Incest Between Consenting Adults: A Case For Decriminalisation?

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Abstract

Consent plays a key role in most sexual offences. For example, the presence of consent removes any criminal liability for an offence such as rape or sexual assault. In contrast, sexual activity between adult family members (see Sexual Offences Act 2003, ss. 64-65) is a criminal offence regardless of whether it takes place *with* or *without* the consent of both parties. This reflects a tension that exists within the criminal law. Generally, the criminal law is based upon the respect for the autonomy of the individual in its reflection of the traditional liberal account. The criminal law is also based upon harm and where an activity is presumed to be harmful (even when consensual) it is unlawful. In terms of sexual activity between adult family members, there are concerns that gendered family power dynamics and childhood abusive, grooming, or coercive behaviours may limit freedom of choice to consent, and that such relationships are, even if consensual, harmful to the family and institution of the family. This thesis aims to resolve the tension between autonomy and harm to protect the former removing the protection of the criminal law from those that are considered vulnerable. To do so, I argue that the criminal law ought to employ a relational approach to autonomy.

The criminalisation of consensual sexual activity between adult family members has been justified on eight grounds. I analyse them to determine whether they enunciate any form of doctrine or are they just “scattered words”.

A relational approach to autonomy focuses upon the constructiveness or destructiveness of a relationship between two (or more) people by allowing the relationship to be seen within its proper context (rather than on time specific circumstances at the time or shortly before an activity takes place). A relational approach employs a “deeper examination” (rather than “face value”) into this context which strengthens my argument that a relational approach can resolve the tension within the criminal law. I analyse whether a relational approach to autonomy is reflected in the current law relating to the sex with an adult relative provisions.

Dedication

I cannot dedicate this thesis to any one person. Though the writing of it and the work that went into it is my own, it has been a team effort to get me to this point.

I wish to thank primarily my supervisors, Professor Kathryn Hollingsworth, Dr Nikki Godden-Rasul and Dr Kevin Crosby (all at Newcastle Law School) who have helped me beyond words to achieve this. I also wish to thank Dr Francesco De Cecco, PGR Director, Newcastle Law School, who ensured that myself and other PGRs in the Law School were able to keep in touch during the 2020-2021 lockdowns which kept us physically apart.

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I also wish to thank two unnamed people for pushing me over the line, when I myself did not think I could.

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List of Abbreviations

In this thesis the following will be referred to in the text by their corresponding abbreviation, as follows:

Punishment of Incest Act 1908	“the 1908 Act”
Sexual Offences Act 1956	“the 1956 Act”
Sexual Offences Act 1967	“the 1967 Act”
Sexual Offences Act 2003	“the 2003 Act”
Sexual Offences Act 2003, ss. 64-65	“the sex with an adult relative provisions”
Sexual Offences Act 2003, ss. 74-76	“the consent provisions”

Chapter 1: Introduction

1.1 Introduction and research question

In this thesis, I examine why, and how, sexual activity between adult family members should be regulated by the criminal law?

The 2003 Act reformed a wide range of sexual offences, including rape.[1] However, it also substantially changed the law relating to sexual activity between family members: the offence traditionally known as incest.[2] One such change was the separate regulation of sexual activity with children and with adults.[3] The change was in keeping with the overall scheme of the 2003 Act.[4] Another such change, a necessity given the separate regulation of adults and children, was the abandonment of the term "incest".[5] A description which had previously referred to any activity involving family members and which made no distinction between child sexual abuse and consensual sexual activity between adult family members.[6]

[1] The 2003 Act was based upon a review of the law on sexual offences conducted by the Home Office: Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences - Volume 1* (HMSO 2000); Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences - Volume 2 Supporting Evidence* (HMSO 2000)

[2] For full text of the relevant provisions see Appendix 1.

[3] Sexual Offences Act 2003, ss. 25 ("sexual activity with a child family member"), 64 ("sex with an adult relative: penetration) & 65 ("sex with an adult relative: consenting to penetration"). Section 25 did not provide any minimum age by which a person can commit the offence however differing sentences exist depending upon whether, or not, the person found guilty has reached the age of 18 (ibid, s. 25(4)-(5)). Unlike s. 25, the sex with an adult relative provisions can only be committed by a person aged 16 or over against a person aged 18 or over (ibid, ss. 64(1) & (1)(c) & 65(1) & (1)(d)). Sections 64-65 are collectively referred to as the "sex with an adult relative provisions".

[4] For example, ibid, ss. 1-4, provided for offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent and ss. 5-8 provided for identical offences with a child under 13. One point to be made here is the title of these offences as being "with", rather than "between". For example, sexual activity with a child family member can be committed by those that are children themselves (the appropriate description for this is sexual activity between child family members). However, the focus of the sex with an adult relative provisions is activity *between* adult family members given the emphasis on a person being aged 16 to commit it (though the offence is accurately titled if the person committing the offence is aged 17, for example, and the other is aged 18 or over). The overall policy of the 2003 Act is to regard the age of 18 as the dividing line between an adult and a child.

[5] Peter Bowsher, 'Incest - Should Incest Between Consenting Adults be a Crime?' (2015) Criminal Law Review 208, 209

[6] See 1.5, below.

In the 2003 Act, the "sex with an adult relative: penetration" provision provides that a person aged 16 or over ("A") commits an offence if they intentionally penetrate another person's vagina or anus with a part of their body or anything else, or penetrate another person's mouth with their penis, the penetration is sexual, the other person ("B") is aged 18 or over, A is related to B in a proscribed way and A knows (or could reasonably be expected to know) that they are related to B in that way.[7] The "sex with an adult relative: consenting to penetration" provision provides that a person aged 16 or over ("A") commits an offence if another person ("B") penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis, A consents to the penetration, the penetration is sexual, B is aged 18 or over, A is related to B in a proscribed way and A knows (or could reasonably be expected to know) that they are related to B in that way.[8] The sex with an adult relative provisions focus upon penetrative activity "*with a part of their body or anything else, or penetrate another person's mouth with their penis*". Non-penetrative sexual activity between family members remains outside of the scope of the criminal law, if consensual, like any other form of consensual sexual touching.

Whilst all non-consensual sexual activity *and* sexual activity with children (including child family members) has long been correctly criminalised,[9] the position on the supposed criminality of sexual activity that takes place *between* consenting adult family members has been, and remains, an issue that causes tension within the criminal law.

In general terms, two adults can engage in any form of sexual activity they choose in private, provided they consent, without risking the incursion of criminal sanction.[10] Choices relating to sex are fundamental to autonomy and what it means to be autonomous. It is for this reason that the criminal law does not prohibit sexual activity

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[7] Sexual Offences Act 2003, s. 64(1)(a)-(e)
[8] Ibid, s. 65(1)(a)-(f)
[9] See, for example, Statute of Westminster 1275, c. 13: "*And the King prohibiteth that none do ravish, nor take away by Force, any Maiden within Age (neither by her own Consent, nor without)*…" [sic]. It is unnecessary to go into detail on subsequent legislation on this issue.
[10] Though there have, historically, been criminal sanctions attached to certain types of *sexual* activity even if consensual, for example anal sex. The criminal law takes a different view when the sexual activity takes place in public (and is viewed): see, for example, *Rose v Director of Public Prosecutions* [2006] EWHC 852 (Admin); [2006] 1 WLR 2626. There remains the potential for criminal sanctions for a *violent* offence: see *R v Brown* [1994] 1 AC 212.

between adults *per se* unless an "additional circumstance relating to the individual" exists. Such circumstances can include when one participant has a mental disorder which may impede choice or, as I am examining here, when one participant is related to another in a prescribed way.[11]

A tension arises in the criminal law between those that consider that, not only consensual, but all forms (both penetrative and non-penetrative) of sexual activity between adult family members ought to be retained within the scope of the criminal law based on issues such as the abuse of power and the possibility of long-term grooming (whom I describe as "retainers") and those that seek to remove (or partially remove) such activity from the scope of the criminal law based on issues such as autonomy and privacy (whom I describe as "abolitionists").[12] The abolitionist position however is divided between those that seek to abolish the offence in its entirety ("total abolitionists") and those that seek to abolish the offence as it currently exists and replace it with an alternative offence dealing, *inter alia*, with abuses of trust due to long-term grooming ("alternative abolitionists"). I argue that the tension between the different positions can be resolved by applying a relational account of autonomy to the criminal law with an emphasis upon whether the relationship between the family members who ostensibly consent is a constructive or destructive one and that consent ought to be established or negated by a deeper examination of the context by which the ostensible consent was given.[13] Having identified the tension that exists and, in summary, how I intend to resolve it,[14] I go on to set my aims and objectives for my thesis and how I have met these in the following chapters.[15]

1.2 The existing tension within the criminal law

As noted above, a tension arises in the criminal law between those that consider that, not only consensual, but all forms of sexual activity between adult family members

[11] Sexual Offences Act 2003, ss. 33-44, contains offences relating to sexual activity with a person with a mental disorder.
[12] I describe the arguments as "retainer" and "abolitionist" though the authors themselves did not describe themselves in such a way. References to "retainer" and "abolitionist" must therefore be read in this way, rather than as authors' self-description.
[13] See 1.2, below.
[14] See 1.3, below.
[15] See 1.4, below.

ought to be retained within the scope of the criminal law based on issues such as the abuse of power and the possibility of long-term grooming ("retainers") and those that seek to remove (or partially remove) such activity from the scope of the criminal law based on issues such as autonomy and privacy ("abolitionists").

Whereas there is a single aim to the retainer line of argument of Hughes and Temkin (that of *retaining* the offence of incest as a criminal offence), there are multiple aims to the abolitionist line of argument of Card, Honoré and Bailey & McCabe. "Total" abolitionists aim to have the offence of incest abolished altogether as a criminal offence whereas the "partial" abolitionist aim is to abolish the current offence of incest and replace it with an offence that is more reflective of the realities of the offence and not based upon pre-conceptions or urban myths.

The distinction between retainer and abolitionist, however, is not a clear cut one. The distinction between them (but again emphasising that the authors themselves did not place themselves in such opposing positions) is not the arguments which they rely upon (for example genetics or references to possible sexual abuse) but rather their interpretation of those arguments (for example the level of importance to genetics). Retainers and partial abolitionists rely upon the same material as a basis for their aims as their shared aim is the retention of *an* offence in some form (this is highlighted below). Indeed, the only real distinction between retainers and partial abolitionists has tended to be that retainers want to keep the offence as it currently exists where partial abolitionists seek to destroy the current offence to build up a more appropriate offence focusing upon more appropriate aims (as noted above).

Though there was some difficulty in criminalising incest (though this was ultimately achieved by the 1908 Act[16]), the criminality of consensual sexual activity between adult family members was never questioned until the 1960s.[17] The catalyst for calling into question the criminality of consensual sexual activity between adult family members was the publication in September 1957 of the Wolfenden Report – the *Report of the*

[16] Punishment of Incest Act 1908, ss. 1-2. Incest was criminalised by Parliament during the Interregnum of 1649-1660 by An Act for suppressing the detestable sins of Incest, Adultery and Fornication 1650 however this "Act" was repealed following the restoration of Charles II in 1660.

[17] I have been unable to find any references questioning the criminality of consensual sexual activity between adult family members before this decade.

Committee on Homosexual Offences and Prostitution – and its ensuing debate.[18] The Wolfenden Committee was convened in August 1954 to consider the law and practice relating to homosexual (and prostitution) offences and to report what changes, if any, were desirable. Their primary conclusion regarding homosexual offences was that behaviour between consenting adults aged 21 in private should no longer be a criminal offence.[19] The Wolfenden Committee was however driven to this conclusion by its own approach that it was not the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour.[20] The Wolfenden Report therefore called into question whether certain criminal prohibitions (incest being one such prohibition) could be defended on utilitarian grounds or whether they only reflected a social repugnancy, which was not capable of utilitarian justification.[21]

In the next section, I provide an overview (which I shall return to in later chapters) of the lines of argument of retainers and abolitionists to highlight the existing tension within the criminal law before providing a summary analysis. As noted above, the terms "retainer" and "abolitionist" are descriptions of my own creation therefore it is not possible to analyse the arguments through a lens which they themselves did not consider themselves to a part. I therefore apply a chronological analysis of the lines of argument. One reason for this is that the two authors whom I would describe as retainers – Hughes and Temkin – were published approximately 30 years apart with, in between, a large amount of "abolitionist" publications. Hughes' and Temkin's publications can therefore not be read in the same way.

