also notes that

> "[p]arents in incestuous family seem incapable of treating their children in a way that produces a secure and healthy unit, and all the members, young and old, are typically short of affection. Often the wrong kind of touching is used in an attempt to satisfy this need."

Another argument supporting the contention that incest may harm individual family members, regardless of whether they are directly involved in incestuous conduct, is that it may be extremely distressing and painful for family members who unwittingly stumble across the evidence that incest is occurring. Hughes[486] cites as an example of the traumatic effects of incest, the "suffering caused to the wife who discovers an incestuous relationship between her husband and her daughter".

The state has a legitimate interest in preventing harm to individuals, including where harm or disruption occurs in the family context, and the incest prohibition may *prima facie* be justified as being a means of doing so. Whether it is a particularly appropriate or effective means, remains to be seen.[487]

---

[483] Renvioze *Incest: A Family Pattern* 100-103.
[484] 1964 *Journal of Criminal Law, Criminology and Police Science* 327.
[485] *Incest: A Family Pattern* 104.
[486] 1964 *Journal of Criminal Law, Criminology and Police Science* 328-329.
[487] See § 5 3 2 4 *infra*.

5 2 2 2 *Good reasons: offence to others*

If it could be shown that incest causes sufficient offence to identifiable victims that it needs to be punished as a crime, this would be a persuasive reason for the retention of the criminal sanction. May it be argued that, due to the powerful cultural taboo against incest – the so-called "ick" factor[488] – the mere knowledge that, for instance, a brother and sister are living together as man and wife, is sufficiently distasteful to justify criminalisation to protect the feelings and sensibilities of those affronted by such knowledge? Such reasoning is unpersuasive. According to Feinberg,[489] affront caused by the mere knowledge that offensive conduct such as incest is taking place behind closed doors is an insufficient reason for invoking the offence principle, and thus the criminal sanction. There is no identifiable victim who can claim to be wronged. Naturally, as is the case with any overtly sexual conduct, if incestuous sexual intercourse occurs in a public place, the offence principle may indeed be relied upon to punish the conduct on the basis that it amounts to public indecency.[490]

It may be asked whether behaviour such as an adult brother and sister blatantly kissing in public, or flagrantly boasting about their incestuous relationship to others, is offensive in Feinberg's sense. It is submitted that whether the conduct is sufficiently offensive to be criminalised depends largely on the reasonableness of the offending parties' conduct, including the motive of the accused. If the aim is to shock or affront others, or to impair their dignity, the use of the criminal sanction may be necessary or appropriate, while in other cases it should not be resorted to. In any event, such behaviour is able to be criminalised not as incest, since sexual intercourse will not have occurred, but rather as *crimen iniuria*[491] or public indecency.

---

[488] Grossman 2002 *Findlaw* 3.

[489] Discussed at § 2 3 3 *supra*.

[490] According to Snyman *Criminal Law* 358, public indecency "consists in unlawfully, intentionally and publicly engaging in conduct which tends to deprave the morals of others, or which outrages the public's sense of decency." See also Packer *The Limits of the Criminal Sanction* 316, where he speculates that a "notorious incest relationship" where there is "exceptionally open flaunting of the sexual character of the relationship" may be punishable as a nuisance.

[491] According to Snyman *Criminal Law* 453, *crimen iniuria* is the "unlawful, intentional and serious violation of the dignity or privacy of another."

5 2 2 3 *Bad reasons: legal paternalism*

In the case of private consensual sexual relations between adults related within the forbidden degrees, arguments based on legal paternalism are occasionally proffered to justify criminalisation. By making certain choices of sexual or marriage partner illegal, the state professes to protect the individuals concerned from choices resulting in self-inflicted harm, such as becoming the parents of a mentally or physically handicapped child. Another indication that incest prohibition may be motivated by a degree of paternalism is that incest is a crime regardless of whether the sexual intercourse is consensual or not. Feinberg would argue that since *volenti non fit iniuria* does not apply, preventing harm to others cannot be the overriding concern of the prohibition.[492]

But is the state's aim truly benevolent paternalism? The incest prohibition is a "direct, substantial and intentional intrusion into an individual's decision to marry",[493] to have sexual relations, to procreate and to form a family. As such, it may only properly be justified in instances where the danger of imminent bodily harm is readily demonstrable, or where the risk is extreme or manifestly unreasonable.[494] But what harm inevitably results from incest between consenting adults? As will be shown at § 5 3 2 3 below, even if the couple are blood relations who decide to procreate, which is certainly not necessarily the case, the risk of a genetically defective child being born of such a union is minimal.[495] There is little or no empirical evidence on the effect of adult consensual incest on the participants, whether positive or negative – certainly insufficient proof of an immediate risk of great harm. And even if the injury envisaged by the state is psychological damage to the parties, "it may be answered that that is more likely to be ameliorated by the absence of a punitive law which only augments feelings of guilt."[496]

Thus paternalistic considerations do not appear to be an overriding rationale in the case of the incest prohibition. It is clear that apparent

---

[492] See discussion of Feinberg's definition of legal paternalism at § 2 3 4 *supra*.
[493] Bratt 1984 *Family LQ* 266.
[494] Bratt 1984 *Family LQ* 288.
[495] According to Bratt 1984 *Family LQ* 278, there is at most a 0.125 – ie, 1 in 8 – risk of defective offspring.
[496] Zellick 1971 *New LJ* 715.

paternalistic justifications are merely society's way of trying to save the individual not from harm, but from conduct that society deems repulsive. In any event, since it has been argued that legal paternalism alone is not a sufficient ground for criminalisation,[497] no more will be said about this ostensible rationale for criminalising incest.

5 2 2 4 *Bad reasons: legal moralism*

5 2 2 4 1 ***General reliance on moralism***

Authors are often reluctant to admit that the primary reason for criminalising incest is to enforce certain moral or religious beliefs. They prefer to hide behind ostensible reasons such as eugenics or prevention of harm to children. However, moral grounds for criminalising incest have long been recognised, and it seems apparent that, particularly in England and USA, the legal prohibition of incest originated as an example of the "secular enforcement of a particular religious tenet".[498]

Packer[499] underlines this, mentioning the assertion that "criminal punishment is required to place a secular sanction behind a widely held religious or moral tenet" and that "the community regards incest with such intense hostility that failure to condemn it will result in loss of respect for the criminal law generally."

Milton speculates that incest may be penalised "simply because our society has an intense moral abhorrence for sexual relations between close relatives"[500] and concedes that, insofar as sexual relations between consenting adults are concerned, "the crime exists only as a reflection of a moralistic disapproval of the choice of a sexual partner."[501] Snyman agrees, by classifying incest as a crime against morality and stating that incest's existence

---

[497] See § 2 3 4 *supra*.
[498] For more on the religious function of incest in England and America, see Bratt 1984 *Family LQ* 281-285.
[499] *The Limits of the Criminal Sanction* 315.
[500] *SA Criminal Law & Procedure: Common Law Crimes* 236.
[501] *SA Criminal Law & Procedure: Common Law Crimes* 237.

> "is based not so much on biological considerations ... as on the protection of certain moral sentiments in the community regarding sexual relationships between members of a family."[502]

This conclusion is underscored by the fact that *mens rea* is required for an incest conviction, a clear indication that "the law is trying to punish the inherent badness, rather than trying to punish the genetic deterioration of the human race or to prevent the birth of biologically 'inferior' human beings."[503] The idea of incest as being morally wrong is underpinned by a powerful social taboo against incest.[504]

Thus legal moralism is clearly an important reason justifying the existence of the crime of incest – indeed, as was emphasised in § 4 4 4 above, it appears as if there is only one rationale for the criminalisation of incest that applies across the board, namely the enforcement of morals. The questionable legitimacy of this rationale with be considered in more detail below at §§ 5 2 3 and 5 3 2.

5 2 2 4 2 ***Protection of the family unit***

Another rationale for criminalising incest separately is the ideological contention that engaging in incestuous conduct harms the family unit itself, quite apart from its individual members. It has been argued that "widespread incest would be socially disruptive – ... result[ing] in the decline of the family [and] upsetting morals and order".[505] According to the British Home Office discussion document on whether incest should be retained as a crime, "[i]t is quite proper to argue that, [in the case of adult incestuous sexual relationships], an adult's right to exercise sexual autonomy in their private life is not absolute, and that society may properly apply standards through the criminal law that are intended to protect the family as an institution".[506] Similarly, Temkin avers that "[f]or those who are dedicated to the institution of the family and the maintenance of family life, incest must remain an

---

[502] *Criminal Law* 356.
[503] Norrie 1992 *Journal of the Law Society of Scotland* 218.
[504] For more on the role of the incest taboo, see § 5 3 3 8 *infra*.
[505] Renvoize *Incest: A Family Pattern* 2.
[506] *Setting the Boundaries* Vol 1 § 5 8 2 available at http://www.homeoffice.gov.uk/docs/vol1main.pdf (2003-09-25).

anathema."[507] Norrie[508] also mentions the argument that, if family stability is disturbed, this may lead to the disturbance of the stability of society itself, since families are the basis on which society rests. Hughes[509] states that "[t]he very kernel of the social complex, the family unit from which outgoing relationships are developed with others in society, is thus gravely threatened by the incest situation". In the context of parent-child and sibling incest, Smith[510] goes so far as to say that

> "to condone or accept an abolition or relaxation of the social or legal prohibitions against incest is to invite the slow but sure dissolution of the family as the foundation of the social fiber [*sic*] of America, the nation's *élan vital* ... [I]f incest were allowed, not only would the family unit collapse, but so too would the kinship system and thereafter the entire social order."

Although at first glance this reason for criminalisation may appear to be based on the consideration of preventing harm, as was the case when the value of security of family members was discussed above at § 5 2 2 1 3, protecting the family itself is a fundamentally different concern from protection of the individual members of the family.