1.2.1 An overview of the existing tension

In 1964, and while the debate following the publication of the Wolfenden Report was ongoing,[22] Hughes sought to argue, by way of a literature review of "*the writings of*

[18] Home Office, *Report of the Committee on Homosexual Offences and Prostitution (Cmnd 247)* (HMSO 1957); Patrick Devlin, 'The Enforcement of Morals' (1959) 45 Proceedings of the British Academy 129; H.L.A. Hart, *Law, Liberty and Morality* (OUP 1969)
[19] Home Office, *Report of the Committee on Homosexual Offences and Prostitution (Cmnd 247)* para. 355(i) & (iii)
[20] Ibid paras. 12-16
[21] Graham Hughes, 'The Crime of Incest' (1964) Journal of Criminal Law, Criminology and Police Science 322, 322
[22] It seems to me to be strange that a "retainer" was the first to set out their arguments as to why the conclusions of the Wolfenden Report did *not* apply to sexual activity between family members. Rather,

sociologists, anthropologists, psychologists, and psychiatrists",[23] that incest produced "*very real harmful effects*" and, as such, it was not difficult to "*see utilitarian reasons for* [the criminalisation of incest]".[24] I categorise Hughes as a retainer.

Hughes' argument, by reference to such works, has failed to make the important distinctions between, first, activity that is consensual from that which is non-consensual and, second, that which occurs solely between adults and that which occurs between adults and children. As to the first point, Hughes failed to make this distinction when basing his conclusion that incest produced "*very real harmful effects*".[25] When the activity is non-consensual, this point is beyond dispute: non-consensual sexual activity is harmful.[26] However, when the activity is consensual, it is more difficult to suggest that what is consensual is also harmful. This is a point I raise in later chapters. Hughes was writing in 1964 and at the time incest was governed by the 1956 Act which provided that, regarding incest by a man, sexual intercourse was

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I would have thought that "abolitionists" would have seized upon it to emphasise how the conclusions *did* apply. Possible explanations could be that "retainers" sought to solidify their position or that "abolitionists" may have been waiting to see how the conclusions were applied to homosexual offences and prostitution before applying them to other offences. However, given that these "positions" have been retrospectively created by me, it is impossible to know.

[23] Hughes 322

[24] Ibid 329

[25] Ibid 329

[26] Examples of harms or effects of sexual activity between family members given in the literature (though I may not necessarily agree with them given that they refer to both consensual and non-consensual activity, but at this stage I merely list them) include the following. (1) Anti-social behaviour (Jean Benward and Judianne Densen-Gerber, 'Incest as a Causative Factor in Antisocial Behavior: An Exploratory Study' (1975) 4 Contemporary Drug Problems 323). (2) Depression (Kurt M. Bachmann, Franz Moggi and Frances Stirnemann-Lewis, 'Mother-Son Incest and its Long Term Consequences: A Neglected Phenomenon in Psychiatric Practice' (1994) 182 Journal of Nervous & Mental Disease 723). (3) Long-term psychological impacts (Reina Attias and Jean Goodwin, 'Knowledge and Management Strategies in Incest Cases: A Survey of Physicians, Psychologists and Family Counselors' (1985) 9 Child Abuse & Neglect 527). (4) Murder (Louis B. Schlesinger, 'Adolescent Sexual Matricide Following Repetitive Mother-Son Incest' (1999) 44 Journal of Forensic Sciences 746). (5) Promiscuity (this was abandoned in the 1980s due to it casting a moral judgment upon the activities of the (usually) female participant and was seen as an excuse for the actions of the other (usually) male participant for seeing them as a sexual partner in the first place: Sana Loue, *Sexual Partnering, Sexual Practices and Health* (Springer 2006). (6) Prostitution, and other sex work (Jean Renvoize, *Incest: A Family Pattern* (Routledge 1982); Carmen M. Cusack, 'Double Glazed: Reflection, Narcissism and Freudian Implications in Twincest Pornography' (2017) 13 Journal of Law & Social Deviance 1). (7) Relationship issues (Judith Herman and Lisa Hirschman, 'Father-Daughter Incest' (1977) 2 Signs 735). (8) Seizures (Jean Goodwin, Mary Simms and Robert Bergman, 'Hysterical Seizures: A Sequel to Incest' (1979) 49 American Journal of Orthopsychiatry 698). (9) Self-harming and suicide (Joan Haliburn, 'Mother-Child Incest, Psychosis and the Dynamics of Relatedness' (2017) 18 Journal of Trauma & Dissociation 409). (10) Social isolation (Philip M. Sarrel and William H. Masters, 'Sexual Molestation of Men by Women' (1982) 11 Archives of Sexual Behavior 117). (11) Substance abuse (Herman and Hirschman). (12) Victims becoming perpetrators of sexual offences (Freda Briggs and Russell M.F. Hawkins, 'A Comparison of the Childhood Experiences of Convicted Male Child Molesters and Men Who Were Sexually Abused in Childhood and Claimed to be Nonoffenders' (1996) 20 Child Abuse & Neglect 221).

required to complete the offence.[27] This was also the requirement for rape under the same Act.[28] Therefore, when arguing that non-consensual sexual intercourse is harmful one is not referring to incest but that of rape.[29] As to the second point, Hughes again failed to make this distinction when coming to his conclusion on harmful effects. The same issues as the first point also apply as it quite right to regard sexual activity by an adult with a child as harmful and sexually abusive, though between adults this, again, is more of a stretch.[30] The sum of these points is that, whereas Hughes considered himself to be referring to incest as having harmful effects, he was concluding that rape and child sexual abuse can have harmful effects (which is beyond dispute).[31]

It was this ambiguity in the offence of incest which, along with the conclusions of the Wolfenden Report, also led to arguments for abolition. Criminal laws should be certain and specific by covering stand-alone conduct in that one ought not to be guilty of offence A by committing activity A *or* activity B, rather activity B ought to be covered by offence B. Take for example offences relating to indecent images: there are individual offences for creating/producing images, distributing images, possessing images and publishing images.[32] Though making images *may* imply the possession of images, the possession does not imply that the owner *made* the images. The same is true for offences such as rape and incest: "…*the mere fact that a relationship was incestuous…cannot of itself corroborate a complainer's account of a lack of consent*."[33]

In 1975, Card argued that the law relating to consensual sexual activity where one, or both, of the parties are under 18 required reform as it did not accord with "*contemporary public opinion*" and that such a reform would make it more "*amenable*

[27] Sexual Offences Act 1956, ss. 10 & 44 (definition of "sexual intercourse")
[28] Ibid, s. 1
[29] This is dependent upon how one views "harm" however my point is that these offences ought not to be conflated.
[30] At the time of publication, adult/child sexual intercourse was governed by Sexual Offences Act 1956, ss. 5-6
[31] Whether consensual sexual activity between adult family members can be described as "harm" is a key focus of this thesis: see chapter 2, below.
[32] Protection of Children Act 1978, s. 1(1)(a)-(d); Criminal Justice Act 1988, s. 160
[33] *LW v HM Advocate* [2020] HCJAC 50, [10] (Lord Carloway LJG)

to rigorous enforcement."[34] Under the heading of "Proposals for reform", Card questioned the need for an offence of incest.[35] He argued that if the rationale for the offence was to protect young girls from sexual exploitation, they could be protected just as well by other offences such as rape and unlawful sexual intercourse (which existed at the time he was writing[36]).[37] On the other hand, if the rationale was because society finds the activity "*repulsive even among consenting adults*" then, Card argued, this is an "*insufficient reason to invade their privacy*".[38] Card's argument therefore focused on privacy, rather than on the conclusions of the Wolfenden Report (though also accepted that the enforcement of moral standards was not a function of the criminal law[39]) or upon autonomy (as I seek to argue). Card's overall conclusion was that there was "*no clear necessity for a general offence of incest*".[40] I categorise Card as a total abolitionist, though this article more than any other highlights the need for caution with my descriptions. Card's argument focused upon sexual relations with minors and his comments upon incest (and incest between consenting adults) were not the primary focus of the piece.

There is, however, evidence from around the same time of Card's publication of both a "total" abolitionist argument being developed by the National Council of Civil Liberties (the "NCCL") and "partial" abolitionist arguments by Honoré and Bailey & McCabe.

The NCCL had a stated policy of abolition.[41] Opinion however within the NCCL may have, over time, been divided. For example, in a document entitled "*Comments on the Memorandum for Submission to the Criminal Law Revision Committee*" (dated 21 November 1975 by Guy Thornton[42]) it states:

[34] Richard Card, 'Sexual Relations with Minors' (1975) Criminal Law Review 370, 370-371
[35] Ibid 375
[36] Sexual Offences Act 1956, ss. 1, 5 & 6; see also Sexual Offences Act 2003, ss. 1, 5 & 9
[37] Card 375
[38] Ibid 375
[39] Ibid 371
[40] Ibid 375
[41] The archives of the NCCL are located at the Hull History Centre (date of visit: 24 July 2018).
[42] Guy Thornton is listed as being a member of the NCCL Executive Committee and a journalist (Christopher Moores, 'From Civil Liberties to Human Rights? British Civil Liberties Activism, 1934-1989' (University of Birmingham 2010) 210)

> "*I feel that we should be even stronger in calling for the abolition of the crime of incest and possibly even allowing marriage to take place between relations – or at least some relations*."[43]

The Memorandum referred to may have been a paper on sexual law reform by Michael Schofield.[44] At the NCCL Executive Committee meeting held on 2 January 1976 it was agreed, having considered the paper, that the offence of incest should be abolished.[45] When, in 1981, further submissions were to be made to the Criminal Law Review Committee the second draft stated that the "*Existing NCCL policy is that incest should be abolished as an offence*".[46] However, written in hand underneath by John Bennet,[47] was stated:

> "*While I must accept NCCL policy I cannot pretend to be happy about this. Parental power is such that true consent is unlikely and most cases that to [four] involve threats or violence. However, I cannot suggest a better response from us so I agree*."[48]

What these records show is that whilst total abolitionists were publicly calling for abolition, some private doubt existed.

Honoré and Bailey & McCabe advanced what I categorise as "partial" abolitionist arguments. Honoré, for example, in his 1978 book, "*Sex Law*", argued that as incest was as an offence which involved, certainly when occurring between adults and children, sexual abuse by authority it "*might therefore be abolished as such, and replaced by a law of sexual abuse of children*".[49] Honoré's concerns regarding the offence of incest were rooted in the need to protect children from sexual abuse by those whom have authority over them such as parents, guardians and teachers.[50]

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[43] NCCL, Comments on the Memorandum for Submission to the Criminal Law Revision Committee, 21 November 1975, Hull History Centre archives ref: U DCL 680/2
[44] Michael Schofield is listed as being a member of the NCCL Executive Committee and a psychologist (Moores 210).
[45] NCCL Executive Committee Minutes 2 January 1976, Hull History Centre archives ref: UDCL/281
[46] NCCL, Second Draft of Submissions / Notes to CLRC on Sexual Offences, 14 June 1981, Hull History Centre archive ref: U DCL 680/2
[47] John Bennet is not listed as a member of the NCCL Executive Committee members 1974-1981 contained within Moores.
[48] NCCL, Second Draft of Submissions / Notes to CLRC on Sexual Offences, 14 June 1981, Hull History Centre archive ref: U DCL 680/2
[49] Tony Honore, *Sex Law* (Duckworth 1978) 79 & 81
[50] Ibid 81

Though such an offence (with its reference to "authority") does focus upon the key issue of power differentials, its focus is too wide to what would traditionally be considered as incest. For example, Honoré considered that the offence could extend to teachers. This extension would have created a large degree of overlap, however, given the protections that were already afforded to those in the care of teachers (for example the offences of rape, unlawful sexual intercourse, indecent assault, and incitement to engage in indecency;[51] especially as the age of legal consent and the school leaving age in 1978 were both 16).

Bailey & McCabe agreed with Honoré that the "*most acceptable proposal*" would be to replace the offence of incest with one of sexual abuse of authority.[52] However, whereas Honoré suggested that such an offence could extend to teachers, Bailey & McCabe argued that the offence ought to be limited to parents though "parent" would be given a wide meaning to include all forms of parenthood such as biological parents, step-parents, foster parents and adoptive parents.[53]

Though there would be benefits to such an offence of sexual abuse by authority such as removing the stigma of incest, protection would be provided for children between the ages of 16-18 and criminal liability would only extend to the abuser of the parental authority, not the sexual partner,[54] the flaw in both Honoré and Bailey & McCabe's proposals is the in-built "sunset" in the offence. A parent has "authority" over their children only when they are under the age of 18. Whilst there are general exceptions to this (for example where a parent retains authority due to some mental incapacity that their child suffers from) a parent could not be said to have "authority" over their children once they reach the age of 18. Though in a general sense it can be said that a parent maintains some authority throughout the entire life of their children is not strong authority, but rather *less* strong, and it is only with strong authority that the offence would apply. In relation to the sex with an adult relative provisions, there is no sunset and therefore it seeks to protect all those in adulthood.[55]

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[51] Sexual Offences Act 1956, ss. 1, 5, 6, 14 & 15; Indecency with Children Act 1960, s. 1
[52] Victor Bailey and Sarah McCabe, 'Reforming the Law of Incest' (1979) Criminal Law Review 749, 761
[53] Ibid 762
[54] Ibid 763
[55] As children, they are protected by Sexual Offences Act 2003, s. 25, though this provision does have a sunset when the child reaches the age of 18 (ibid, s. 25(1)(e)).