It is submitted that characterising incest as a "crime against the family" is merely an attempt to disguise the true motivation for criminal punishment, namely the desire to maintain a certain moralistic notion of what a family ought to be like, and punishing persons in intimate relationships who fail to conform to this view.[511] The underlying fear that necessitates criminal intervention seems to be that the recognition and acceptance of alternative manifestations of "family" would inevitably lead to the disintegration of the family as we know it.[512] Taking this into account, it must first be considered

---

[507] 1991 *Current Legal Problems* 187.
[508] Norrie 1992 *Journal of the Law Society of Scotland* 218.
[509] 1964 *Journal of Criminal Law, Criminology and Police Science* 327.
[510] 1991 *Journal of Family Law* 835 and 853; see also 874.
[511] This argument is akin to what Feinberg calls "moral conservatism", which advocates the use of the criminal sanction to prevent social change – see § 2 3 5 *supra* as well as Feinberg *Harmless Wrongdoing* 39-80, especially 39, where he describes legal conservatism as a viewpoint regarding drastic social change as "an evil in itself, whatever its effect on personal interests and sensibilities ... of such magnitude that it is morally legitimate to use criminal penalties to prevent it." See also Johnson 2003 *Seattle University LR* 41-74 for a interesting moral conservatism-based argument for retaining the incest prohibition. He argues (at 48-52) that a broad incest prohibition, punishing even non-harmful conduct, serves the socially useful purpose of preserving the traditional aversion to incest.
[512] This argument is also similar to Lord Devlin's argument in favour of legislating against immorality, where he argues that society would be in danger of disintegration, were it not for the legal enforcement of its common moral code (Blom-Cooper and Drewry (eds) *Law and Morality* 22).

whether the incestuous family does indeed cause a serious risk of disturbance to the notion of family, and thus also to the social fabric itself. Second, it may legitimately be asked whether it is at all appropriate to use the criminal law to preserve the "fundamental integrity"[513] of the family as institution – is the "demolition of the family structure as we know it" an evil so unacceptable that the criminal sanction must be made use of to prevent it?

The first question has already been addressed to an extent at § 4 3 4 2 1 above, where it is noted that, even under the amended definition of incest in terms of proposed Sexual Offences Bill, incest consists only of sexual penetration, leaving sexual behaviour short of this unpunished as incest *per se*.[514] Non-penetrative sexual behaviour may be as disruptive of the family relationship as any other, but does not amount to incest.[515] Thus the incest prohibition does not cover all cases of serious risk to the family unit due to sexual molestation and is to this extent under-inclusive, if protection of the family is the true rationale for the prohibition. Conversely, in instances of incest where no real danger of disruption to family exists, for instance where a forty-year-old bachelor has sexual intercourse with his forty-five-year-old spinster sister,[516] the criminal sanction applies in an over-inclusive manner. Norrie[517] also points out that the number of individuals wishing to have sexual relations with or to marry relations within the forbidden degrees is likely to be tiny, and would hardly be as disruptive of families as is divorce, which is legally permitted. It must also be mentioned that empirical studies concerned with parent-child incest conclude that incest is a symptom or result of family disorder, not its cause.[518]

As regards the second question, whether the family unit as such is worthy of protection by means of the criminal law, the answer must be "no". Although "[f]amily roles will of course be altered by developing and changing sexual relations and marital desires"[519] by permitting incestuous sexual

---

[513] Smith 1991 *Journal of Family Law* 582.
[514] See, however, n 365 *supra*.
[515] Norrie 1992 *Journal of the Law Society of Scotland* 218.
[516] Norrie *supra* 218.
[517] *Supra*.
[518] Bratt 1984 *Family LQ* 288.
[519] Norrie 1992 *Journal of the Law Society of Scotland* 218.

relations, it is submitted that a new interpretation of "family" is both desirable and inevitable. Labuschagne[520] points out that the law increasingly recognises alternative intimate associations and family combinations: "Sede- en waarde-voorskriftelikheid is vervang deur 'n beskermende en akkommoderende regs- en staatsbetrokkenheid."[521]

There has been a shift away from the state moralistically prescribing certain ideal relationships and (especially religiously-based) "relationship models" ("*verhoudingsmodelle*"). This is because of an increased emphasis on human rights such as the right to equality,[522] especially equality between the sexes, the right to privacy, and the right to human dignity.[523] Due to individual autonomy being acknowledged as an important value to a far greater degree than in the past, there is growing recognition that the state has no right to intervene in personal choices such as the decision to engage in a relationship, to live together or to form a family – such choices fall within the private sphere.

In the light of the increasing pluralisation of types of intimate relationships,[524] there is no longer only one type of "normal" or "acceptable"

---

[520] 2002 *Obiter* 241.

[521] 2002 *Obiter* 239. "Prescriptiveness concerning morals and values has been replaced by a protective and accommodating legal and state involvement" [my translation].

[522] See, eg, *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 2 SA 198 (CC); 2002 10 BCLR 1006 (CC) §§ 18-19 and §§ 23-26.

[523] See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) § 36-37.

[524] See *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 2 SA 198 (CC), where it is stated (at § 19) in the context of a judgment giving lesbian same sex life partners the right to adopt a child jointly:
"The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. *However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change*" [emphasis added].
See also *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); 2002 9 BCLR 986 (CC) §§ 11-13; 22 and 25; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) § 31; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); 2000 1 BCLR 39 §§ 47-48; and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 § 99.

family.[525] It should thus be possible to recognise unconventional (even incestuous!) intimate or family relationships too, provided that the parties involved are consenting adults. According to Labuschagne,[526] no legitimate or rational state purpose is served by criminalising as incest, sexual relations between consenting adults. Instead of subjecting members of families not conforming to the established definition of "family" to the wrath of criminal punishment, what is defined as "family" should be extended to include such relationships.[527] Punishment, in the guise of protecting the family (or marriage) as institution against those who defy moral conventions, is uncalled for and ineffective.[528] The right to the family life of one's choice far outweighs the need to maintain prescriptive and narrow classifications of family.

To sum up, it would be preferable to be tolerant and accommodating of different kinds of family relationships, focusing instead on protecting the individuals involved in a particular intimate association or family from abuse by other individuals, whether the source of abuse is from within the family or from an outsider.

5 2 3 ***Conclusion***

It appears from the above discussion that there are a considerable number of reasons advanced for criminalising incest. Justifications range from preventing harm to others, both born and unborn, and preventing offence to others, on the one hand, to protecting persons from the harmful consequences of their own decisions and reinforcing society's taboo against sexual relations within the forbidden degrees, on the other. As has been argued above in § 3 3 2, where the state's rationale for criminalisation can be shown to be grounded on preventing harm or offence to others, the state has

---

[525] This is also recognised by Labuschagne 2002 *Obiter* 240, where he states:
"Aangesien die begrippe 'huwelik' en 'gesin' … regskonstruksies is, het hulle 'n dinamiese onderbou wat met die koms van nuwe kennis (en insigte) en waarde-veranderinge in 'n betrokke gemeenskap gewysig en aangepas kan en behoort te word."

[526] 2002 *Obiter* 246.

[527] Grossman (2002 *Findlaw*) even speculates that perhaps the term incest could be "replaced with more palatable terms like 'kinship marriage' or 'distant consanguineous relationships'."

[528] Even if preservation of the family unit were regarded as a worthwhile aim of criminal punishment, the restoration of a functional family unit can hardly be regarded as realistic, since the effect of punishment is to remove the offender(s) from the family, thus breaking up the nuclear family. See Smith 1991 *Journal of Family Law* 870.

discharged its onus of showing that the use of the criminal sanction is justifiable in theory. Conversely, if only paternalistic or moralistic arguments were relied on, the use of the criminal sanction would seldom if ever be convincingly justified. It has already been posited[529] that the justification for the incest prohibition does not appear to be based to any great extent on legal paternalism, but that even if it were, this would be unpersuasive. It is further submitted that moral condemnation alone, without underlying justifications that amount to more than mere "prejudice, ignorance and irrationality",[530] is an insufficient reason for imposing the criminal sanction. "[G]eneral repugnance is nowhere near sufficient to justify a criminal prohibition ... Something more is required than a mere gut reaction."[531] Thus in the discussion of whether the incest prohibition is a reasonable one, no further mention will be made of legal paternalism or legal moralism as convincing justifications for criminalising incest.

It has been noted that it appears as if the enforcement of morality is incest's only rationale that is valid in all instances. This casts doubt on whether other legitimate considerations for supporting criminalisation are indeed of overriding importance. Be that as it may, there are a number of other seemingly weighty grounds advanced for resorting to the criminal sanction. Justification contentions based on prevention of harm or offence to others are arguably of such sufficient substance that it can be said that incest is prohibited on pain of criminal punishment at least in part due to the desire to advance certain legitimate and important state goals, such as preventing identifiable harm or offence to others. Indeed, if criminalising incest truly does prevent intra-familial child abuse or harm to individual family members, if it decreases the number of children being born with genetic defects or if it puts a

---

[529] At § 5 2 2 3 *supra*.

[530] Bratt 1984 *Family LQ* 287.

[531] Norrie *supra* 217. See also Zellick 1971 *New LJ* 715, where he states that criminalising incest "because society finds the practice so odious and repulsive even among consenting adults that it is not to be tolerated ... is a most questionable base for the criminal law." Packer *The Limits of the Criminal Sanction* 316 goes further, stating that criminalising incest because it is viewed with hostility is "simply a stark claim for the enforcement of morals through the criminal law [that] must be rejected on the ground that in the absence of any claim that the conduct ... is injurious ... people should be free of the peculiar condemnatory restraint of the criminal law."

stop to the offence caused by the public flaunting of an incestuous sexual relationship, then criminal punishment may indeed be appropriate.

However, it is insufficient merely to conclude that certain forms of incest *may* be criminalised and that criminal punishment is deserved and justifiable in principle. It is further necessary to establish whether incest in particular *should* be criminalised. State punishment of incest must be both practically desirable and feasible on policy grounds. What must be investigated next is, *inter alia*, the efficacy of the existing incest prohibition in inhibiting the undesirable manifestations of harm or offence to others identified earlier in §§ 5 2 2 1 and 5 2 2 2.