Issues such as this were recognised by Temkin in 1991 where she argued that the offence of incest should not only be retained but also strengthened.[56] Temkin's overall argument was that the call for sexual activity between family members to be removed from the scope of the criminal law was based upon assumptions which needed to be re-examined in light of modern research into sexual abuse.[57] Temkin argued that the offence could be strengthened by removing the so-called "boundaries of incest" such as the type of sexual activity covered by the offence and the extension of the list of prohibited relationships.[58] As to the type of sexual activity covered by the offence,[59] Temkin's primary concern was that girls aged 16 were "*utterly unprotected from sexual acts perpetrated against them…unless consent in the narrow legal sense is absent*".[60] Temkin's argument was that, unless the absence of consent could be established, there were no legal protections for women who were the victim of unwanted sexual acts by family members which did not consist of penetration due to the difficulties surrounding the issue of consent. Whereas women and girls were theoretically protected from penetrative sexual activity by family members by the offence of rape, when the sexual activity fell short of this, issues around consent would make prosecution unlikely given the vast range of coercive conduct that can be perceived by the authorities as "consensual".[61] The focus upon penetration was, according to Temkin and for obvious reasons, due to the basis of the offence being "*mainly or exclusively eugenic*".[62] Whilst Temkin accepted that there was a case for retaining the offence based on genetics (despite a warning from Hughes as to the weakness of such an argument[63]), albeit in my view incorrectly, she argued that "*other factors are at least of equal significance*".[64] As to the extension of the list of prohibited relationships,[65] Temkin argued that the list was "*open to debate*" depending upon what

[56] Jennifer Temkin, 'Do We Need the Crime of Incest?' (1991) 44 Current Legal Problems 185, 185
[57] Ibid 185
[58] Ibid 200-205
[59] At the time of publication, this was penile penetration only (Sexual Offences Act 1956, ss. 10(1), 11(1) & 44).
[60] Temkin 200
[61] Ibid 187
[62] Ibid 200
[63] Hughes 328 ("*not too much should be made*" of such an argument)
[64] Temkin 200
[65] At the time of publication, these were "*granddaughter, daughter, sister or mother*" (Sexual Offences Act 1956, s. 10(1)-(2)) and "*grandfather, father, brother or son*" (ibid, s. 11(1)-(2)).

constituted the ground for the offence.[66] If one considered genetics to be the ground, then uncle/aunt and nephew/niece should be included, she argued, however, if it was not, "*then there may be a case for excluding some relationships and including certain others*."[67] These "certain others" would naturally include non-biological children and, indeed, any that could have been included in Bailey & McCabe's offence: i.e. step-children, foster children and adoptive children, all of whom require protection.[68] It is difficult to argue with Temkin's arguments when one is focussing solely upon children or the sexual abuse of children by adults *only*. When one is focussing upon activity between adults *only* (who ostensibly can make decisions autonomously or free from coercion) her arguments lose some of their strength.

As noted above, a change to the offence of incest came in 2004 with the commencement of the 2003 Act.[69] The changes, however, were not without criticism. For example, Spencer criticised the sex with an adult relative provisions as being "*deeply unsatisfactory*".[70] He, like others such Bailey & McCabe, emphasised that since the enactment of the Sexual Offences Act 1967,[71] it had been "*widely accepted*" that no liability would attach to sexual activity engaged between consenting adults in private, therefore he asked directly: "*what possible justification is there for retaining the offence of incest*"?[72] Spencer's answer was not founded in law, but rather in political necessity: the reason for not removing consensual sexual activity between adult family members from the scope of the criminal law was essentially a political one in which the Home Office did not want to read headlines such as "*Blunkett Legalises Incest*".[73] The point made is a fair one and there are some offences which are political "hot potatoes" by which to interfere in them pleases nobody and infuriates everyone.

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[66] Temkin 201
[67] Ibid 201
[68] Ibid 203-204
[69] The 2003 Act commenced on 1 May 2004 (Sexual Offences Act 2003 (Commencement) Order 2004 SI 2004/874, art. 2).
[70] J. R. Spencer, 'The Sexual Offences Act 2003: Child and Family Offences' (2004) Criminal Law Review 347, 347
[71] Sexual Offences Act 1967, s. 1
[72] Spencer 357
[73] Ibid 358

In 2015 Bowsher considered the judgment in *Stübing v Germany*[74] and applied it to the 2003 Act.[75] The focus of Bowsher's argument was his belief that the sex with an adult relative provisions were a legislative muddle and that they were criminal laws created by committee.[76] Bowsher's main argument was that, notwithstanding the conclusions in *Stübing*, if a suitable case were to be brought the European Court of Human Rights would find the sex with an adult relative provisions incompatible with Article 8(1) and that the exception under Article 8(2) (that it is necessary in a democratic society) would not apply.[77] In order to pre-empt this, he suggested that the sex with an adult relative provisions ought to be repealed, though leaving the offences involving children intact, or, failing that, the Law Commission ought to examine this aspect of the criminal law.[78] I remain unconvinced by Bowsher's argument that the European Court of Human Right would find the sex with an adult relative provisions incompatible with Article 8 given the supposed universality of the incest taboo.[79] I consider that such an argument is not the correct way in which to advocate for the removal of consensual sexual activity between adult family members from the scope of the criminal law. Article 8 arguments necessarily support a majority, rather than a minority, view of actions and consensual sexual activity between adult family members will always likely be a minority activity.

In the above overview, I have highlighted that a tension exists between those that consider that, not only consensual, but all forms of sexual activity between adult family members ought to be retained within the scope of the criminal law and those that seek to remove (or partially remove) such activity from the scope of the criminal law. In the next section, I provide a summary (and an analysis thereof) of the lines of argument identified from the above overview.

1.2.2 Analysis of the arguments

[74] *Stubing v Germany* [2013] 1 FCR 107
[75] See also James A. Roffee, 'The Law on Incest: A New Legal Realist Approach to Understanding the English and Welsh Prohibitions' (University of Leicester 2011) and James A. Roffee, 'No Consensus on Incest? Criminalisation and Compatibility with the European Convention on Human Rights' (2014) 14 Human Rights Law Journal 541
[76] Bowsher 218
[77] Ibid 218
[78] Ibid 218
[79] See 3.4.3, below.

Those that consider that incest ought to remain within the scope of the criminal law advance three primary lines of argument to justify this conclusion: the protection of the young; the protection of the family unit; and the genetic argument.

First, the protection of the young. Hughes argued that the offence of incest is needed to protect younger members of the family from a culture of sexual abuse which may affect their ability to consent as future adults.[80] In response, Card argued that there are other offences which are available to protect these younger members of a family (while they are young) and that, if that fails, there are also offences which relate to non-consensual sexual activity with adults.[81] Similarly, adults have less of a need to be protected from exploitation as they can make choices for themselves and that no harm can occur between consenting adults.

Whilst the protection of the young (both girls and boys) is an important role of the criminal law, the specific offences pre-2003 Act[82] did this in abundance as offences designed to protect the young were blind to the relationship between the perpetrator of the acts and those whom the acts were perpetrated upon. If the act was penetrative, two specific offences provided protection: rape (if it were alleged to be non-consensual); and unlawful sexual intercourse (if it were alleged to be consensual).[83] Both of these offences applied to both familial and non-familial relationships: it would have been an offence for *any* man (regardless of whether he was the girl's father, brother etc.) to have sexual intercourse with a girl under 16. If the act were non-penetrative, the offence of indecent assault provided protection.[84] This offence, too, had no regard to the relationship between the perpetrator and perpetrated for it to be committed.

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[80] Hughes 329
[81] Card 375
[82] The arguments for the retention of the offence of incest were made before the enactment of the 2003 Act therefore I address here the offences under the 1956 Act which were in force at the time of the arguments.
[83] See Sexual Offences Act 1956, ss. 1, 5 & 6; *R v Harling* [1938] 1 All ER 307; *R v Howard* [1966] 1 WLR 13. As to the penetration of boys, the offence of buggery could be committed with or without consent (Sexual Offences Act 1956, s. 12).
[84] Sexual Offences Act 1956, ss. 14 (indecent assault on a woman) & 15 (indecent assault on a man). Both offences applied to women and girls aged above and below 16. As to the non-penetration of boys, the offence of indecent assault was bolstered by the offence of gross indecency between men (ibid, s. 13).

Whether or not the offence of incest, pre-2003 Act, was required or addressed a particular evil not covered by the existing legislation at the time (just highlighted), given the immense power differentials between parents and children within families, was due to the drafting of the offence – it applied to both adults and children. To protect children, therefore, the drafting necessitated the punishment of consensual sexual activity between adult family members. However, under the changes made by the 2003 Act with the "splitting" of offences against children and adults, the need for such an offence covering adults *alone* decreases as the removal of the sex with an adult relative provisions do not affect the offences seeking to protect children.

Second, the protection of the family unit. Temkin argued that the offence of incest is needed to prevent the destruction of the family unit that would occur if sexual activity between family members were allowed (or allowed to persist). In response Hornle argued that the protection of the family unit is not a legitimate aim of the criminal law as there are other activities which can occur within families which can destroy it as a unit, but which are not prohibited such as adultery and divorce.[85]

The protection is an important social policy aim, though whether the maintenance or protection of the unit ought to be the concern of the criminal law in meeting that social policy aim is debateable. Unfortunately, families break up all the time and not every cause of this is a matter for the criminal law to intervene. For example, as noted by Spencer and Hornle, there are (now) no criminal laws to prevent adultery (which can cause the break-up of a family) or divorce which is a legally sanctioned destruction of a family. Incest between members of the same families is considered not to be a *cause* of family breakdown, but an *effect* of a breakdown (a position I disagree with). The argument therefore ought to be that if *consensual* incest is an effect, rather than a cause, then the criminal law is seeking to protect and maintain that which may already be broken. The imposition of criminal sanctions for consensual sexual activity between adult family members is flogging the proverbial dead horse. If the incest is *non-consensual* (though I argue that this is a different offence), then different social policy aims come into play, other than the protection of the family unit.

[85] Spencer 358; Tatjana Hornle, 'Consensual Adult Incest: A Sex Offense?' (2014) 17 New Criminal Law Review 76, 94

Third, the genetic argument. Hughes and Temkin both argued that (though it is accepted as the weakest argument[86]) there is a genetic impact upon society in allowing sexual activity between family members to occur. In response, Bailey & McCabe argued that the science upon which the argument is based is flawed and attention is drawn to comparisons with other child-producing situations such as age of giving birth and the existence of genetic-defects in parents which are not criminally prevented.[87]

The genetic argument is the most often cited reason for criminalising any sexual activity between family members despite it being the weakest argument for retaining sexual activity between family members within the scope of the criminal law. It is for this reason that when arguments for retention of incest as a criminal offence are made this figures close to the bottom of the list in favour of more socially harmful arguments (such as the first and second argument above). I discuss this in more detail in the next chapter however for present purposes to emphasise two points. The first is that there is a misunderstanding of genetics and that, for present purposes, it relates to *probabilities* rather than *certainties*.[88] Take the following basic example: if one parent has brown eyes and the other blue eyes, there is a one in four (25 percent) probability that a child will have blue eyes. It does not mean that, if these parents had four children, that one of them will *certainty* have blue eyes. The same is true for genetic defects: criminalisation is based upon the *probability* of an event, rather than on the *certain* knowledge that it will occur. The second point is that humanity has reached a stage whereby genetics can be "cheated". By this I mean that pregnancy can be prevented using both male and female contraceptives, women are able to obtain (legal) abortions (I refer here to England and Wales) and CRISPR technology[89] (often referred to as "magic scissors") has been invented whereby DNA can be edited to prevent certain genetic traits from being passed on.

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[86] Hughes 328; Temkin 192

[87] Bailey and McCabe 757-758; Clare Kasemset, 'Should Consensual Incest Between Consanguine Adults Be Restricted?' (2009) 2 Intersect 83, 88

[88] I refer here to genetics in the general sense rather than in a more specific sense of having everyone's genetic code recorded.

[89] CRISPR: Clustered Regularly Interspaced Short Palindromic Repeats.

Those that consider that incest ought to be removed from the scope of the criminal law advance two primary lines of argument to justify this conclusion: the absence of harm between consenting adults; and the respect for autonomy. A third, weaker line of argument, is political reasons.

First, the absence of harm between consenting adults. Card argued that the only basis upon which activity can be criminalised is if it causes harm to another. It therefore follows that, if an activity is consensual, there can be no harm incurred by the participants to the activity.[90] Bailey & McCabe argued that to bring consensual sexual activity within the scope of the criminal law would be a contravention of the principle established by the Wolfenden Report (that the criminal law has no business in the sexual lives of individuals which takes place in private with consent,[91] noted above) and that consensual sexual activity between adult family members in private is akin to consensual sexual activity between homosexuals in private. In response, Temkin argued that one cannot impose the conclusions of the Wolfenden Report "*lock, stock and barrel*" upon consensual sexual activity between adult family members given the nuances of consent which may be different between homosexuals and family members.[92]

The arguments raise several important issues: whether "harm" can be incurred in consensual activity (which in turn leads on from how one defines "harm" in this sense)? Whether harm is the correct basis upon which to criminalise an activity (consensual or not)? How is "consent" to be interpreted (given its nuances) in a family relationship? These are questions which I seek to answer in this thesis.