5 3 **Second stage: reasonableness**

5 3 1 ***Nature and extent of limitation***

In determining the nature and extent of the limitation of the rights of those accused or convicted of incest, it is firstly necessary to characterise the particular limitation, and secondly to establish whether criminal punishment has a significantly severe negative effect on the fundamental rights of such persons, or whether the impact is a relatively minor and benign one. As has been explained above at § 3 3 3 1, the greater the degree of impairment of human rights inherent in the use of criminal punishment, the less reasonable such punishment will be. It is submitted that, where incest is concerned, the degree of impairment of fundamental rights is considerable and wide-ranging.

5 3 1 1 *Nature*

In respect of the nature of the violation, it has been shown at § 5 2 1 that, by prohibiting incest, law-abiding citizens are dissuaded from engaging in socially desirable and constitutionally protected conduct. The arguments outlined there and in this regard at § 3 3 3 1 will not be repeated here. Suffice it to say that a consequence of criminalising incest is that adult persons are not allowed to engage freely in consensual sexual or marriage relationships of

their choice. Thus the prohibition itself infringes, *inter alia*, the rights to human dignity and privacy.

In addition, due to the fact that incest most often takes place within the confines of the nuclear family and that in cases of consensual incest there is no "victim" as such, there is no complainant to lay a charge. As was noted by Packer,[532] where consensual crimes are at issue the chance of prosecution is slight and enforcement of the prohibition must, at best, be extremely sporadic. Because of the difficulty of obtaining sufficient evidence for conviction, the police would be far more inclined to resort to underhand detection methods, and there would thus be a greater risk that the incest suspect's right to privacy and human dignity would be limited in an unconstitutionally-acceptable manner during the criminal investigation process. Particularly in a case of consensual adult incest, which would likely be included among Packer's crimes that are "just barely taken seriously",[533] the danger of a discriminatory abuse of the exercise of the discretion to prosecute can also not be ruled out.

Lastly, due to a general revulsion of incest and the considerable stigma attached to it, the mere fact that a person is suspected of incest, much less convicted thereof, entails a considerable impairment of human dignity. An adult convicted of consensual incest, who is an otherwise law-abiding person, may be saddled with the burden of societal rejection and disapproval that is completely disproportionate to the deed committed. Thus even if the punishment imposed by a court is relatively light, the negative ramifications of an incest conviction are substantial.

5 3 1 2 *Extent*

As mentioned above in § 3 3 3 1, the extent of prejudice resulting from subjecting an individual to a criminal sanction may only be determined in relation to the good sought to be achieved by criminalisation. This requires a weighing up of the benefits to society of an incest conviction against the harm caused to the individual accused. In this regard, a distinction must be drawn

[532] See discussion at §§ 3 3 3 1 and 5 2 1 *supra*.
[533] *The Limits of the Criminal Sanction* 290.

between consensual and non-consensual incest. In the latter situation, the state's rationale for criminal punishment is far more convincing, and a correspondingly severe infringement of the accused's rights would be permissible. Where incest is consensual, however, it is hard to conceive of an instance where the detrimental consequences of the imposition of the criminal sanction would not far outweigh its benefits. It is submitted that there is a gross disproportionality between the beneficial purpose that the incest prohibition aims to achieve and the potential infringement of rights resulting from its unnecessary over-inclusiveness.

5 3 2 *Relation between limitation and purpose: effectiveness*

It must not be forgotten that it is by no means certain that the main aims of the incest proscription are indeed to prevent harm and serious offence – on the contrary. There is a strong likelihood that the fact that the ambit of the crime is extensive enough to include non-consensual or offensive conduct is merely coincidental; the core of the offence was and still is to "[enforce] the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice".[534] The original reason for criminalising incest was not to prevent harm to its victims, but to enforce a societal taboo that was incapable of rational explanation. Although it is an improper reason for criminalisation,[535] enforcement of morality is still the chief underlying motivation for the retention of the offence in its present extensive form.

Despite this, in the discussion that follows it is assumed that the primary *raison d'être* for a prohibition need not be the only one, and that other (even ostensible!) grounds for criminalisation that are acceptable justifications for criminalisation must not be rejected out of hand. Instead, they should be

---

[534] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) § 37.

[535] See *National Coalition supra* §§ 37-37 and § 69, where it was stated in the context of sodomy that justifications of a criminal sanction based on enforcement of private morality only are "motives and objectives [that are] flagrantly inconsistent with the Constitution." This argument would apply with equal force to the incest prohibition.

carefully scrutinised with the aim of establishing whether the criminal sanction is effective in preventing and punishing harmful or offensive conduct too.

There are indeed several manifestations of extremely undesirable conduct that fall within the scope of the offence of incest. The most convincing reason for retention of the prohibition is that incest, like all violations of sexual integrity, is harmful to non-consenting victims, especially where the injured party is a child. In the case of parent-child incest, particularly, the danger of abuse of trust and authority is ample reason to justify prohibiting incest so as to protect the child. Additional incest-specific grounds for criminalisation examined above that may be regarded as sufficiently weighty, are that progeny of incestuous matings may be slightly more inclined to suffer from mental or physical defects, and that the members of a family within which incest occurs are harmed due to the breakdown of the structure of family authority and sexual jealousy caused by incest. It was also noted that overt public displays of incest might be prohibited on the grounds that they could offend observers.

However, even if it is conceded that the crime of incest may be utilised to protect certain legitimate state interests, it must still be established that the incest prohibition is indeed closely enough tailored to achieve these purposes and these purposes only. It will be argued that the crime of incest, even if it were to be amended as proposed in the Sexual Offences Bill, fails to achieve its ostensible goals of preventing harm or offence to others with any degree of effectiveness, while simultaneously prohibiting conduct that is in no way harmful or offensive to others. It will be shown that justifications based on harm-to-others or offence-to-others arguments do not apply across the board or are less than convincing in certain instances. It will become apparent that the incest prohibition's infringement of constitutionally-protected interests is unreasonable, as there is not a sufficiently rational connection between the benefits to society of criminalising incest and the impairment of individual rights that the criminal sanction entails.

5 3 2 1 *Non-consensual incest between adults*

If prevention of intra-familial rape were a central aim of criminalising incest, it would be a laudable one, but this is clearly not the case. That preventing coerced sexual violation is a secondary consideration is evidenced by the many other far more effective and appropriate legal mechanisms that are available for dealing with sexual assault, as well as the fact that the incest prohibition applies to both consensual and non-consensual sexual intercourse. Indeed, the state's legitimate and permissible interest in combating sexual violence would be misleadingly disguised if non-consensual sexual relations between adult persons related within the forbidden degrees, were punished as incest. Where a family member coerces another to obtain sexual favours, it is the evil of non-consensual sex, not of sex with a family member, that should be emphasised and punished. Depending on the specific nature and extent of the sexual assault, its perpetrator could be convicted of rape or indecent assault (or, in future, their equivalents contained in the Sexual Offences Bill, in addition to indecent assault).[536] A conviction of rape rather than incest would rightly highlight the true nature and heinousness of the crime – what is being punished is non-consensual sexual violation, and not the mere contravention of a social taboo.[537]

5 3 2 2 *Incest between adult and child – irrespective of whether there was* de facto *consent or not*

A common reason advanced for retaining incest as a crime is that criminalising incest between adults and children "prevents a particular and abhorrent form of sexual abuse against children".[538] Sexual exploitation of

---

[536] See the Bill at s 3-7, as well as §§ 4 2 3 and 4 3 4 2 2 *supra*. The common law offence of indecent assault will remain in force, even if the Sexual Offences Bill comes into operation (§ 3 10 5 1 of SA Law Commission *Sexual Offences* Discussion Paper 85).

[537] It would be appropriate to convict a perpetrator of non-consensual incest between adults of rape, for which the sentencing options are generally considerably more severe. See Milton *SA Criminal Law & Procedure: Common Law Crimes* 245-247 for indications on how courts might exercise their discretion in punishing incest.

[538] Milton *SA Criminal Law & Procedure: Common Law Crimes* 236. See also, for instance, the July 2002 British report on reforming the law on sex offences, "Setting the Boundaries" vol 1 ch 5 § 5 1 4, where it was made clear that the overriding rationale for punishing incest was to protect children within the family, and Temkin 1991 *Current Legal Problems* 187-188.

children consisting of breach of trust and abuse of power within the family context are certainly deserving of criminal punishment.

Although it is not disputed that child abuse should be criminalised, incest is not a particularly appropriate means to do so.[539] It is clear that the incest prohibition provides grossly inadequate protection against child abuse. Not only does the common law crime of incest not apply to all adults in positions of family trust or care who may abuse children sexually, but it prohibits only vaginal sexual intercourse, while not covering homosexual abuse of children and other forms of sexual activity not amounting to penetration. It has been shown above at § 4 3 4 2 1 that even the proposed amendments to the crime of incest in the Sexual Offences Bill fail to address this problem adequately. The Bill does not recognise that sexual abuse of a relationship of trust is not dependent on blood or family ties – especially with the diversification of groups defined as "family", there is a good chance that sexual abuse of authority within the family may be committed by somebody not necessarily related to their victim within the prohibited degrees. In addition, although the proposed definition of penetration is wider than mere sexual intercourse, it is still not comprehensive enough to include non-penetrative sexual activity within its ambit.

Conversely, if the state objective of the incest prohibition is to prevent sexual abuse of children and to punish its perpetrators, criminalising incest is a hopelessly over-reaching means to attain these worthy goals. The crime fails to differentiate between manifestations of incest as disparate as the rape of an eight-year-old daughter by her trusted and beloved father and the consensual adult sexual relations between a father-in-law and daughter-in-law after the death of both their spouses, where the parties have never even lived in the same household before – in both instances, the conduct is equally stigmatised by the law as incest. Also, if child abuse is the evil to be combated, why is the prohibition on sexual intercourse a life-long one, instead of being terminated when the child is grown?[540] And if the danger of abuse of

[539] See further Norrie 1992 *Journal of the Law Society of Scotland* 218.

[540] Presumably when the child reaches 16 years of age – but see n 469 for sources where objections to standardising the age of consent are raised.

trust within the family is the reason for the prohibition, why is the conduct criminalised not reserved for sexual relations between caregivers and their charges, regardless of whether such caregiver is also a family member?

It is clear that the link between the evil of child sexual abuse and criminalising incest is an extremely tenuous one. It can hardly be said with conviction that that there is a sufficiently close connection between one of the ostensible objectives of this criminal sanction – to combat child sexual abuse – and the manner in which it attempts to achieve such objective, ie, by criminalising sexual penetration between persons related within the forbidden degrees, regardless of the age of either party.[541]

5 3 2 3 *Eugenics*

As was noted in § 5 2 2 1 3 above, prohibiting sexual relations between close relatives will prevent them from procreating, and thus possibly passing genetically-linked disorders to their offspring. However, eugenic considerations for criminalising incest are far from persuasive.

First, it is clear that in cases of incest where the parties do not share a common genetic makeup, but are related within the forbidden degrees of marriage or adoption, any biological argument falls flat. Similarly, any incestuous conduct other than sexual intercourse between a man and a woman capable of reproducing would not be able to be motivated by referring to the increased danger of genetically-transmitted defects. If the range of conduct punishable as incest is extended as proposed by the South African Law Commission,[542] this would narrow still further the field of application of the eugenic argument in favour of prohibiting incest. At most, then, a rationale relying on the prevention of the negative consequences of in-breeding is relevant only where a certain restricted category of conduct punishable as incest is at issue. Since it applies only to blood relatives who procreate as a consequence of sexual intercourse with one another, the eugenic argument is

[541] It will be seen at § 5 3 3 *infra* that there are far more effective ways of preventing and punishing the intra-familial sexual abuse of children than making use of the incest prohibition.

[542] See § 4 3 4 2, where it is explained that proposed conduct defined as incest in the Sexual Offences Bill is gender neutral, including forms of sexual penetration that cannot have procreation as a result, for example oral and anal sex.

an unconvincing justification for retaining the much wider incest prohibition in its present (and future) form.

Second, the claim that children born of incestuous unions are more inclined to suffer from genetically perpetuated mental or physical defects is a hotly debated and often disputed one.[543] There is scientific evidence that the probability of defective births is not significantly increased where the parents are related within the prohibited degrees of consanguinity.[544] At most, scientific evidence suggests that there is an increase in risk of genetically transmitted disabilities, which is very different from claiming that a disabled child will be born.[545] It has also been argued that endogamous mating may perpetuate desirable recessive genetic traits as well as undesirable ones.[546]

Third, it is to be remembered that not all consanguineous heterosexual sexual unions result in the birth of a child. Bailey and McCabe rightly point out that "people rarely indulge in incest to produce children"[547] and that the development in contraceptive methods may also undermine the importance of the eugenic argument. Eugenic arguments hold no water if blood relatives engage in sexual intercourse, but do not plan to have children or are unable to do so.

Fourth, it may also be noted that it is not incest for a woman to artificially inseminate herself with the semen of a close male blood relative – it is clearly the act of penile penetration, and not the act of fecundation, that is the focus of the prohibition.[548] This once again undermines the idea that concern for the

---

[543] See, for example, Bratt 1984 *Family LQ* 267-276; Labuschagne 1999 *SAfrJ Ethnol* 60-61 and the authorities quoted there; Bailey & McCabe 1979 *Crim LR* 757-258 and the studies quoted in n 38-39; Labuschagne 1990 *TSAR* 424-425 and the authorities quoted there.

[544] See Milton *SA Criminal Law & Procedure: Common Law Crimes* 235 as well as the authorities and studies referred to by the authors quoted in n 543 *supra* and the Bratt quote at n 551 *infra*.

[545] See further Norrie 1992 *Journal of the Law Society of Scotland* 217-218. See also n 495, where Bratt is quoted as saying that there is at most a 1 in 8 chance of a genetically abnormal child being born.

[546] Labuschagne 1985 *THRHR* 452; Wolfram 1983 *Crim LR* 315; Hughes 1964 *Journal of Criminal Law, Criminology and Police Science* 328; Packer *The Limits of the Criminal Sanction* 315.

[547] Bailey & McCabe 1979 *Crim LR* 758. See also Packer *The Limits of the Criminal Sanction* 315.

[548] See Norrie 1992 *Journal of the Law Society of Scotland* 217. As far as could be ascertained, the Human Tissue Act 65 of 1983 does not criminalise artificial fertilisation of a woman by a close blood relative. Neither do the regulations concerning artificial insemination issued in terms of the Act make any reference to the prohibition of artificial insemination between closely related consanguines (GN R1182 in *GG* 10283 of 1986-06-20; GN R1354 in *GG* 18362 of 1997-10-17).

genetic quality of the offspring of incestuous couplings is a convincing overriding rationale for prohibiting incest.

Fifth, the criminal law is inconsistent in that incestuous relationships are ostensibly proscribed on genetic grounds, while in situations where the parties are unrelated, but there is a greater statistical risk of transmission of negative recessive genetic traits, neither marriage nor procreation is prohibited on pain of criminal punishment.[549] Although Temkin argues that requiring a person "to seek a sexual partner from amongst the many million individuals in the world who do not constitute family"[550] imposes no hardship on individuals wishing to engage in consensual incestuous sexual relations, it is submitted that this argument is flawed. It was argued above at § 5 2 1 that the right to freely choose a sexual partner is indeed substantially impaired by the incest prohibition – a convincing justification for such infringement is required, which the eugenic argument fails to provide.

As has been shown, although the state could argue that it has a legitimate interest in preventing an increase in genetically defective births, the method chosen to achieve that goal, namely criminalising incest, is particularly inappropriate. Eugenic arguments apply only to an extremely limited category of incestuous conduct: heterosexual intercourse between parties able to procreate and whose mating does indeed produce offspring. Eugenic concerns are irrelevant to affines or relatives by adoption, or where parties are unable or unwilling to procreate, or where they engage in forms of sexual penetration where ejaculation into the vagina does not occur, as well as where parties are of the same sex. To this extent, if genetic considerations were paramount, the incest prohibition would be overbroad. Simultaneously, the failure to include as incest cases where there would be a high probability of

[549] Labuschagne 1999 *SAfrJ Ethnol* 61; Norrie 1992 *Journal of the Law Society of Scotland* 217; Bratt 1984 *Family LQ* 275; Temkin 1991 *Current Legal Problems* 191, where reference is made to Huntington's disease or cases where the mother is a carrier of muscular dystrophy. Parents are also not prohibited from transferring non-genetic diseases to their children. For instance, there is no ban on procreation by HIV positive mothers, who have a good chance of giving birth to HIV-positive babies.

[550] 1991 *Current Legal Problems* 192.

genetic disorders despite the parties being unrelated, also makes the crime under-inclusive from a eugenic perspective.[551]

5 3 2 4 *Family strife*

At first glance, the argument that incestuous relationships within families are a recipe for strife and conflict seems a powerful one. If incestuous conduct does indeed have such serious consequences, harming family members by breaking down intrafamily trust in a sufficiently grave manner to distinguish it from the harm suffered by other victims of sexual abuse, should it not be criminalised separately? And are family jealousy and rivalry not evils worth combating by employing all possible means in the state's arsenal, including the criminal sanction?

Even if the above arguments are accepted, there is little rational connection between the incest prohibition in its present form and the perceived need to discourage sexual exploitation of young family members. Similarly, it is unclear how criminalising incest is effective in preventing the disruption of family tranquillity caused by competition for sexual companionship.

Bratt[552] points out that if incest statutes are to be justifiable as a means of "protecting the family ... so that it can perform its essential function as the primary agency for the socialization [*sic*] of the personality of the young", the conduct proscribed should be sexual relationships *between members of the same household unit*, regardless of whether or not such members are related

---

[551] See especially Bratt 1984 *Family LQ* 296, where she states:
"Because the purported genetic justification for incest statutes rests on inaccurate understanding of genetic inheritance, incest statutes are both overinclusive and underinclusive. Matings between consanguineous relatives do not cause genetic defects in the offspring. Such matings merely increase the probability of homozygosity for a recessive gene trait in the offspring. Only if the recessive gene trait is 'bad' will the homozygous offspring suffer deleterious effects. Moreover, the increased genetic dangers in consanguineous matings are fairly minimal and are exceeded by the genetic dangers involved in the matings of other social populations. The failure to prohibit these matings with the same or higher genetic risks as consanguineous ones makes incest statutes fatally underinclusive. On the other hand, incest statutes are overbroad as a mechanism to protect offspring from increased risks of genetic disorders because all that is needed to accomplish that goal is a prohibition on reproduction by at-risk mates and not a marriage prohibition. In terms of the genetic rationale, the inclusion of affineous relationships in some ... incest statutes also makes them impermissibly overinclusive."

[552] 1984 *Family LQ* 290.

within the forbidden degrees of blood, marriage or adoption. The detrimental effects of intra-familial sexual relationships are the same, irrespective of "the precise legal nomenclature describing the relationships".[553] The changes in the modern family structure mean that there are an increasing number of households containing members to which others in the same "family unit" are unrelated, such as where the adult couple is unmarried and each has children who are the product of a previous sexual liaison. The current incest prohibition is inadequate to protect such children from sexual exploitation by other family members. Thus if laws against incest are to achieve the purported objective of protecting individual family members from the harm caused by intrafamilial sexual relations, they must be applicable to all adults and all children who live in the same household. To this extent, therefore, incest prohibitions are under-inclusive.

Conversely, since the crime of common law incest extends beyond criminalising sexual relations between members of the same household – contemporary households tend not to include uncles, grandfathers, fathers-in-law, etc, – the crime can hardly be said to have the primary aim of diminishing significantly the danger of sexual rivalries and sexually induced discord and tension within the (nuclear) family. Even in cases where older relatives not living with the family attempt to take advantage of their power to dominate younger, more vulnerable family members, there is no rational reason for distinguishing between sexual exploitation by an older relative and that by a trusted neighbour. In either case, it is submitted that there are better ways of dealing with the situation than by using the law against incest.

5 3 2 5 *Offence to others*

The state has a legitimate interest in preventing its citizens from being exposed to offensive conduct, and may, in instances of serious offence, be justified in using the criminal sanction to enforce this interest. Since most people would profess to regard incest as offensive in the sense that they find

[553] Bratt 1984 *Family LQ* 290.

it repugnant and feel affronted by its commission, is it not then reasonable for the state to prohibit incest as an offence to others?