Second, the respect for autonomy. Hornle argued that the offence of incest ought to be removed from the scope of the criminal law so that the autonomy of the individual (which includes their sexual autonomy to choose a sexual partner, even one from within their own family) will be respected in the way that it would be if they chose a sexual partner outside of their family (or *less* related to them).[93] In response, Temkin

[90] Card 375
[91] Bailey and McCabe 756
[92] Temkin 186-187
[93] Hornle 79

argued that autonomy (and its link to consent) is a problematic concept and that concerns regarding whether an activity is truly consensual or truly consensual (when engaged in with a family member) cannot be brushed aside.[94] Again, the arguments raise important issues relating to autonomy and its link with consent which I seek to answer in this thesis.

Third, political reasons. Spencer argued that, overall, there is no objective reason for the retention of the offence and that it remains criminal due to a lack of political will to abolish it.[95] Indeed, the presence or absence of a will to undertake any action is difficult to assess. In response, Temkin argued that sexual activity between family members is correctly criminalised and therefore, by implication and not specifically addressed, there is no need for a political will to exist.

The tensions that exist in the criminal law require an approach that will, in some ways, resolve it and address the concerns of both side. In this thesis, and outlined in the next section, I propose one possible resolution to the tension.

1.3 Resolving the existing tension: a relational account of autonomy

In the previous section, I identified the tension that exists in the criminal law regarding the criminalisation of consensual sexual activity between adult family members. The tension exists between those that consider that this activity must remain within the scope of the criminal law (due to the harm that it causes) and those that consider that this activity must be removed from the scope of the criminal law (out of respect for personal autonomy).

As noted above, those that consider that incest (in general) ought to remain within the scope of the criminal law advanced three arguments, namely the protection of the young, the protection of the family unit and the genetic argument. These are all harm-based approaches: the harm that would be incurred upon the young; the harm that would be incurred upon the family unit; and the harm that would be incurred upon

[94] Temkin 186-187
[95] Spencer 358

future unborn children. In comparison, those that consider that incest (between consenting adults) ought to be removed from the scope of the criminal law also advanced two arguments, namely the absence of harm between consenting adults and the respect for autonomy. These can (broadly) be described as autonomy-based approaches: no harm is incurred between consenting adults and, even if it were to be incurred, they have consented to it; and adults can autonomously choose their own sexual partners and, if they have consented autonomously then that choice ought to be respected: to consent autonomously, the choice must be made without force, pressure, or coercion of any sort.[96]

This tension between harm-based and autonomy-based approaches is emphasised by the fact that neither approach adequately addresses the problems identified by the other. For example, the sex with an adult relative provisions criminalise both consensual and non-consensual activity. The harm-based approach of those who seek to retain these offences within the scope of the criminal law emphasise that to make a distinction between what is consensual and what is non-consensual does downplay concerns regarding the nature of consent and that it is a "*problematic notion*".[97] The autonomy-based approach of those who seek to remove these offences from the scope of the criminal law, however, emphasise the unfairness of criminalising activity which is consensual (and which would be equally criminal under these provisions had it not been consensual[98]) and autonomous. Questions of consent are naturally linked with questions of autonomy. For example, as I will discuss in more detail in chapter 3, the traditional liberal account of autonomy perceives a *consensual* choice to automatically be an *autonomous* one and *vice versa*.

I argue, therefore, that the tension created by these approaches can be *resolved* (rather than the approaches reconciled with each other) by way of the application of a relational account of autonomy which can address the substance of each approach. A good example of this occurring is grooming. Grooming which occurs in children and continues (or its effect is continued to be felt) into adulthood is not addressed by an

[96] The political reasons argument cannot be described as an autonomy-based approach.
[97] Temkin 186
[98] This argument applies only to Sexual Offences Act 2003, s. 64 (penetration offence), as an offence under s. 65 (penetrated offence) cannot be committed non-consensually (ibid, s. 65(1)(b)).

autonomy-based approach in that it does not fully recognise that decisions made in adulthood (when one is supposed to be autonomous) may be affected by events that occurred in childhood. However, nor is it fully addressed by a harm-based approach in that this approach does not adequately protect the autonomy of those who have, perhaps, been the subject of grooming. The decisions they make in adulthood cannot be assumed to be non-autonomous by the simple fact of grooming alone.

Relational autonomy is a feminist reconceptualisation of autonomy.[99] However, it is not a single conceptualisation, rather it is more of an "umbrella term".[100] Relational autonomy's basic premise is that of shared conviction: the idea that people are socially embedded and that their identities are formed within the context of social relationships and shaped by complex intersecting social determinants such as race, class, gender, and ethnicity.[101]

Relational autonomy is an appropriate methodological framework to use as it attempts to address the "behind the scenes" issues that a traditional liberal account of autonomy is unable to account for. There are several interconnected examples (which are relevant to the issue of consent) which highlight the inadequacies of the traditional liberal account of autonomy.

First, the type of relationship that exists between the adult family members. A traditional liberal account presumes that a relationship between two autonomous adults is an equal one whereas relational autonomy examines the relationship and asks whether the relationship is constructive or destructive therefore it is better at accounting for power differentials which may be present or may be difficult to identify.

Second, the impact of internalised oppression: is the relationship between the adult family members one which is subject to oppression, and which renders one of them

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[99] Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) 4; Natalie Stoljar, 'Feminist Perspectives on Autonomy' (2018) <https://plato.stanford.edu/archives/win2018/entries/feminism-autonomy/> §1 (accessed 15 February 2019)

[100] Mackenzie and Stoljar 4; Jonathan Herring, 'Relational Autonomy and Rape' in Shelley Day Sclater and others (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing 2009) 54

[101] Mackenzie and Stoljar 4

more likely to consent or otherwise consent when they would otherwise not? A traditional liberal account of autonomy presumes that in an equal relationship there is no such oppression however relational autonomy recognises that even in apparently "equal" relationships oppression can take a form which is not recognised as "oppression" in a traditional sense, for example subliminal grooming.

Third, the impact that socialisation and other societal pressures may have upon decisions to consent: is the decision to consent a person's true feeling or is the consent brought about because that is what society expects of the individual? A traditional liberal account of autonomy discounts entirely the possible impact of socialisation upon a person's ability to consent whereas relational autonomy takes such socialisation into account.[102]

A relational account can therefore address some of the difficulties that arise when trying to determine whether consent is present or not. Circumstances which may appear, at face value, to be indicative of consent may, at some deeper level, indicate non-consent. A deeper level examination is a closer examination into the context within which the decision to consent was made, and may not appear in the same way that it does at face value. Such a deeper examination can examine, for example, the overall state of the relationship between the adult family members and not be hindered by the state of the relationship at one specific time. Indeed, the question of "*did X consent?*" is a time-restricted question with only two possible answers: that of "yes" or "no".[103] A deeper level examination into context does not, however, necessarily lead to a conclusion that the face value assessment on consent was incorrect. A deeper examination into context could identify further evidence of consent as well as evidence of non-consent.

A relational account however, whilst seeking to inform autonomy through its deeper level examinations of consent, applies the traditional liberal account of autonomy's "formula of autonomy". The traditional liberal formula of autonomy is based upon the

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[102] Socialisation was one of the reasons for the need for relational autonomy (Diana T. Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 Journal of Philosophy 619, 622)

[103] Vanessa E. Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923, 925; Herring 65

general assumption that consent *equals* autonomy: that an autonomous choice is a consensual one and a consensual choice is an autonomous one.[104] The connection between autonomy and consent is a general assumption however the core value that consent protects is personal autonomy.[105]

A relational account of autonomy would resolve the tension in the criminal law regarding the criminalisation of consensual sexual activity between adult family members in that it would accommodate both the abolitionist value of autonomy by its acceptance that a consensual decision is *prima facie* an autonomous one and the retainer concerns regarding protection and potential grooming by examining whether consent was genuine to determine its validity.

1.4 The aims and objectives of the thesis

The aim of the thesis is to examine the overall questions of why, and how, consensual sexual activity between adult family members should be regulated by the criminal law?

To examine these overall questions, it is necessary to ask several sub-questions. First, is sexual activity between family members correctly criminalised? This will allow me to analyse the arguments for the creation of the offence of sexual activity between family members by exploring the strength of the justifications for the initial criminalisation of the offence, its retention as a criminal offence, and on what basis it ought to be retained by reference to contemporary criminalisation principles. I conclude that whether an activity is brought within the scope of the criminal law is to be determined by reference to the harm principle. However, by itself, this is insufficient when making the final determination of whether to bring an activity within the scope of the criminal law. Something *more* is required. I argue that the something *more* is autonomy. For criminalisation to be justified, it must cause harm *and* does not impact upon a person's autonomy.

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[104] Alasdair Maclean, 'Now You See It, Now You Don't: Consent and the Legal Protection of Autonomy' (2000) 17 Journal of Applied Philosophy 277, 277; Herring 61; Pamela Laufer-Ukeles, 'Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity and Relational Autonomy' (2011) 37 American Journal of Law & Medicine 567, 611

[105] Catherine Elliott and Claire de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70 Modern Law Review 225, 231

Second, if the harm principle alone is insufficient to determine whether an activity is brought within the scope of the criminal law, and that autonomy is required, what account of autonomy ought to be applied? This will me to my analyse the merits of both the traditional liberal account of autonomy and an alternative approach of relational autonomy. I conclude that an alternative approach to autonomy ought to be applied and that, of the various accounts of the alternative approach, a procedural account, with a focus upon critical reflection, is to be preferred.

Third, if an alternative approach of relational autonomy ought to be applied, could it be reflected in the current law? This will allow me to analyse whether, in a practical sense, an alternative approach to autonomy could be applied sense. I conclude that an alternative approach to autonomy is reflected in the current law by reference to the current Crown Prosecution Service guidelines on the sex with an adult relative provisions.

Before providing an overview of how the above aims and objectives are reflected in the chapters of the thesis, it is first necessary to explore the multiple meanings of incest (and to provide a meaning used in later chapters) to address the significance of terminology and how it can misrepresent the activity which it is meant to describe.

1.5 The multiple meanings of "incest"

"Incest" has a significance attached to it. One result of such a significance, is that it has no singular meaning. However, providing a meaning is essential if one is to argue that such activity (when it occurs between consenting adult family members) ought to be removed from the scope of the criminal law.

Knowing "what" we would be removing from the criminal law's scope may be an impossible question to answer for "incest" has no fixed or standardised definition.[106] Incest is an important concept not only in law but also in scientific disciplines such as anthropology, psychology, and sociology. It also has multiple *legal* meanings (as the

[106] David M. Schneider, 'The Meaning of Incest' (1976) 85 Journal of Polynesian Society 149, 149

legal definition varies between jurisdictions, thus further emphasising my point) as well as a *popular* meaning and these are not always identical. To anthropologists, incest can mean anyone within a specified kinship group, to English criminal lawyers it means the relationships specified in the 2003 Act (the "legal meaning").[107] But the person on the Clapham omnibus, with no knowledge of anthropology or the specific terms of the 2003 Act, it may mean something completely different (the "popular meaning"). This raises several problems.

First, most people have fixed notions about the meaning of incest,[108] and these notions may not tally with the legal meaning or with what their next-door neighbour considers to be incest.[109] Though the popular meaning approximates the legal meaning to the extent that it refers to sexual activity between family members,[110] the extent of whom is a member of one's family may differ. For example, sexual activity (or marriage) between first cousins (who share an *average* shared DNA of 12.5%) may be considered by some to be incestuous despite English law not considering such a relationship to be so. Indeed, cousin marriage is relatively common in some cultures in Britain[111] and was historically common. For example, Queen Victoria married her maternal first cousin Prince Albert of Saxe-Coburg-Gotha, Charles Darwin married his maternal first cousin Emma Wedgwood (Darwin's sister also married her first cousin, Wedgwood's brother) and H.G. Wells married his paternal first cousin Isabel Wells.

Second, there is a tendency to lump all sexual relations between kin or family members into one category and call it "incest".[112] This is one example of the popular meaning. Similarly, a host of different sexual activities between kin or family members of varying age and consanguinity are usually classified as incest and are analysed *in toto*.[113] As a result, a father engaging in non-consensual sexual activity with an under-aged daughter is placed in the same category as consensual sexual activity between, for example, two adults who are uncle/niece and no distinction is made between the two.