However, this argument is flawed because, as explained in § 5 2 2 2 above, the mere knowledge that incestuous practices are being engaged in in private is not sufficient for the use of the criminal sanction to be justifiable – the punishment of unwitnessed incest could hardly be defensible in terms of the offence principle.[554] And while public engaging in incestuous conduct could indeed be offensive in Feinberg's sense, the offence would generally be due to its sexual nature, since most observers would in all likelihood be unaware of the fact that the parties were related within the forbidden degrees.

Given that the incest prohibition makes no distinction between publicly and privately committed incest, there is little evidence of a rational connection between the punishment of incest and the prevention of offence. Although the punishment of isolated instances of incest may be able to be explained in terms of the offence principle, this is clearly not the decisive reason for criminalisation.

5 3 2 6 *Enforceability*

Another problem with the incest prohibition is its low degree of practical enforceability. If the factors outlined in § 3 3 3 2 are taken into account, it is clear that the incest prohibition's deterrent effect is negligible.[555] Not only is enforcement sporadic, but in cases of consensual incest it has already been noted that there is a considerable risk of discriminatory enforcement and of over-intrusive detection methods being used. Consensual incest could certainly be characterised as a trivial offence, yet effective enforcement would require disproportionate resource allocation.

Even if the prohibition were effectively enforced, which it is not, it is in any event doubtful whether the criminal sanction is successful in deterring people from committing incest. If incest is committed despite strong societal

[554] See the discussion of Feinberg's analysis of offence § 2 3 3 *supra*.

[555] This notion is supported by Bailey & McCabe 1979 *Crim LR* 756, where they refer to Andenaes' argument that "the criminal sanction is least effective in producing lawfulness when it comes to more irrational offences like incest."

disapproval of interfamilial sexual relations, this indicates that it is doubtful whether the mere knowledge of possible criminal punishment will inhibit those desiring to commit incest from doing so.[556] Arguably, strong societal pressure to refrain from committing incest serves the same purpose as criminalisation and prevents incest at least as successfully as punishment.[557]

5 3 2 7 *Summary*

The above analysis seriously questions the effectiveness of the incest prohibition in combating harmful and offensive conduct – even the harmful and offensive conduct identified as incest-specific! The crime is certainly not specifically concerned with eugenics or directed towards preventing harm to family members, being simultaneously over-broad and under-inclusive to serve these purposes adequately. And only a small proportion of cases of incest could possibly be defined as offensive, the offensiveness lying largely in the fact that the parties are engaging in sexual intercourse, regardless of their blood, marriage or adoptive relationship.[558] I would agree with Hughes that the "unreflecting vestiges of primitive taboo attitudes" retained in the incest prohibition make it too clumsy to be able to focus its prohibition with "sufficient precision [on] the evils that ought to be suppressed."[559] In addition, the incest prohibition is relatively unsuccessful in deterring or preventing incestuous behaviour. Its application in practice does not achieve its stated goals because the (perceived) risk of detection, apprehension and conviction is comparatively low. The relation between the limitation and its purpose is thus too questionable to be regarded as reasonable. Lack of effective enforcement is a strong indication that decriminalisation is an option that should be taken seriously. The extremely tenuous relationship between the (few) worthy aims of the incest prohibition and the definition of the crime itself

---

[556] *Contra* Smith 1991 *Journal of Family Law* 875, where reference is made to a study that showed that the "greater the likelihood that incest offenders will be brought to trial, the greater the deterrent effect on potential violation."

[557] See § 5 3 3 8 *infra* for more on the role of the societal taboo.

[558] Due to its inefficacy and inadequacy in combating the evils it professes to be aimed at preventing, Packer calls incest an "imaginary offence" (*The Limits of the Criminal Sanction* 312).

[559] 1964 *Journal of Criminal Law, Criminology and Police Science* 329-330.

undermines the validity of retaining incest as a crime in its present form, or indeed, at all. The cost of criminalising incest far outweighs the benefit.

5 3 3 *Less restrictive means: alternatives to the incest criminal sanction – recommendations*

5 3 3 1 *General remarks*

It is not reasonable for the state to make use of the criminal sanction if the crime in question is over-broad, including both objectionable and unobjectionable conduct within its ambit. Where there is not a sufficiently close connection between the operation of a particular criminal sanction and its (legitimate) objectives, such offence must be carefully scrutinised. It must be determined whether the crime may be saved by limiting (and/or extending) its scope of application, and if so, whether it should be saved. It is necessary to consider whether the better alternative would not be to reject it completely, while relying on be other criminal sanctions in existence to proscribe only the conduct deserving of punishment.

As has already been mentioned, the incest prohibition criminalises both conduct where criminalisation is desirable (such as non-consensual sex or sex between an adult and a child) and conduct that is both constitutionally protected and unobjectionable (such as sexual relations between consenting adults). The only conclusion, then, is that the incest prohibition cannot be retained in its present form without being subject to serious constitutional challenge. To quote Ackermann J's remarks made in the context of sodomy, "neither the coherence of the common law, nor judicial policy, requires the continued existence of a severely truncated form of the common-law offence".[560] Our criminal law would not be left with a *lacuna* if the decision were made to decriminalise incest – there are sufficient alternatives available that would subject harmful incestuous conduct to punishment, without

[560] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) § 71.

unreasonably limiting the rights of consenting adults to freely choose their sexual (or marriage) partner.

5 3 3 2 *Option one: alternative definition of the crime*

Even if it were correct to conclude that incest is constitutionally suspect, it must be considered whether it would be an acceptable alternative for the incest prohibition to be retained, while being sufficiently adapted so as to make it comply with constitutional requirements. A number of substantive changes to the crime would be required. First, it would be necessary to use remedies similar to severance or "reading down" in order to narrow the ambit of the prohibition so as to include only harmful or offensive conduct, while leaving all other conduct presently criminalised as incest, beyond the reach of the criminal law. This would mean that incest between consenting adults would have to be decriminalised, since there is no victim to be harmed. The rationale for criminalising incest between affines may also be called into question;[561] however, since there is evidence that one of the most prevalent forms of incest is that between step-parents and minor stepchildren,[562] this prohibition should probably be retained where adult-child incest is concerned.

Second, it is clear that extensive "reading in" would also be essential so as to ensure that the crime does not fall foul of the constitutional imperative that there be a rational connection between the prohibited conduct and any justifiable aim of the prohibition. If it is acknowledged that the most weighty permissible rationale for the crime's continued existence is the prevention of sexual abuse of authority within the family context, the ambit of the crime would need to be extended to make it comprehensive enough to cover all forms of intra-familial sexual abuse of this nature. At the very least, non-penetrative conduct and sexual abuse perpetrated by a trusted caregiver who is not related to the victim within the forbidden degrees, would need to be included within the definition of the crime.

[561] See Nel 2002 *Stell LR* 331-351 as well as § 4 3 4 2 3 *supra*.
[562] Temkin 1991 *Current Legal Problems* 207-208.

Incest as currently defined is both too wide and too narrow to serve any legitimate state purpose effectively. It is clear that only considerable cosmetic surgery could save the incest prohibition – would the effort involved in such a face-lift be worth it?

5 3 3 3 *Option two: use of other existing criminal sanctions*

It is submitted that there are no sensible reasons based on legal principle or public policy for retaining the incest prohibition as a crime separate from existing crimes against sexual integrity. As already mentioned,[563] it is strongly suggested that it would be preferable to punish non-consensual incest as rape.[564] This would emphasise what is being punished is heinous non-consensual sexual violation, rather than the mere contravention of a societal taboo. The fact that the abuser is a caretaker or relative living in the same household as the victim could be a factor to be taken into account in aggravation of sentence,[565] rather than criminalising the conduct separately.

Although at first glance it may appear odd to describe as "less restrictive", convicting of rape rather than incest, persons who engage in sexual relations with close relatives. Rape is, after all, the more serious crime. However, it should be kept in mind that the single aim of the rape prohibition is to punish and prevent harm – sexual violation – and it is narrowly tailored to do just that. Its purpose, which is a legitimate and overridingly important state objective, is achieved without simultaneously unnecessarily subjecting those whose incest does not harm others, to criminal punishment.

---

[563] *Inter alia* at § 4 2 3 *supra*.

[564] Rape is used broadly in this context to refer not only to common law rape, but also to indecent assault and crimes in terms of s 14 of the Sexual Offences Act 23 of 1957, as well as the crimes proposed in s 3, s 4, s 5, s 7 and s 10 of the proposed Sexual Offences Bill.

[565] See, for instance, Labuschagne "Intieme Menslike Verhoudinge, Seksuele Misbruik van 'n Kind en 'n Eggenote en die Strafregtelike Effek van 'n Lang Tydsverloop tussen Misdaadpleging en Aanmelding" 2001 *De Jure* 136 137, where he quotes a Canadian case that mentions that abuse of a position of trust or authority by the offender is a factor that should be taken into account when deciding on appropriate punishment for sex offenders.

5 3 3 4 *Option three: the criminal sanction as back-up*

Diversion is another option to be considered – it may be possible to avoid the criminal process initially and utilise it only indirectly, as a sanction of last resort where less coercive methods fail.

Especially where a party is suspected of non-violent incest with a younger family member it may be better not to involve the criminal law at all. The legal process may be much more traumatic to the victim than the actual molestation itself.[566] In such instances it might be preferable for the family to stay together, and for the offender to undergo treatment while the rest of the family attends therapy.[567] However, experience shows that there is a high drop-out rate where treatment is undertaken voluntarily or where it is merely suggested.[568] It is submitted that in appropriate cases[569] a simple procedure could be developed whereby social workers or other interested parties could obtain a court order requiring suspected incest "offenders" to attend suitable treatment or therapy programs. Only if the treatment order is disregarded need criminal prosecution – possibly resulting in imprisonment – be an option, and even then, those who fail to comply would be found guilty of contempt of court, rather than be saddled with the stigma of an incest conviction. This would have the benefit of giving perpetrators a strong incentive to persist with treatment without the negative consequences for the whole family of premature and inappropriate resort to the criminal sanction.