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[107] Sexual Offences Act 2003, ss. 64(2) & 65(2). See also Punishment of Incest Act 1908, ss. 1(1) & 2(1), and Sexual Offences Act 1956, ss. 10(1) & 11(1).
[108] Cyril Greenland, 'Sex Law Reform in an International Perspective: England and Wales and Canada' (1983) 11 Bulletin of the American Academy of Psychiatry and the Law 309, 320
[109] A degree of disapproval can also vary, for example from "very mild" to "very strong" (Schneider 165).
[110] Though there may also be a difference as to what *type* of sexual activity constitutes incest.
[111] Chris Barton, 'Beyond the nuclear family: another theory of relativity' (2019) 49 Family Law 799, 803
[112] Schneider 152
[113] Ray H. Bixler, 'The Multiple Meanings of "Incest"' (1983) 19 Journal of Sex Research 197, 197

One possible explanation, however, is the inherent illicitness of incest[114] whereby it is associated, at least in the minds of anthropologists, with cannibalism as an example of the "wrong way" to act and being the opposite of what is proper.[115] The focus therefore tends to be upon its overall evil, rather upon the specifics of the individuals involved. Further, the mind wanders to the worst-case scenario whereby the assumption, almost automatically, is made of an aggressive father penetrating his unwilling and underage daughter rather than to consider other possible alternatives.

Due to the non-fixed meaning of incest and the distinction between the legal and popular meaning of it, I seek to distance myself from the term "incest". There are three reasons for this. First, as noted above, the lack of specific definition means that it can mean different things to different people. Second, the image that incest conjures may not be a true reflection of what occurs and therefore the term is potentially biased. Third, the use of the term "incest" is now redundant in English law though the content of the offence remains.

Though the legal meaning (and the name of the offence) can change, the popular meaning is deeply rooted and there has been no apparent alteration of the popular meaning of incest because of the changes enacted by the 2003 Act. I therefore seek to move away from with these descriptions by using the term "consensual sexual activity between adult family members".[116] The use of this term is more accurate in describing *how* the activity is occurring (consensually), *what* is occurring (sexual activity) and with *whom* it is occurring (an adult family member). The term therefore does not carry any "emotional baggage" or conjured up imagery that incest may evoke.

1.6 Chapter outlines

In chapter 2, I ask whether sexual activity between family members is correctly criminalised? To answer this question, I identify the bases upon which the

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[114] Joseph Shepher, *Incest: A Biosocial View* (Academic Press 1983) 27
[115] Schneider 162 & 166
[116] This term is based upon "*consensual adult familial sexual activity*" (Roffee, 'No Consensus on Incest? Criminalisation and Compatibility with the European Convention on Human Rights' 542). This does not however reflect the wording in the 2003 Act and therefore the current law. Rather, I make a distinction between consensual and non-consensual sexual activity.

criminalisation of sexual activity between family members (rather than specifically between adult family members), I then consider the theoretical framework of criminalisation before analysing whether consensual sexual activity between adult family members is correct criminalised by reference to the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. I further argue that, by itself, this is insufficient when making the final determination of whether to bring an activity within the scope of the criminal law. Something *more* is required. I argue that the something *more* is autonomy.

In chapter 3, I consider the foundations of autonomy by establishing the link between the harm principle and autonomy, the link between autonomy and consent, before, finally, considering autonomy as a human rights principle.

In chapter 4, I consider alternative approaches to the traditional liberal account of autonomy. I argue that the criminal law ought to employ a relational autonomy approach as the current meaning of autonomy based upon a traditional liberal account may fail to protect some vulnerable (and adult) family members whose ostensible consent may not be true consent. Such ostensible consent can be achieved, for example, by subliminal grooming or blatant abuses of power and oppression. I also consider a further alternative, advanced by Fineman, with a focus upon vulnerability rather than dependency. I then consider the implications of this alternative approach regarding the formula that consent equals autonomy.

In chapter 5, In this chapter, I consider whether the alternative approach to autonomy – relational autonomy – could be reflected in the current law relating to sex with an adult relative. To determine whether this is the case, I consider the legislative history of the sexual activity between family members provisions to consider the context in which the offence was brought within the scope of the criminal law in the first place and to consider what would be required for it to be removed from scope. I conclude that there is a lack of desire to alter (or repeal) the sex with an adult relative provisions beyond that of maintaining the *status quo* with the continuation of the offence in its current form. As coercion is a key factor to be considered when dealing with both consent under the 2003 Act and the alternative approach to autonomy, I examine the consent provisions and coercion specifically as a prelude to analysing whether the sex

with an adult relative provisions, rather than be removed from the scope of the criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions. I conclude that rather than remove the sex with an adult relative provisions from the scope of the criminal law, the provisions could be amended to better reflect the above guidance, or be otherwise applied in a more uniform way, but that statutory intervention would be required.

In chapter 6 I conclude the thesis.

Chapter 2: Is Sexual Activity Between Family Members Correctly Criminalised?

2.1 Introduction

In this chapter I ask whether sexual activity between family members is correctly criminalised? To answer this question, I identify the bases upon which the criminalisation of sexual activity between family members (rather than specifically between adult family members),[117] I then consider the theoretical framework of criminalisation before analysing whether consensual sexual activity between adult family members is correct criminalised by reference to the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle.

Sexual activity between family members was made a criminal offence in 1908 by the enactment of the Punishment of Incest Act.[118] At the time, and despite previous opposition, it attracted little opposition or attention.[119] Due to the general disgust incest generated, Roffee suggested that "*Members certainly did not want to be seen as opposing the Bill*…" due to concern over repercussions at election time.[120] This implies that, at the time, there may have been a group of Members of Parliament who were opposed to bringing sexual activity between family members within the scope of the criminal law but whom, due to reasons only they themselves knew, chose to remain silent. Whether there was or was not some form of unspoken opposition to the enactment remains unknown. Regardless of any unspoken opposition to bringing sexual activity between family members within the scope of the criminal law in 1908, no such opposition appeared to exist in 1956 when the offence was retained in the 1956 Act.[121] However, this is not surprising as the 1956 Act was a consolidating

[117] Hereafter referred to as the "grounds of justification".
[118] Punishment of Incest Act 1908, ss. 1-2
[119] Sybil Wolfram, *In-Laws and Outlaws: Kinship and Marriage in England* (St Martin's Press 1987) 42
[120] James A. Roffee, 'Lifting the Veil on Incest: the Historical Development of the Offence' (2011) 5 International Journal of Interdisciplinary Social Sciences 297, 308. The previous General Election had been held between 12 January-8 February 1906 and the next being required by 1913 (Septennial Act 1715), though in the event it was held between 15 January-10 February 1910 due to a constitutional crisis it is therefore difficult to image that the attention span of voters in 1913 (had it been "on time") would have recalled voting records from 1908, no matter what the subject.
[121] Sexual Offences Act 1956, ss. 10-11

statute[122] therefore little, if any, debate was possible. As Stevenson noted: "*The incest provisions in sections 1 and 2 of the 1908 Act were simply renumbered as sections 10 and 11 respectively in the consolidating Sexual Offences Act 1956*…"[123] The offence was also retained, though under a different name and in specific regard to adults, in the 2003 Act.[124]

I consider firstly the identified grounds of justification upon which the criminalisation of sexual activity between family members, rather than specifically between adult family members, were based.[125] These grounds of justification have included reasons that were used both to initially *bring* sexual activity between family members within the scope of the criminal law and to *retain* it within scope.[126] These grounds of justification have been grouped into groups A to D.[127] In examining the grounds of justification upon their own merits, I refer to the context that existed at the time of their use as a justification.[128]

Having identified the grounds of justification for the criminalisation of sexual activity between family members, I discuss the theoretical framework of criminalisation[129] before analysing whether, in specific regard to consensual sexual activity between adult family members, criminalisation is justified by reference to the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle.[130] The identification and analysis of the grounds for justification must come before any analysis of the contemporary criminalisation principles as these principles draw upon the justifications as source material. In this chapter, I argue that, amongst the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle, that it is the harm principle that is the correct basis for, not

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[122] Under the Consolidation of Enactments (Procedure) Act 1949.
[123] Kim Stevenson, '"These are cases which it is inadvisable to drag into the light of day": Disinterring the Crime of Incest in Early Twentieth Century England' (2016) 20(2) Crime, History & Societies 31, 52
[124] Sexual Offences Act 2003, ss. 64-65
[125] Some of the grounds of justification applied to sexual activity between *adult* family members and some applied to *all* sexual activity between family members regardless of whether the participants were both adults, both children or adults/children.
[126] For ease, I refer to them in the present tense, rather than past tense.
[127] See 2.2, below.
[128] See, in general, Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 History & Theory 3
[129] See 2.3, below.
[130] See 2.4, below.

only, bringing sexual activity between family members within the scope of the criminal law, but also any activity within scope. By “correct”, I argue that this means the most justifiable of the contemporary criminalisation principles.

2.2 The grounds of justification

In this section, I provide an overview of the eight grounds of justification which have been advanced for bringing sexual activity between family members within the scope of the criminal law. I explore the grounds as they were presented at the relevant time before giving my analysis upon that presentation.

To identify the eight grounds of justification, I conducted a review of the criminal Bills and the debates upon them (if any) which sought either to bringing sexual activity between family members within the scope of the criminal law, retain it within scope, or remove it from scope.[131] For the purposes of this review, it was immaterial whether or not the Bill was enacted. From these debates, I extracted reasons that were advanced for bringing sexual activity between family members within the scope of the criminal law (these “reasons” were then summarised to form “grounds”).

For the purposes of the review, it was immaterial whether the reason came from a government minister, or a backbench member of either House of Parliament. Nor was it material, for the purposes of identifying a ground of justification, whether the reason made coherent or logical sense. For example, ground of justification (1), was that incest occurs therefore it ought to be criminalised when it occurs. A minimal threshold as to what constituted a reason was employed for the maximum number of reasons and therefore grounds of justification could be identified.[132]

From the above methodology, I identified eight grounds of justification as follows: (1) incest occurs therefore it ought to be criminalised when it occurs; (2) incest is already thought to be a criminal offence; (3) incest is immoral; (4) incest is repugnant; (5) incest carries a genetic risk; (6) criminalisation protects the family unit; (7) criminalisation

[131] For a list of Bills see Appendix 2.
[132] The minimal threshold was that the speech gave *some* reason for the criminalisation of sexual activity between family members. The evidence of this minimal threshold is in grounds (1) and (2).

prevents psychological harm; and (8) criminalisation protects against sexual exploitation and other breaches of trust. Although eight grounds of justification have been identified and advanced as a basis for the criminalisation (and retention) of sexual activity between family members, "*it is hard to ascertain a single operative reason for the re-enactment of the offence*."[133]

For the purposes of analysis, I group the eight grounds of justifications in four groups as follows. First, **"Group A"**. This group consists of (1) incest occurs therefore it ought to be criminalised when it occurs; and (2) incest is already thought to be a criminal offence. This group relates to those grounds of justification which I consider to be spurious, and which have no real value when considering the justification of the criminalisation of sexual activity between family members.[134] Second, **"Group B"**. This group consists of (3) incest is immoral; and (4) incest is repugnant. This group relates to those grounds of justification which are linked to moral or otherwise offensive nature of sexual activity between family members.[135] Third, **"Group C"**. This group consists of (5) incest carries a genetic risk; and (6) criminalisation protects the family unit. This group relates to those grounds of justification which can be described as loosely harmful in nature, but which are not direct harms to a person or group of people.[136] Finally, **"Group D"**. This group consists of (7) criminalisation prevents psychological harm; and (8) criminalisation protects against sexual exploitation and other breaches of trust. This group relates to those grounds of justification which can also be described as harmful in nature, but which, as compared to Group C, are direct harms to a person or group of people.[137] "Group D" is the strongest group of grounds of justification.

Before turning to consider the grounds of justification, it is necessary for me to briefly set out how they are to be understood given that they are not contemporaneous.

2.2.1 Understanding the grounds of justification

[133] Roffee 308
[134] See 2.2.2, below.
[135] See 2.2.3, below.
[136] See 2.2.4, below.
[137] See 2.2.5, below.

In "*Meaning and Understanding in the History of Ideas*" Skinner asked the question "*what are the appropriate procedures to adopt in the attempt to arrive at an understanding of the work?*"[138] Skinner noted the two "*orthodox*" approaches of the context of the work (or speech) which determines the meaning and therefore the framework to understand it, and the autonomy of the text (or, again, speech) as the sole necessary key to its own meaning.[139] Does the text (or speech) speak for itself alone or must it be read in its own cultural context? Skinner considers that both approaches lack a means of achieving a "proper understanding" of any given work.[140]

When analysing what a particular Member of Parliament has said (and therefore written in *Hansard*) how far can one refer to the text as a standalone statement of purpose or statement of views on the criminalisation of sexual activity between family members, or should one view it in a complete context as to what those views could have been based upon context, some of which even the speaker may not have been aware of at the time?

A complete context cannot be established for any statement of view made by a Member of Parliament, rather only a partial context can be sought and even this may not be sufficient to evidence the motivations or beliefs behind the speech. For example, the Member of Parliament may make a speech in support of a cause or a Bill for which they have no interest in whatsoever but are merely showing support to raise their own political profile or because they have been asked to make such a speech by their party whips. The "context" could therefore be viewed in several ways, and this may change for a Member of Parliament from issue-to-issue and Bill-to-Bill, and in one sense it may not be possible to establish the context of a particular speech. For example, there may be a political context (just mentioned), a financial context, or a "family" or incestuous context, specifically to the Member of Parliament, as well as the overall cultural context referred to by Skinner.

Skinner considered that "…*it will never in fact be possible simply to study what any given classic writer has said…without bringing to bear some of one's own expectations*

[138] Skinner 3
[139] Ibid 3
[140] Ibid 3-4

about what he must have been saying."[141] It is therefore possible for one to look back and consider that these contexts must or may have played a part in the Member of Parliament's think (as we would expect) but they may not have in reality have played any part whatsoever in the Member's thinking at the time. Further, one must not make the mistake, when viewing the speeches of Members of Parliament offering grounds for justification, of thinking that they *enunciate some doctrine on each of the topics*".[142] Skinner considered that there is a danger of taking "*some scattered or quite incidental remarks*" and turning them into their doctrine[143] or, similarly, "*reading in*" a doctrine which was not intended to be conveyed.[144] The difficulty that arose, as one shall see below, is that there is little that can adequately be described as "doctrine" on the issue of sexual activity between adult family members (save only the belief that it should not be engaged in at all). Thus, the ("*danger*[ous]") action I have tried to avoid is that of "*apparently*" seeing something rather than "*really*" seeing it.[145]

Whilst Skinner considered that the context may "*help*" in the understanding of a text (or speech), he viewed it as "*mistaken*".[146] To take one brief example to elaborate this point, Major Christopher Lowther MP made a speech opposing the Second Reading of the Criminal Law Amendment Bill 1921[147] and emphasising, *inter alia*, that the House of Commons was dealing with questions of law and crime rather than questions of morals.[148] If one were to analyse the speech, it may *help* to understand it knowing Major Lowther's background and that he was a member of an aristocratic family headed by the Earl of Lonsdale, that two of his father's cousins had married,[149] or that his daughter would (after his death) marry her own third cousin the 7th Earl of Lonsdale, but ultimately one could argue that this context does not go to greatly understanding the speech or his opposition to the Bill.

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[141] Ibid 6
[142] Ibid 7
[143] Ibid 7
[144] Ibid 9
[145] Ibid 24
[146] Ibid 43
[147] The purpose of the Bill was to amend the Criminal Law Amendment Acts 1885-1912 and repeal Punishment of Incest Act 1908, s. 5.
[148] HC Deb 15 July 1921, Vol. 144, cols. 1657 & 1663. Duff made the synonymous point that systems of criminal law and punishment are political tasks, not moral ones (R.A. Duff, 'Political Retributivism and Legal Moralism' (2012) 1 Virginia Journal of Criminal Law 179, 179).
[149] Major Lowther's father was James Lowther, Speaker of the House of Commons 1905-21 who was created 1st Viscount Ullswater upon his retirement.

I now turn to consider the four groups.

2.2.2 "Group A"

Group A consists of (1) incest occurs therefore it ought to be criminalised when it occurs; and (2) incest is already thought to be a criminal offence. This group relates to those grounds of justification which I consider to be spurious, and which have no real value when considering the justification of the criminalisation of sexual activity between family members.

That incest occurs therefore it ought to be criminalised when it occurs was advanced as a ground for justification by Colonel Amelius Lockwood MP, the Parliamentary spokesman of the National Vigilance Association,[150] during the passage of the Incest Bill 1903[151] (for which he was the sponsor). He argued that it was right that sexual activity between family members ought to be brought within the scope of the criminal law as many such acts were being committed "*in the rural districts of England*" therefore he did not think that Members of Parliament would imagine that "*such crimes should not be severely punished*."[152] *By itself* this is flawed reasoning by Colonel Lockwood: simply because an act takes place is not a sufficient justification for it to be criminalised. However, he may have been guided by his own *moral* views.[153]

Sexual activity between family members was most likely occurring as Col. Lockwood suggested, however, such an assertion is not in and of itself a sufficient ground of justification. If it were sufficient, there would be grounds to justify the criminalisation of normal, everyday activities such as watching television, using a mobile telephone, or going shopping. The view that sexual activity between family members acts *were* being committed was a common belief at the time. For example, in "*The Bitter Cry of Outcast London*" the author stated that "*Incest is common; and no form of vice and*

[150] Stevenson 39
[151] *Incest Bill* (1903) (HC Bill 51). The 1903 Bill was passed by the House of Commons but failed in the House of Lords at Second Reading.
[152] HC Deb 5 March 1903, Vol. 118, col. 1683
[153] See 2.2.3, below.

sensuality causes surprise or attracts attention."[154] Despite its apparent commonality, it was later pointed out during the passage of the Incest Bill 1908[155] that as there was no suggestion that such activity was on the increase (at that time) there was in fact *less* of a need to criminalise it.[156]

The question, it seems, is why such a reason was advanced at all given its obvious flaws? The answer may well lie in Colonel Lockwood's own speech in which he presented this ground of justification. He stated that: "*he had no wish to enter into any detailed explanation…which dealt with a rather disagreeable subject*."[157] This unwillingness suggests that his ground of justification sought to rely on other members' unstated reasons in that Colonel Lockwood sought to open the door for the argument by providing a vague ground, but it was for other members to complete the journey with their own reasons. At the time of the presentation of this ground (during the Incest Bill 1903), the Government had no view on it. However, by the time of the Incest Bill 1908 they considered that it was essential for such activity to be stopped given the State's "*special interest*."[158] Interestingly, if the State had such a "special interest" it would have existed in 1903 as it did in 1908 and, despite this, there had been no attempt to stop such activity beyond stating that of a person must not do what the law forbids. No evidence of the perceived deterrent effect was ever advanced or provided (nor to less "drastic measures").[159]

That incest was already thought to be a criminal offence was advanced during the passage of the Incest Bill 1908. It was argued by Mr Donald Maclean MP that: "*Out of every 1000 people, 999 were under the impression that it was a crime, and most people would be astonished to hear that it was not*."[160] This has close links with the previous ground of justification in that simply because an activity is *thought* to be criminal does not make it so. The Government's view regarding this ground of justification was that if sexual activity between family members was thought to be

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[154] Andrew Mearns, *The Bitter Cry of Outcast London: An Inquiry into the Condition of the Abject Poor* (James Clarke & Co 1883) 12
[155] *Incest Bill* (1908) (HC Bill 12) (enacted as Punishment of Incest Act 1908)
[156] HC Deb 26 June 1908, Vol. 191, col. 280
[157] HC Deb 5 March 1903, Vol. 118, col. 1683
[158] HC Deb 26 June 1908, Vol. 191, col. 284
[159] Roffee 307-308
[160] HC Deb 26 June 1908, Vol. 191, col. 283

criminal by the public then the law should match the public's views.[161] The Government did not rely upon any specific evidence for this and appeared to merely respond to Mr Maclean's assertions. Indeed, a government does not want to be viewed as being out of touch with the views of the public.

2.2.3 "Group B"

Group B consists of (3) incest is immoral; and (4) incest is repugnant. This group relates to those grounds of justification which are linked to moral or otherwise offensive nature of sexual activity between family members.

That incest is immoral was advanced as a ground of justification during the passage of the Incest Bill 1908. It was noted (rather than argued) by Mr Herbert Samuel (the Under-Secretary of State for the Home Department) that sexual activity between family members "*was not merely the case a moral offence*…"[162] The Government dealt with immorality in passing, rather than in substance, because of the weakness of the argument.

That incest is repugnant (or disgusting) was not advanced directly as a ground of justification, rather it has only been implied. It was impliedly advanced during the passage of the Incest and Related Offences (Scotland) Bill 1985-86[163] in which Lord Wilson of Langside argued that, although the language of the Bill was different from that of the *Incest Act 1567*,[164] the level of repugnance was the same as in 1567 therefore the offence ought to continue in Scotland.[165] This ground of justification has been rarely used in Parliament though it has been used more frequently in departmental reports. For example, the Scottish Law Commission referred to one commentator who considered that the purpose of making incest a crime was to declare that society regards it as a crime with a "*high degree of revulsion and disgust*."[166] This was a view shared by the Criminal Law Revision Committee who stated that: "*Our*

[161] HC Deb 26 June 1908, Vol. 191, col. 284
[162] HC Deb 26 June 1908, Vol. 191, col. 284
[163] *Incest and Related Offences (Scotland) Bill* (1986-86) (HC Bill 150)
[164] Incest Act 1567
[165] HL Deb 9 December 1985, Vol. 649, cols. 65-66
[166] Scottish Law Commission, *The Law of Incest in Scotland (Scot Law Com No 69)* (HMSO 1981) para. 3.17

society regards incest with abhorrence…"[167] Likewise, in *Setting the Boundaries*, sexual activity between family members was viewed with "abhorrence".[168]

2.2.4 "Group C"

Group C consists of (5) incest carries a genetic risk; and (6) criminalisation protects the family unit. This group relates to those grounds of justification which can be described as loosely harmful in nature, but which are not direct harms to a person or group of people.

That incest carries a genetic risk has been described as the most "*overrated*" ground of justification for sexual activity between family members being within the scope of the criminal law.[169] Its use as a direct justification has been rare in Parliament, with only two references.[170] Before reviewing these references, it is first necessary to highlight the science behind genetic risks.

It is said that genetic risks are increased when two individuals are closely related ("consanguineous"). Two individuals are said to be consanguineous if they have at least one ancestor in common.[171] However, for practical purposes, the relationship to the common ancestor must be detectable therefore common ancestors more remote than great-great-grandparents are rarely considered.[172] Geneticists calculate how "inbred" someone is by using two factors. First, *r* (known as the relationship coefficient), which is used to calculate the amount of average shared DNA.[173] Second, *f* (known as the inbreeding coefficient), which is the probability that an individual receives, at any given locus, identical genes by descent (not the actual number of

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[167] Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences (Cmnd 9213)* (HMSO 1984) para. 8.1
[168] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences - Volume 1* (HMSO 2000) para. 5.1.4
[169] Martin Ottenheimer, *Forbidden Relatives: The American Myth of Cousin Marriage* (University of Illinois Press 1996) 118; Illinois Compiled Statutes Annotated ch. 38 *§11-11* (Committee Comments) 445
[170] Wolfram 138; Adam Kuper, 'Incest, Cousin Marriage and the Origin of the Human Sciences in Nineteenth-Century England' (2002) 174 Past & Present 158, 183
[171] Sewall Wright, 'Coefficients of Inbreeding and Relationship' (1922) 56 American Naturalist 330, 333
[172] L.L. Cavalli-Sforza and W.F. Bodmer, *The Genetics of Human Populations* (W.H. Freeman & Co 1971) 341
[173] E. Ya Tetushkin, 'Genetic Aspects of Genealogy' (2011) 47 Russian Journal of Genetics 1288, 1300

identical genes), *f* is half of *r*.[174] *f* is a stand-alone figure (measured on a scale of 0 to 1) and alters when the number of generations consider is increased.[175] It is impossible to say with absolute certainty how much shared DNA a person has with another person, even with close family members. Whereas the average between parent/child is 50 percent, it could be 40 percent (with 60 percent shared with the other parent).

In our average shared DNA, we inherit genes some of which are dominant, and some are recessive. Deleterious genes tend to be recessive if they are not manifested.[176] I shall use my own eye colour as an example. I have brown eyes. One of my parents has blue eyes and the other brown eyes therefore, and without knowing with certainty the eye colour of my grandparents, I may have a dominant brown eyes gene and a recessive blue eyes gene, or I may have both a dominant and recessive brown eyes gene. If two people with identical recessive genes have children, there is a probability that they may produce a child in which that recessive gene becomes dominant. This does not however mean that dominant genes are "good" and recessive genes are "bad", for the reverse can be true. If recessive traits are desirable inbreeding can be "positively advantageous".[177] Coming back to my own eye colour example, if I do have a recessive blue eyes gene, and I have children with someone who also has brown eyes but who also may have a recessive blue eyes gene, there is the possibility that we may produce a child with blue eyes.

The passage of genetic risks to children is a costs-benefits analysis, though a risk is not being taken *per se*. For example, if you have a child, there is a 50 percent chance of having a boy and a 50 percent chance of having a girl, you do not incur a cost or a benefit if either is born, rather you have just "played the game". Take the following example. The inbreeding coefficient for first cousins is 0.0625 (or 1 in 16) therefore if first cousins decide to have a child together the amount of average *non-shared* DNA is 15 in 16 (or 93.25 percent). For siblings, the inbreeding coefficient is 0.25 (or 1 in 4) therefore the amount of average *non-shared* DNA is 3 in 4 (or 75 percent). If I

[174] Cavalli-Sforza and Bodmer 343, 345 & 348
[175] Alan H. Bittles, *Consanguinity in Context* (Cambridge University Press 2012) 85
[176] James F. Crow and Motoo Kimura, *An Introduction to Population Genetics Theory* (Harper & Row 1970) 61
[177] George P. Murdock, *Social Structure* (Macmillan 1949) 290; Wolfram 145

suggested there was a 75 percent chance of winning the lottery, has a risk *really* been taken?