---

[566] See Renvoize *Incest: A Family Pattern* 166-187; Nelson *Incest: Fact and Myth* (1987) 48-50. West "Thoughts on Sex Law Reform" in *Crime, Criminology and Public Policy* 480 states:
"Everyone agrees that the effects of a prosecution for incest can be disastrous to the [victim] involved. If the father is imprisoned, she suffers the guilt of being in part responsible, she loses his protection and economic support, her parental home is broken up, and she herself may be taken into a children's home."

[567] See *S v D* 1989 4 SA 709 (T), where Kriegler J state at 716 D-E: "Die straftoemeter moet himself afvra of daar, beide wat betref die besondere indiwidu voor hom asook wat betref die gemeenskapsbelange, hervormend, dit wil sê rekontruktief, gehandel kan of moet word. Veral in die geval van vader-dogter bloedskande … tree die gesin sterk op die voorgrond. Summiere gevangesetting van die vader/broodwinner, met gepaardgaande verbrokkeling van die gesin en vernietiging van sy sosio-ekonomiese onderbou, kan die jong klaagstertjie onberekenbare verdere benadeling toebring. Die tussenkoms van die strafreg in so 'n bloedskandelike verhouding skep vir die dogter 'n dilemma waarvan die straftoemeter kennis moet neem."

[568] Renvoize *Incest: A Family Pattern* 170.

[569] Renvoize (*Incest: A Family Pattern* 173) suggests that perpetrators should have no previous history of incestuous offences; that they must not have used violence, including intimidation implying bodily harm; and that they admit that they need help and voluntarily agree to follow treatment programs, including family counselling, for up to two years.

5 3 3 5 *Option four: voluntary treatment or therapy*

Where incest consists simply of consensual sexual relations between adults who are related within the forbidden degrees, even the slightest degree of state coercion is uncalled for. It is submitted that use of the criminal sanction is superfluous and even counter-productive in such instances. According to Bailey and McCabe,[570] the intervention of the criminal law in the personal sphere of consenting adults "augments rather than relieves" the adult offender's existing sense of guilt and psychological damage that a knowing violation of a social taboo tends to engender. They suggest that, rather than imposing punishment, a better option would be to provide therapeutic help on a voluntary basis. This approach is to be recommended.

5 3 3 6 *Option five: marriage prohibition*

An alternative to the criminal sanction would be merely to retain the prohibition on incestuous marriages, which is presumed to be less burdensome than criminalisation. Social disapproval of incest, it is argued,[571] is registered effectively through making marriage between parties related within the prohibited degrees of blood, marriage or adoptive relationship, null and void. It is unnecessary to back this sanction up with criminal punishment. There are examples of other countries[572] where the criminal law incest prohibition does not overlap with the civil law one, so it would not be anomalous for the legislature to refuse to allow parties to enter into a valid marriage, while not subjecting sexual relations between them to criminal penalties.

This argument is not entirely convincing, however. It is submitted that not allowing individuals related within the forbidden degrees to marry each other may be considered a limitation on rights at least as severe as the criminal sanction. Just as in the case of the criminal prohibition, the marriage prohibition considerably undermines the strong desire of such parties to commit themselves to an enduring relationship by freely choosing their

[570] 1979 *Crim LR* 758.
[571] Bailey & McCabe 1979 *Crim LR* 756-757.
[572] See n 450 *supra*.

marriage partners without the state interfering in their private decisions to form the family units of their preference. It may well be imagined that in some instances, the civil sanction of being unable to marry may be yet more devastating than any criminal punishment that could be imposed. Indeed, there may be an even greater impairment of human dignity here than in instances where parties are punished by the criminal law for merely engaging in a casual or once-off incestuous sexual act. Thus any conclusion that the crime of incest is constitutionally impermissible and should be abolished, applies equally to the civil marriage prohibition. It would therefore be preferable that incest not only be decriminalised, but that incestuous marriages between consenting adults also be legally recognised.

5 3 3 7 *Option six: delictual damages*

Where incest causes harm to identifiable victims, injured parties should be entitled to recover damages, even if no criminal prosecution is undertaken. According to Labuschagne,[573] it should be possible for victims to bring the *actio iniuriarum* against persons who have sexually exploited a relationship of dependence, such as perpetrators of incest. It is often the case that incestuous abuse takes place over a long period of time, and the fact may only come to the attention of authorities many years later. That the abuse occurred a considerable time ago does not mean it should be condoned.[574] Recovery of compensation after a long period has elapsed could be facilitated by relaxing the rules of proscription so as to allow victims to institute claims

[573] "Deliktuele Aanspreeklikheid vir Seksuele Bedrog en Seksuele Uitbuiting van 'n Afhanklikheids-verhouding" 1995 *TRW* 32 41-42; 50.
[574] Labuschagne 2001 *De Jure* 140-141.

within a reasonable period[575] after they have attained majority, or after they become aware of the harm that they have suffered, whichever occurs later.[576]

According to Smith, greater ease in recovery of civil damages would

> "act as a reinforcing social benefit to both present and potential victimized [*sic*] plaintiffs by inviting a public reconsideration, and thus a heightened awareness of the real plight and horror of the victims and also of where the real blame is to be fixed in tragic cases of this nature."[577]

5 3 3 8 *Option seven: social taboo*[578]

The social taboo associated with incest is strong, and incest has been prohibited from the earliest days of civilisation.[579] Societal opposition to incest is arguably more effective at discouraging incest than any criminal proscription.[580] If the aim of criminal punishment is to deter potential offenders and to prevent crimes being committed in future, it is submitted that this purpose is equally well served by the social stigma attached to incest as by any criminal punishment. Removing the criminal sanction for non-harmful incest is hardly likely to result in a proliferation of incest, since even if the threat of criminal punishment were absent, most people would choose not to

---

[575] See the Prescription Act 68 of 1969, where provision is presently made in s 13(1)(a) for the delaying of the completion of the prescription period until a year has elapsed after the minor has attained majority in circumstances where the prescription period would otherwise have been completed within a year of the minor's attaining majority. For more details on the operation and application of this provision, see *Road Accident Fund v Smith NO* 1999 1 SA 92 (SCA) 98 (*obiter*) and *Santam Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A). In addition, s 3(1)(a) read with s 3(1)(c) of the Prescription Act provides for postponement of completion of prescription in the case of a minor until 3 years after the minor has attained majority, where the prescription period would have been completed within 3 years of attainment of majority.

[576] See in the criminal law context Labuschagne 1997 *TRW* 101-102 and 109-110, where he advocates that prescription periods not be too strictly adhered to, at the expense of general considerations of justice and common sense. See also Labuschagne "Tydsverloop, Omstandigheidsverjaring en Seksuele Misbruik van Kinders" 1996 *Obiter* 228 331, where he argues that prescription periods are arbitrary and should bow before interests of justice: "Verjaringstermyne kan … wel as riglyne gestel word, maar dit moet wyk indien geregtigheid dit in 'n gegewe geval vereis."

[577] 1991 *Journal of Family Law* 875.

[578] For more general information on the incest taboo, see Arens *The Original Sin: Incest and its Meaning* (1986). For a wider anthropological perspective on taboos, see Douglas *Purity and Danger: an Analysis of Concepts of Pollution and Taboo* (1966).

[579] Norrie 1992 *Journal of the Law Society of Scotland* 216.

[580] Bailey & McCabe 1979 *Crim LR* 756. *Contra* Temkin 1991 *Current Legal Problems* 188-190, who suggests at 190 that "the law itself plays a crucial role in reaffirming the incest taboo. In a changing society with confused and often exploitative attitudes towards sexuality and sexual relationships, the taboo needs more than ever the force of law behind it." In response it might well be asked, if Temkin is correct in her view that the social disapproval of incest is weakening, why it would be necessary for the criminal law to continue to enforce an outmoded and irrational taboo at all! See also Smith 1991 *Journal of Family Law* 834-845 for a general discussion of the incest taboo, and particularly the "continued public fascination with vicariously exploring social and legal taboos such as incest" (845).

engage in incestuous practices anyway, either due to natural inclination or to social pressure. Thus even if the argument were accepted that it is justifiable to subject consensual adult incest to criminalisation, which it is not, it may be asked whether it is really necessary for the state to waste its resources and time policing conduct that an existing social taboo is more than capable of keeping under control.

6 CONCLUSION

6 1 Aim of the study

This study commenced with a question – how should the decision concerning whether conduct should be criminalised, be made? It was hoped that the criteria identified and test developed could serve as a starting point for answering this question. Another goal was to evaluate the test's efficacy by assessing an existing crime in terms of its criteria. The ultimate objective was the establishment of test that might be more widely applicable and useful in ascertaining the optimal use of the criminal sanction.

6 2 Approach followed

After arguing that the use of criminal punishment inevitably limits certain human rights, it was contended that the state has the task of justifying criminal punishment with reference to the crime's underlying rationale. If the reason for the existence of the crime is to prevent harm or serious offence to others, criminalisation is acceptable in principle, whereas a crime's existence is unjustifiable if it merely enforces paternalistic state attitudes or certain moral viewpoints. However, even if the purpose of criminalisation is a legitimate and worthy one, the reasonableness of the means chosen to achieve the state goal must still be established. The state needs to show that there is a rational connection between criminal punishment and the effective prevention and deterrence of the objectionable conduct identified. Where criminalisation achieves state aims only to a minor degree, or where there are other ways to achieve the same aim at less cost to the individual perpetrator, use of the criminal sanction will be unreasonable and therefore undesirable.

This study applied the approach developed above to the common law crime of incest. First, it was found that although the primary reason for criminalising sexual relations between close relatives is to punish immorality, the rationale for incest based on prevention of harm to non-consenting or child victims is sufficient for the criminal sanction to be *prima facie* justifiable.