Wright conducted a series of inbreeding experiments on rodents. In one experiment he bred brothers and sisters together, it took eight generations of continuous mating for the inbreeding coefficient to reach 0.9 and, after eleven generations of continuous mating, the inbreeding coefficient had reached 0.95. In another experiment, he bred second cousins and it took sixteen generations of continuous mating for the inbreeding coefficient to reach 0.5 (the same as a sibling mating).[178] These experiments establish that "inbreeding" takes many generations.[179] It is not therefore a single generation of sexual activity between family members that creates the genetic risk, but rather multi-generations of such activity.[180]

The first reference to genetic risks was during the passage of Incest Bill 1908 in which Mr Herbert Samuel (the Under-Secretary of State for the Home Department) stated that such activity "…*might entail consequences of a disastrous kind on the offspring*…"[181]

There are two obvious interpretations of what disastrous consequences *might* occur. First, that the consequences of incestuous sexual intercourse may be disastrous for the children who *might* suffer from generic defects as a result (the genetic risk interpretation).[182] Second, the offspring born of incestuous sexual intercourse *might*, if their parentage became known, be subject to stigma as a result (the stigmatisation interpretation). Both the genetic risk and stigmatisation interpretations are possible consequences that might occur, though, equally, they might not occur. However, as the Minister did not elaborate further in his speech, it is not possible to attribute his specific meaning: he could have meant one or the other, or both.[183]

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[178] Sewall Wright, 'Systems of Mating: V. General Considerations' (1921) 6 Genetics 167, 172
[179] Ibid 172
[180] L.L. Cavalli-Sforza, *Elements of Human Genetics* (2nd edn, W.A. Benjamin 1977) 1-2
[181] HC Deb 26 June 1908 Vol. 191, col. 284
[182] Though there has been a long-established belief that sexual activity between family members was the cause of sickly children, it was previously believed that it was due to divine disapproval rather than due to genetic reasons (Kuper 168).
[183] Skinner 24

Wolfram suggested (and then discounted) that the failure to use genetic factors at the time of the initial Incest Bills was due to an ignorance of such factors.[184] Wolfram noted that experts at the time were aware of such factors however they were not agreed on the possible "evils" of inbreeding.[185] The genetic argument therefore was not entirely favourable for bringing sexual activity between family members within the scope of the criminal law.[186]

The second reference to genetic risks was during the passage of Sexual Offences Bill 2003[187] in which Baroness Scotland of Asthal (the Minister of State, Home Office) stated that the Government's view was that: "…*we are content that the primary motivation for the "sex with an adult relative" offences should be concerned with morality and eugenics – gene mutation in children born same-blood unions*."[188] This is clearly an error on the Minister's part given the overall intentions behind the Sexual Offences Bill as set out in *Setting the Boundaries*.

Genetic risks have been more frequently used as a ground of justification in departmental reports and in case-law.[189] The genetic effects of incest were considered by the Scottish Law Commission to be of "*fundamental importance*."[190] The Criminal Law Revision Committee also viewed genetic risks as one of two bases for the bringing sexual activity between family members within the scope of the criminal law (the other being the social and psychological consequences).[191] Whilst the latter basis brings within its scope (and recognition of) adoptive and non-biological relationships in which there are no genetic risks, *Setting the Boundaries* firmly rejected the former as a ground for justification as to place reliance upon it would be "*treading a dangerous*

[184] Wolfram 139
[185] Ibid 141
[186] Ibid 142 & 145
[187] *Sexual Offences Bill* (2003) (HC Bill 128)
[188] HL Deb 17 June 2003, Vol. 649, col. 742
[189] Though, see *R v Murphy (John)* (1981) 3 Cr App R (S) 285, 286 (Mustill J): "*There was no genetic risk, for she had been sterilised*."
[190] Scottish Law Commission paras. 3.19-3.23
[191] Criminal Law Revision Committee para. 8.8

path".[192] Despite this view, it was not until 2008 that adoptive relationships, where no genetic link exists, were brought within the definition of prohibited relationships.[193]

Though criminalisation protects of the biological and functional family unit is a stronger ground of justification than any of the previous grounds, it has never been used in Parliamentary debates.[194] It has however been used by departmental reports. In the Scottish Law Commission's 1981 report, they considered that "…*there is a core of theory associating the prohibition with the need to preserve the family*…"[195] In *Setting the Boundaries*, this ground of justification was advanced in lieu of a genetic risk argument (as noted above) and was the ground upon which the rationale for the offence name-change was based.[196]

The need for the State to "protect" the family must be balanced with the interests of individuals in freely selecting sexual and marriage partners.[197] It appears that it is *automatically* assumed that sexual activity between family members destroys a family unit however Noble & Mason view this as a false assumption.[198] They perceived sexual activity between family members not as a *cause* of family disruption (or ultimate destruction) but as a *symptom* of family disruption.[199] Sexual activity between family members is an *effect* of family breakdown, rather than a *cause* of the breakdown. It is therefore arguable that bringing within the scope of the criminal law of sexual activity between family members upon this ground of justification would be a futile effort: one may be trying to protect a family that may already be irreparably broken. Though the "institution" of the family *may* be protected, I am not focussing upon generalisations.

2.2.5 "Group D"

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[192] Home Office para. 5.1.6 & 5.1.9. This provides evidence of the move regarding legislation from the biological to the functional family.
[193] Sexual Offences Act 2003, ss. 64(3)(za)-(zb) & 65(3)(za)-(zb) (inserted by Criminal Justice & Immigration Act 2008, s. 73, Sch. 15, paras. 5(3) & 6(3))
[194] O.M. Stone, 'The Last of the "In-Laws"' (1960) 23 Modern Law Review 538, 539 (*If consideration was at any time given by the legislature to the dual role of the prohibited degrees of marriage as ensuring the integrity of the family circle as well as promoting biological wellbeing, there is no evidence of it*.")
[195] Scottish Law Commission paras. 3.10-3.16 & 6.3
[196] Home Office paras. 5.1.9 & 5.5.5
[197] Margaret M. Mahoney, 'A Legal Definition of the Stepfamily: The Example of Incest Regulation' (1993) 8 Brigham Young University Journal of Public Law 21, 35
[198] Mary Noble and J.K. Mason, 'Incest' (1978) 4 Journal of Medical Ethics 64, 67
[199] Ibid 67; Ellen Edge Katz, 'Incestuous Families' (1983) Detroit College of Law Review 79, 87

Group D consists of (7) criminalisation prevents psychological harm; and (8) criminalisation protects against sexual exploitation and other breaches of trust. This group relates to those grounds of justification which can also be described as harmful in nature, but which, as compared to Group C, are direct harms to a person or group of people. This is the strongest group of grounds of justification.

That sexual activity between family members incurs psychological harm upon those that engage in it has never been used directly in Parliamentary debates as a ground for justification. It has however been used by departmental reports which relied upon psychological studies.[200]

In *Setting the Boundaries* the incursion of psychological harm was used as a basis for extending the criminal law (as it stood under the 1956 Act) to sexual activity beyond penile-vaginal penetration on the basis that other forms of sexual activity can be equally harmful.[201] Earlier reports, such as the one by the Criminal Law Revision Committee, relied upon psychological studies which defined "incest" more broadly and which focused upon children and the vulnerable (rather than upon adults), and which made no distinction between consensual and non-consensual sexual activity.[202]

Factors such as those just referred to do affect the strength of the psychological harm ground of justification as they conflate issues which ought to be separated. For example, conflating apparent consensual sexual activity with apparent non-sensual sexual activity weakens the overall strength of whether psychological harm has been incurred. The reality is that consensual and non-consensual sexual activity ought to be treated separately, as should sexual activity that involves only adults, only children, from that involving adults *and* children.

The studies of psychological harm have primarily centred upon children and the general view is that "harm" *is* caused "…*either at the time of the incident or later*."[203]

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[200] See, for example, Criminal Law Revision Committee para. 8.8.
[201] Home Office para. 5.2.1
[202] Phyllis Coleman, 'Incest: A Proper Definition Reveals the Need for a Different Legal Response' (1984) 49 Missouri Law Review 251, 256
[203] Scottish Law Commission para. 3.10

Finkelhor, however, suggested that "…*it is possible that a majority of these children are not harmed*."[204] Whilst the generalisation that not everyone *is* harmed by a particular experience that they may share (and which *some* would consider to be harmful) is a valid one, it is important to avoid such generalisations. Harm itself ought to be evidenced in each case and no general rule can apply: because one person has been *harmed* because they engaged in a particular activity does not equate to every person that engages in the same activity must also have been harmed.[205]

Given these concerns, that sexual activity between family members incurs psychological harm upon those that engage in it must be considered with some caution.

The final ground of justification was that bringing sexual activity between family members within the scope of the criminal law was to protect against sexual exploitation and other breaches of trust. This ground of justification was advanced during the passage of the Sexual Offences Bill 2003.

During the passage of the 2003 Bill, Baroness Scotland of Asthal (the Minister of State, Home Office) stated that:

> "*Our general policy on the offences in Part 1 has been that the criminal law should intervene only if sexual behaviour is non-consensual, exploitative or abusive and that it has no role to play in consensual activity that does not cause harm*."[206]

Unfortunately, the Minister immediately backtracked by the reference to the primary motivations for the sex with an adult relative provisions being morality and eugenics.[207] One possible reason for this was because the Government's general policy aims of "*non-consensual, exploitative or abusive*" did not sit well with the sex with an adult

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[204] David Finkelhor, 'What's Wrong with Sex Between Adults and Children? Ethics and the Problem of Sexual Abuse' (1979) 49 American Journal of Orthopsychiatry 692, 693 (this suggestion by Finkelhor dates from 1979 and must therefore be viewed in that light and with some caution); see also Archbishop'sGrouponTheLawofAffinity, *No Just Cause - The Law of Affinity in England and Wales: Some Suggestions for Change* (CIO Publishing 1984) para. 208: "…*although the younger person is not likely to be damaged or hurt in every such instance*…"

[205] Coleman 267

[206] HL Deb 17 June 2003, Vol. 649, col. 742

[207] HL Deb 17 June 2003, Vol. 649, col. 742

relative provisions. The focus of the Minister therefore shifted from exploitation and abuse (regarding children) to morality and eugenics (regarding adults). This suggests that the rationale for the sex with an adult relative provisions is suspect for reliance upon the protection of children is not applicable to consensual adult relationships.[208]

The protection against sexual exploitation and other breaches of trust was described in *Setting the Boundaries* as the "primary aim" of legislation.[209] This is in keeping with Baroness Scotland of Asthal's initial statement. However, the report went further by stating that: "*The rationale for the offence is the need to protect children and more vulnerable people within the family*…"[210] and emphasising that sexual activity between family members was a "f*undamental breach of trust by one family member to another*."[211]

Breaches of trust are not unique to sexual activity between family members. For example, the rape of one partner by another is a grievous breach of trust. It was however to prevent breaches of trust that prompted the extension of the list of prohibited relationships within the 2003 Act to include uncles and aunts as well as nephews and nieces.[212] The extension to these relationships recognised possible breaches of trust and a clear power differential.

2.2.6 Summary

The purpose of this section has been to provide an overview of the grounds of justification for the bringing of sexual activity between family members within the scope of the criminal law. The grounds of justification were obtained from a range of sources and therefore it is difficult to discern specific focus. The question asked by Skinner is whether they enunciate any form of doctrine or are they just scattered words?[213]

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[208] Roffee 309
[209] Home Office para. 5.5.3
[210] Ibid para. 5.5.5
[211] Ibid para. 5.1.4
[212] Sexual Offences Act 2003, ss. 64(2) & 65(2)
[213] Skinner 7

The grounds of justification do not offer any form of coherent doctrine, either collectively or individually. The grounds of justification contained within Groups A, B and C are piecemeal. The only grounds of justification which come close to forming some kind of coherent doctrine are in Group D as they originated from the Home Office review in *Setting the Boundaries*. Unfortunately, as was seen when reviewing Baroness Scotland of Asthal's speech during the passage of the Sexual Offences Bill 2003 was that even a clear doctrine of "*non-consensual, exploitative or abusive*" can be led astray by scattered words referring to morality and eugenics.

The grounds of justification were discerned from the legal development of the offence, they are not the grounds of justification that I say can or should apply. There are criticisms that can, and have, been made of these grounds of justification, especially those made regarding the Sexual Offences Bill 2003. For example, the aim of the Government was to pass the Bill quickly without ensuring consistency. The dissonance between the 2003 Act and its ability to achieve its goals in that the 2003 Act presents as protecting children but, by doing so, targets individuals engaging in supposedly morally repugnant acts or the prevention of genetically defects.[214]

2.3 The theoretical framework of criminalisation[215]

To determine whether consensual sexual activity between adult family members is correctly within the scope of the criminal law, it is first necessary to identify the correct basis for bringing any activity within the scope of the criminal law. In the next section, I consider the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. I then give my reasons why, having considered these contemporary criminalisation principles, I consider that the correct basis for bringing (or retaining) any activity within the scope of the criminal law is the harm principle. However, before turning to consider the contemporary criminalisation principles, the theoretical framework of criminalisation requires attention.