However, as to the second question of whether the use of the incest prohibition in its present form was reasonable, it was concluded that there was an extremely tenuous link between conduct criminalised as incest and the actual harm that the prohibition seeks to prevent. The crime of incest is simultaneously under-inclusive and over-inclusive, on the one hand failing to punish obviously harmful manifestations of intra-familial sexual behaviour, while on the other, criminalising utterly innocuous conduct. As a consequence, it was recommended that the incest prohibition be abolished. It was submitted that our criminal law makes adequate provision for the criminalisation of harmful forms of incest, both in terms of common law and statute. The only conduct remaining that is exclusively punishable as incest, is consensual sexual relations between adults related within the forbidden degrees of blood, marriage or adoptive relationship. Incestuous preferences of consenting adults are, to put it bluntly, none of the state's business. Subjecting such conduct to the criminal sanction is likely to cause far more harm than good.

6 3 **Recommendations for further study**

There is considerable scope for further research in this field.

First, it is necessary to make an extensive study of the problem of the legitimacy of the criminal justice system being undermined, including the related question of vigilantism.[581] The manifestations and consequences of these phenomena need to be investigated, but most importantly, an attempt must be made to arrive at possible solutions, the more carefully considered utilisation of the criminal sanction proposed in the present study being just one of many.

Second, a more extensive inquiry into alternatives to criminalisation should be undertaken.[582] Before it can be said with confidence that criminal punishment ought not to be resorted to, because there are less restrictive means of achieving the same aims, there should be clarity as to what these

[581] Mentioned in § 1 2 *supra* in the context of the problem of over-criminalisation.
[582] See n 19 as well as § 5 3 3 *supra*.

alternative means are, the circumstances under which they may be utilised and the cost of such utilisation for all parties involved.

Third, another general criminal law problem highlighted in this study that deserves more attention is the issue of the age of consent to sexual activities.[583] It needs to be asked whether a move away from arbitrary age limits currently recognised by law towards a more nuanced approach would be desirable, and if so, whether it would be feasible.

Fourth, one of the incest-specific matters not addressed in this study is the criminalisation of incest in customary law.[584] Especially in the light of the recommendations made in this study as regards the decriminalisation of incest, it must be determined whether such recommendations also imply the demise of incest as customary law offence, and if not, the constitutional implications of any conclusion reached in this regard.

Fifth, this study also fails to address the question of whether incest (or, for that matter, other sexual behaviour) between children should be regulated in any way, and if so, how and under what circumstances.[585] This important matter urgently needs further attention.

Last, and perhaps most important, it is necessary to apply the test outlined for determining the optimal use of the criminal sanction, to other crimes suspected of having outlived their usefulness, as well as evaluating proposed future crimes according to its criteria. Only if this is done may it be established whether the test developed is indeed a truly valuable one.

6 4 **Concluding remarks**

It is hoped that this study will emphasise the need to be critically aware of the state's current and future utilisation of the criminal sanction. Too often there is the tendency simply to let irrational instincts prevail and to unthinkingly label behaviour as criminal if it evokes revulsion or distaste. It is forgotten that the fundamental rights of potential offenders, as well as the

[583] See n 469 *supra* for more sources on age limits.
[584] See n 292 *supra*.
[585] For more on this debate, see n 465 *supra*.

financial resources of the state, are at stake if criminal punishment is resorted to without careful consideration. Measuring common law incest against rational criminalisation criteria plainly reveals the dangers of indiscriminate use of the criminal sanction. Abhorrent conduct should not inevitably be criminal conduct, and merely because conduct is presently a crime does not mean that it should continue to be criminalised. Constant re-evaluation of existing criminal sanctions is required to determine whether criminalisation is still necessary, or whether the crime in question has outlived its usefulness. Similarly, before the legislature decides to subject additional conduct to criminal punishment, there must be certainty that such a step is really appropriate. The supremacy of the Constitution makes it possible to subject the state's criminalisation decisions to more careful scrutiny than in the past and to hold the state accountable for choices made in this regard. Constant and critical evaluation of existing and proposed criminal prohibitions is a duty that should be taken seriously. Criminalisation decisions matter. Not only would potential violations of human rights be avoided, but the legitimacy of the criminal justice system as a whole would be considerably enhanced if the criminal sanction were reserved for conduct truly deserving of punishment.

BIBLIOGRAPHY

BOOKS & ARTICLES

Arens W 1986
The Original Sin: Incest and Its Meaning Oxford University Press, New York & Oxford

Arneson RJ 1980
Mill Versus Paternalism **Ethics** vol 90 at 470-489

Bailey V & Blackburn S 1979
The Punishment of Incest Act 1908: A Case Study of Law Creation **Criminal Law Review** 708-718

Bailey V & McCabe S 1979
Reforming the Law of Incest **Criminal Law Review** 749-764

Bayles MD 1974
Criminal Paternalism in **The Limits of Law: Nomos XV** Pennock, JR & Chapman JW (eds) Lieber-Atherton, New York 174-188

Bentham J 1982
An Introduction to the Principles of Morals and Legislation (Burns JH & Hart HLA eds) Methuen, London

Blom-Cooper L and Drewry G (eds) 1976
Law and Morality Duckworth, London

Bratt CS 1984
Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry? **Family Law Quarterly** 257-309

Brits JJ 1994
Seksuele Misdrywe met Jeugdiges – 'n Kritiese Beskouing LL.M thesis

Brundage JA 1987
Law, Sex, and Christian Society in Medieval Europe University of Chicago Press, Chicago & London

Burchell J (ed) 1997
South African Criminal Law and Procedure Volume I: General Principles of Criminal Law (Burchell EM & Hunt PMA 1st ed) 3 ed Juta, Kenwyn

Burchell J & Milton J 1997
Principles of Criminal Law 2 ed Juta, Kenwyn

Cachalia A, Cheadle H, Davis D, Haysom N, Maduna P & Marcus G 1994
Fundamental Rights in the New Constitution Juta, Kenwyn

Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S 1996 (revised to June 1999)
Constitutional Law of South Africa Juta, Kenwyn

Chidester D 1992
Shots in the Streets: Violence and Religion in South Africa Oxford University Press, Cape Town

Coleman P 1991
Who's Been Sleeping in My Bed? You, Me and the State Makes Three **Indiana Law Review** 399-416

Cook CW & Millsaps PK 1991
Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest **University of Richmond Law Review** 1-40

Dash S 1986
Philosophy of Punishment **Journal for Juridical Science** 194-201

De Waal J, Currie I & Erasmus G 2001
The Bill of Rights Handbook 4 ed Juta, Landsdowne

De Wet JC 1985
De Wet en Swanepoel Strafreg Butterworth, Durban

Devlin P 1965
The Enforcement of Morals Oxford University Press, London

Douglas M 1966
Purity and Danger: an Analysis of Concepts of Pollution and Taboo Routledge & Kegan Paul, London

Dworkin RM 1977
Taking Rights Seriously Duckworth, London

Dworkin RM 1985
A Matter of Principle Harvard University Press, Cambridge, Massachusetts

Dworkin RM 1986
Law's Empire Belknap Press of Harvard University Press, Cambridge, Massachusetts

Feinberg J 1984
The Moral Limits of the Criminal Law *Volume 1: Harm to Others* Oxford University Press, New York & Oxford

Feinberg J 1985
The Moral Limits of the Criminal Law *Volume 2: Offense to Others* Oxford University Press, New York & Oxford

Feinberg J 1985
The Moral Limits of the Criminal Law *Volume 3: Harm to Self* Oxford University Press, New York & Oxford

Feinberg J 1985
The Moral Limits of the Criminal Law *Volume 4: Harmless Wrongdoing* Oxford University Press, New York & Oxford

Grossman J 2002
Should The Law Be Kinder To 'Kissin' Cousins'?" *Findlaw* at http://writ.corporate.findlaw.com/grossman/20020408.html

Hart HLA 1963
Law, Liberty and Morality Oxford University Press, London

Hodson JD 1983
The Ethics of Legal Coercion D. Reidel Publishing Company, Dordrecht, Holland

Hogan B 1978
On Modernising the Law of Sexual Offences in ***Reshaping* the Criminal Law: Essays in Honour of Glanville Williams** (Glazebrook PR (ed)) Stevens, London

Hughes G 1962
Morals and the Criminal Law **Yale Law Journal** 662-683

Hughes G 1964
The Crime of Incest **Journal of Criminal Law, Criminology and Police Science** 322-331

Johnson EA 2003
Harm to the "Fabric of Society" as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from Ravin v State **Seattle University Law Review** 41-74.

Joubert WA (ed) 1996
The Law of South Africa First Reissue Volume 6: Criminal Law Butterworths, Durban

Joubert WA (ed) 1996
The Law of South Africa First Reissue Volume 16: Marriage Butterworths, Durban

Labuschagne JMT 1985
Dekriminalisasie van Bloedskande **Tydskrif vir die Hedendaagse Romeins-Hollandse Reg** 435-455

Labuschagne JMT 1990
Ouderdomsgrense en die Bestraffing van Pedofilie **South African Journal of Criminal Justice** 10-23

Labuschagne JMT 1990
Teoretiese Verklaring van die Bloedskandeverbod **Tydskrif vir die Suid-Afrikaanse Reg** 415-425

Labuschagne JMT 1990
Die Bloedskandeverbod in die Inheemse Reg **Journal for Juridical Science** 35-56

Labuschagne JMT 1992
Bestraffing van Geslagsomgang tussen Kinders **South African Law Journal** 584-587

Labuschagne JMT 1993
Strafregtelike Aanspreeklikheid van Kinders: Geestelike of Chronologiese Ouderdom? **South African Law Journal** 148-152

Labuschagne JMT 1993
Strafbaarheid van Seksuele Uitbuiting van 'n Gesagsverhouding **De Jure** 443-446

Labuschagne JMT 1995
Deliktuele Aanspreekilikheid vir Seksuele Bedrog en Seksuele Uitbuiting van 'n Afhanklikheidsverhouding **Journal for Juridical Science** 32-52

Labuschagne JMT 1996
Tydsverloop, Omstandigheidsverjaring en Seksuele Misbruik van Kinders **Obiter** 328-331

Labuschagne JMT 1997
Seksuele Misbruik van Kinders en die Vraagstuk van Verjaring van Misdade **Journal for Juridical Science** 98-114

Labuschagne JMT 1998
Ouderdomsgrense en Strafregtelike Aanspreeklikheid weens Seksuele Misbruik van Kinders **Obiter** 340-343

Labuschagne JMT 1999
Die Insestaboe in 'n Regstaat: Regsantropologiese Kantaantekeninge **South African Journal of Ethnology** 59-66

Labuschagne JMT 2001
Intieme Menslike Verhoudinge, Seksuele Misbruik van 'n Kind en 'n Eggenote en die Strafregtelike Effek van 'n Lang Tydsverloop tussen Midaadpleging en Aanmelding **De Jure** 136-141

Labuschagne JMT 2001
Die Legaliteitsbeginsel in die Strafreg en die Groeiende Geregtigheidsbehoefte aan Abstrakte Misdaadomskrywing: 'n Regsantropologiese Perspektief **Obiter** 57-73

Labuschagne JMT 2002
Bestaan Daar 'n Behoefte aan Strafregtelike Beskerming van die Gesin en van Intieme Assosiasies? **Obiter** 233-249

Lötter S 1991
Moraliteitswetgewing en die Suid-Afrikaanse Strafreg LL.D Thesis, University of Pretoria

Mill JS 1956
On Liberty (Shields CV ed) Bobbs-Merrill Educational, Indianapolis, Ind.

Milton JRL 1996
South African Criminal Law and Procedure Volume II: Common Law Crimes (PMA Hunt 1st ed) 3 ed Juta, Kenwyn

Mitchell B 1967
Law, Morality and Religion in a Secular Society Oxford University Press, London

Morris N 1976
The Overreach of the Criminal Law **Law, Crime and Community** Juta, Cape Town 40-53

Morris M 2002
Kangaroo Courts Demand Government Action **The Star** found at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct200201212141477 99G525179

Mureinik E 1988
Law and Morality in South Africa **South African Law Journal** 457-469

Nel M 2002
The Constitutionality of "Affinity" Incest: An Argument Based on the Recognition of Customary Marriages Act" **Stellenbosch Law Review** 331-351

Nelson S 1987
Incest: Fact and Myth Stramullion, Edinburgh

Norrie K McK 1991
Incest and the Forbidden Degrees of Marriage in Scots law **Journal of the Law Society of Scotland** 216-219

Olivier NJJ together with Olivier NJJ (jr) & Olivier WH 1989
Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes 3 ed Butterworths, Durban

Packer HL 1968
The Limits of the Criminal Sanction Stanford University Press, Stanford, California

Rabie MA & Strauss SA 1994
Punishment: An Introduction to Principles Lex Patria (Butterworth Publishers), Durban

Renvoize J 1982
Incest: A Family Pattern Routledge & Kegan Paul, London

Sartorius RE 1972
The Enforcement of Morality **Yale Law Journal** 891-910

Schwikkard PJ 1999
Presumption of Innocence Juta, Kenwyn

Selfe DW & Burke V 1998
Perspectives on Sex, Crime and Society Cavendish Publishing Limited, London

Smith GP 1991
Incest and Intrafamilial Child Abuse: Fatal Attractions or Forced and Dangerous Liaisons? **Journal of Family Law** 833-878

Snyman CR 2002
Criminal Law Butterworths, Durban

South African Law Commission 2002
Sexual Offences Report (Project 107)

South African Law Commission 2001
Sexual Offences: The Substantive Law Discussion Paper 102 (Project 107)

South African Law Commission 1999
Sexual Offences: The Substantive Law Discussion Paper 85 (Project 107)

South African Law Commission 2001
Report on the Review of the Marriage Act (Project 109)

South African Law Commission Discussion Paper 74 (Project 90):
The Harmonisation of the Common Law and the Indigenous Law: Customary Marriages

Temkin J 1991
Do We Need the Crime of Incest? **Current Legal Problems** 185-216

Van der Merwe SE 2001
Re-defining Rape: Does the Law Commission Really Wish to Introduce a Reverse Onus? ***SA Journal of Criminal Justice*** 60-70

Van der Vyver JG 1976
The Overreach of the Criminal Law **Law, Crime and Community** Juta, Cape Town 53-58

Van Zyl Smit D 1986
The Limits of the Criminal Sanction **Journal for Juridical Science** 186-193

Wolfram S 1983
Eugenics and the Punishment of Incest Act 1908 **Criminal Law Review** 308-316

West DJ 1974
Thoughts on Sex Law Reform in **Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz** (Hood R (ed)) Heinemann Educational, London

Zellick G 1971
Incest **The New Law Journal** 715-716

CASES

Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae) 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC)

Jordan and Others v S and Others 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC)

Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC)

S v Abrahams 2002 (1) SACR 116 (SCA)

Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC)

S v Jordan and Others 2002 (1) SA 797 (T)

S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC)

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)

Road Accident Fund v Smith NO 1999 (1) SA 92 (SCA)

S v Steenberg 1999 (1) SACR 594 (N)

S v M 1999 (2) SACR 548 (SCA)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (1) BCLR 1517 (CC); 1998 (2) SACR 556 (CC)

S v B 1996 (2) SACR 543 (C)

Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)

S v Shasha 1996 (2) SACR 73 (Tk)

S v B 1996 (2) SACR 543 (C)

S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); 1995 (2) SACR 1 (CC)

S v Williams and Others 1995 (3) SA 632 (CC); 1995 (2) SACR 251 (CC)

S v S 1995 (1) SACR 267 (A)

S v Coetzee 1993 (2) SACR 191 (T)

S v A 1990 (2) SACR 266 (ZS)

S v D 1989 (4) SA 709 (T)

S v Ndhlovu 1984 (3) SA 23 (A)

S v Boshoff and Others 1981 (1) SA 393 (T)

S v Kgogong 1980 (3) SA 600 (A)

S v Steenberg 1979 (3) SA 513 (B)

Santam Versekeringsmaatskappy Bpk v Roux 1978 (2) SA 856 (A)

S v W 1976 (1) SA 1 (A)

S v D 1972 (3) SA 202 (O)

S v S 1971 (2) SA 591

S v M 1968 (2) SA 617 (TPD)

Ex parte die Minister van Justisie: In re S v Van Wyk 1967 (1) SA 488 (A)

S v A 1962 (4) SA 679 (E)

R v Z 1960 (1) SA 739 (A)

R v V 1959 (3) SA 621 (TPD)

R v M and Another 1959 (4) SA 743 (T)

R v Tshipa 1958 (2) SA 384 (SR)

R v D 1957 (2) SA 74 (E)

R v Davies 1956 (3) SA 52 (A)

R v Mulder 1954 (1) SA 228 (E)

R v M 1950 (4) SA 101 (T)

R v Botes & Botha 1945 NPD 43

R v Chavendera 1939 SR 218

R v Daniels 1938 TPD 312

R v Blaauw & Blaauw 1934 SWA 3

R v Van Wyk 1931 TPD 41

R v Holliday 1927 CPD 395

R v Pieterse 1923 ELD 232

R v Troskie 1920 AD 466

R v Paterson 1907 TS 619

R v Delport 1901 18 SC 355

R v Hattingh 1899 ECD 141

R v Abraham Mentoor 1897 11 EDC 125

R v Dudley and Stephens 1884 14 QB 273

WEB SITES

http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct200201212141
47799G525179

http://www.publications.parliament.uk/pa/ld200203/ldbills/026/2003026.htm

http://writ.corporate.findlaw.com/grossman/20020408.html

http://www.worldlii.org/uk/legis/num_act/cla1995342/s1.html

http://www.touchngo.com/lglcntr/akstats/Statutes/Title11/Chapter41/
Section450.htm

http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-
01000&file=281-294

http://www.azleg.state.az.us/ars/13/03608.htm

http://www3.state.id.us/cgi-bin/newidst?sctid=180660002.K

http://www.geocities.com/CapitolHill/2269/kansas.html#Incest

http://www.legislature.state.al.us/CodeofAlabama/1975/13A-13-3.htm

http://www.geocities.com/CapitolHill/2269/georgia.html#Incest

http://www.moga.state.mo.us/statutes/C500-599/5680020.HTM

http://www.geocities.com/CapitolHill/2269/nebraska.html

http://www.livepublish.le.state.ut.us/lpBin20/lpext.dll?f=templates&fn=main-hit-
h.htm&2.0

http://www.azleg.state.az.us/ars/25/00101.htm

http://www.legislation.act.gov.au/a/1900-40/current/pdf/1900-40.pdf

http://www.austlii.edu.au/cgi-
bin/disp.pl/au/legis/vic/del/consol%5fact/ca195882/s44.html?query=%7e+
incest

http://www.austlii.edu.au/cgi-
bin/disp.pl/au/legis/vic/del/consol%5fact/ca195882/s44.html?query=%7e+
incest

http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s222.html

http://www.austlii.edu.au/cgi-
bin/disp.pl/au/legis/nt/consol%5fact/ccotntoa498/s134.html?query=%7e+
incest

http://www.austlii.edu.au/cgi-
bin/disp.pl/au/legis/nt/consol%5fact/ccotntoa498/s135.html?query=%7e+
incest

http://www.homeoffice.gov.uk/docs/vol1main.pdf

LEGISLATION

South Africa

Recognition of Customary Marriages Act 120 of 1998
Constitution of the Republic of South Africa Act 108 of 1996
Constitution of the Republic of South Africa Act 200 of 1993
Decriminalization Act 107 of 1991
Human Tissue Act 65 of 1983
Child Care Act 74 of 1983
Criminal Procedure Act 51 of 1977
Prescription Act 68 of 1969
Marriage Act 25 of 1961
Children's Act 33 of 1960
Sexual Offences Act 23 of 1957
Children's Act 31 of 1937

England

Sexual Offences Act 1956
Sexual Offences Bill [HL] introduced 2003-01-28

Scotland

Criminal Law (Consolidation) (Scotland) Act 1995 (C 39)

Germany

Strafgesetzbuch section 173
Grundgesetz section 6

Canada

Canadian Criminal Code

USA

Alaska Statutes
California Penal Code
Arizona Revised Statutes
Idaho Statutes

Kansas Statutes

Code of Alabama

Missouri Revised Statutes

Utah Criminal Code

Australia

Australian Capital Territory Crimes Act 1900

Victoria Crimes Act 1958

New South Wales Crimes Act 1900

Queensland Criminal Code Act 1899

Northern Territory of Australia Criminal Code