[214] Roffee 309-310

[215] In discussion the theoretical framework of criminalisation, I do not, as Duff does in *The Realm of Criminal Law*, advocate any specific "master principles" as I believe such a discussion would take me too far from the primary question of this thesis.

Criminalisation is a response to a perceived problem[216] and generally fulfils the goal of evaluating legislation,[217] with the central question being: what activity *can* the legislature legitimately subject to prohibition and potential punishment?[218] This question, however, has tended to be answered with "*how should we criminalise this*", rather than "*ought we to criminalise this*".[219] Indeed the challenge is not so much as to reduce the scope of the criminal law but, rather, to develop a more principled criminal law.[220]

The question of "what ought to be criminalised?", centres on those activities which a State chooses to prohibit based upon its own societal and political norms and, when new activities come along, whether they are a violation of those norms. The question of whether an activity ought to be criminalised therefore tends not to focus on activities which are considered wrong in themselves.[221] There would, therefore, be no question of removing murder from the scope of the criminal law however the question of whether cannabis ought to be removed from scope is an open one. Indeed, the fact that the question of whether consensual sexual activity between adult family members ought to be retained within the scope of the criminal law necessarily implies that it is an offence that violates societal norms rather than being considered as wrong in itself. I accept, however, that there is a more nuanced and complex relationship between societal norms and what is considered wrong with each example just given.

Stringent conditions must be satisfied before the State is justified in enacting criminal laws[222] because, without such conditions, the State could act in an arbitrary and coercive way towards its citizens. One such condition must be to provide reasons and

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[216] R.A. Duff, 'Towards a Modest Legal Moralism' (2014) 8 Criminal Law & Philosophy 217, 226

[217] Javier Wilenmann, 'Framing Meaning Through Criminalization: A Test for the Theory of Criminalization' (2019) 22 New Criminal Law Review 3, 4

[218] Douglas Husak, 'Crimes Outside the Core' (2004) 39 Tulsa Law Review 755, 773; A.P. Simester and Andrew von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 3; R.A. Duff, *The Realm of Criminal Law* (OUP 2018) 39

[219] John Lawrence Hill, 'The Constitutional Status of Morals Legislation' (2009) 98 Kentucky Law Journal 1, 13

[220] Duff, *The Realm of Criminal Law* 2 (Duff seeks to develop a normative theory of criminalisation in this work)

[221] This can lead to issues with overcriminalisation, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008)

[222] Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 Oxford Journal of Legal Studies 207, 207

justifications for criminalisation.[223] The reasons must be specific, rather than general,[224] and without the ability to provide this it is doubtful whether any wrong existed in the first place. It is for this reason that I am conducting an analysis of the grounds of justification for retaining sexual activity between family members within the scope of the criminal law.

In June 1999, Lord Dholakia asked the UK Government two questions on the creation of new criminal offences. The first asked how many criminal offences had been created or proposed since 1 May 1997 in both public and private legislation.[225] The second asked what principles were observed when proposing the creation of new criminal offences.[226] As to the first, the response of Lord Williams of Mostyn (the Lord President of the Council) was that, in public legislation, six new offences had been created and 27 new offences were being proposed and, in private legislation, eight new offences had been created and 73 new offences were being proposed (of which 23 were identical to ones already created in another private statute).[227] As to the second, the response of Lord Williams was that:

> "*The Government are mindful that the criminal justice system is a scarce resource and take the view that new offences should be created only when absolutely necessary. In considering whether new offences should be created, factors taken into account include whether:*
> - *the behaviour in question is sufficiently serious to warrant intervention by the criminal law;*
> - *the mischief could be dealt with under existing legislation or using other remedies;*
> - *the proposed offence is enforceable in practice;*
> - *the proposed offence is tightly drawn and legally sound; and*
> - *the proposed penalty is commensurate with the seriousness of the offence*."[228]

This response does not address what principles are observed when considering whether to maintain an activity within the scope of the criminal law. There are no

[223] Ibid 232; Douglas Husak, 'Disgust: Metaphysical and Emperical Speculations' in Andrew von Hirsch and A.P. Simester (eds), *Incivilities: Regulation Offensive Behaviour* (Hart Publishing 2006) 110
[224] Jennifer M. Collins, 'Exploitation of Persons and the Limits of the Criminal Law' (2017) Criminal Law Review 169, 172
[225] HL Deb 18 June 1999, Vol. 602, col. 57WA
[226] HL Deb 18 June 1999, Vol. 602, col. 58WA
[227] HL Deb 18 June 1999, Vol. 602, col. 58WA
[228] HL Deb 18 June 1999, Vol. 602, col. 58WA

principles that I have been able to identify relating to whether an activity ought to be maintained within, or removed from, the scope of the criminal law. However, I argue that the response of the Minister can be adequately applied in reverse (in lieu of the absence of specific decriminalisation principles) to consider whether an activity should be maintained or removed.

I argue that the appropriate principles, using the Minister's response as a template, would be as follows.[229] First, the behaviour in question is *not* sufficiently serious to warrant intervention by the criminal law. This must be addressed in accordance with the harm principle, as I argue below.[230] I argue that if the behaviour in question requires a determination by a contemporary criminalisation principle less than the harm principle[231] then it is not sufficiently serious to warrant intervention by the criminal law.

Second, the mischief could be dealt with under existing legislation or using other remedies. This is identical to the Minister's second principle and works to determine inclusion, withdrawal, or maintenance within the scope of the criminal law. I argue that non-consensual sexual activity between family members (or those involving children) can be dealt with under existing legislation therefore there is no need for consensual activity to remain within the scope of the criminal law.

Third, the proposed offence is *not* enforceable in practice. If the activity is not enforceable because, for example, it takes place in private with the consent of the participants involved, then criminalisation serves little useful purpose. To be enforceable an offence must be reported, and this is reliant upon either one of the participants to report the act (because they consider it to be criminal) or someone who has knowledge of the act (and who also consider it to be criminal) to report it. For example, consensual sexual activity between adult family members is unlikely to be reported by the participants themselves as they are unlikely to consider their activity to be criminal or otherwise wrong. On the other hand, take the example of non-

[229] The proposed changes have been italicised.
[230] See 2.4.3, below.
[231] In this regard, I am artificially grading the contemporary criminalisation principles in the following order: (1) the harm principle, the highest standard; (2) the offence principle, the middle standard; and (3) legal moralism, the lowest standard.

consensual sexual intercourse between two people (i.e., rape). If one of the participants considers that they have been raped, they are more likely to be report it as they would consider the activity to criminal or otherwise wrong.[232] The enforceability of an offence is therefore reliant upon those willing to enforce it. I do not address enforceability directly in this thesis; however, I do address it indirectly in the context of arguing that consensual activity is unlikely to be perceived by the participants as criminal, wrong, or harmful.

Fourth, the proposed offence is *not* tightly drawn *or is* legally *un*sound. Any criminal offence must be legally certain. I argue that the sex with an adult relative provisions are not legally certain as they encompass two types of activity: consensual sexual activity between adult family members and non-consensual sexual activity between adult family members. This is in comparison to sexual activity that takes place between adult non-family members, in the case of consensual sexual activity, no offence is committed, and in the case of non-consensual sexual activity, an offence is committed.[233]

Fifth, the proposed penalty is *not* commensurate with the seriousness of the offence. As the title character in Gilbert & Sullivan's *The Mikado* emphasises: the punishment must fit the crime. In the case of the sex with an adult relative provisions, the maximum penalty, on indictment, is 2 years imprisonment.[234] This punishment, on the literal interpretation of the statute, applies regardless of whether the activity was consensual or non-consensual. Whereas such a punishment for a non-consensual act, may seem (unduly) lenient, for a consensual act it may seem (manifestly) excessive. I do not propose to alter these sentencing aspects of the sex with an adult relative provisions.

Applying these principles, my overall argument in this thesis is that consensual sexual activity between adult family members ought to be withdrawn from the scope of the criminal law.

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[232] Whether or not an act which someone perceives to be criminal or otherwise wrong *is* reported is a separate question.
[233] I do not dispute the criminality of non-consensual sexual activity of any sort.
[234] Sexual Offences Act 2003, ss. 64(5)(b) & 65(5)(b). On summary conviction, the maximum is 6 months (ibid, ss. 64(5)(a) & 65(5)(a)).

However, it is not theoretical principles alone that can determine whether conduct, and in this instance consensual sexual activity between adult family members, is "withdrawn" from the scope of the criminal law. There are other methods by which this could be achieved though I argue that they provide insufficient safeguards (both in practical terms and in autonomy terms) to individuals engaging in such activity. I now turn to discuss these before analysing the contemporary criminalisation principles.

In England & Wales,[235] both the police and Crown Prosecution Service play a role in the criminal process and are therefore "*agents of criminalisation*."[236] The police can, for example decide not to enforce a substantive criminal law.[237] This occur both individually and institutionally. For example, an officer called out to an alleged incident can determine that the matter is so minor as to not report it or arrest anyone. They can, upon further investigations, determine that the matter is not worth pursing further or referring to the Crown Prosecution Service. On an institutional level, a police force can prioritise resources in a particular direction, at the expense of other types of conduct.[238] In either case, this does not amount to a decriminalisation of a particular conduct, rather the police decide not to enforce it.[239]

Similarly, the Crown Prosecution Service have considerable discretion in deciding whether to commence criminal proceedings against an individual for an alleged breach of the criminal law.[240] They also play an important role in determining what is (or is treated as) criminal.[241] The Crown Prosecution Service applies two tests in its decision-making process (an evidential and a public interest test[242]) and if a particular case does not meet those tests "*we would not naturally talk of "decriminalization"*."[243]

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[235] For a US perspective see William J. Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Michigan Law Review 505, 533-539
[236] Duff, *The Realm of Criminal Law* 44
[237] Ibid 44
[238] Ibid 44
[239] Ibid 44
[240] J.E. Hall Williams, 'The Neglect of Incest: A Criminologist's View' (1974) 14 Medicine, Science & the Law 64, 64. The discretion of the Crown Prosecution Service in the charging, or proceeding with, sexual cases is not absolute and is subject to judicial review (*R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin); [2019] QB 1019).
[241] Duff, *The Realm of Criminal Law* 45
[242] Ibid 46
[243] Ibid 46

The Crown Prosecution Service also play a further role as agents of criminalisation by having its discretion relied upon when applying Government intention.[244] For example, it could be the Government's (and Parliament's) intention for a particular activity to be criminal (as in on the statute book) but that it is not really considered to be criminal: "*it was formally criminalized, but it is not substantively criminalized, or has been substantively decriminalized*."[245] How this could possibly apply to consensual sexual activity between adult family members is discussed below.[246]

I turn now to consider the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle.

2.4 The contemporary criminalisation principles

In this section, I analyse the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle to determine whether consensual sexual activity between adult family members can be justified by reference to them.

I begin with an analysis of the offence principle to determine whether consensual sexual activity between adult family members can be justified by reference to it, before turning to do the same with legal moralism, and the harm principle. There is a link between each of the selected criminalisation principles, they are not "*self-standing*",[247] however due to the close connection between legal moralism (as advocated by Duff) and the harm principle (though not to say that there is not a similarly close connection between the offence and harm principles[248]), I begin my analysis with the offence principle.

In summary, I conclude that the offence principle or legal moralism are not bases upon which consensual sexual activity between adult family members can be justified as a criminal offence and that the correct basis for bringing such activity within the scope of the criminal law is the harm principle.

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[244] Ibid 46
[245] Ibid 46
[246] See 5.4, below.
[247] Duff, *The Realm of Criminal Law* 52
[248] Simester and von Hirsch 138

2.4.1 The offence principle

As with all the contemporary criminalisation principles, there is a link between each one. For example, there is a link between legal moralism and the offence principle in that, though mere offence differs from mere immorality,[249] offence is an indicator of a society's moral views and is the "public face" of morality.[250] Offence can also be a less serious form of harm.[251]

An initial question, however, could be *why* should I consider the offence principle at all regarding consensual sexual activity between adult family members? Such activity has always been subject to a certain level of disgust, and disgust is reflected (as will be shown below) in accounts of the offence principle. Disgust is a powerful reaction to activity such as sexual activity between family members regardless of whether it is consensual or takes place between consenting adults. It is therefore necessary to analyse the offence principle to determine whether consensual sexual activity between adult family members can be justified by reference to it.

The concept of offence is a difficult one to define,[252] and though it can be an invasion of our sensory or emotional interests[253] such as disgust. The result is that there is, like other contemporary criminalisation principles, no single account of the offence principle. I therefore highlight below the accounts given of the offence principle by Feinberg and Simester & von Hirsch and apply them to the question of whether they justify the criminalisation of consensual sexual activity between adult family members.

2.4.1.1 Feinberg's account

[249] A.P. Simester and Andrew von Hirsch, 'Rethinking the Offense Principle' (2002) 8 Legal Theory 269, 291
[250] Andrew Koppelman, 'Does Obscenity Cause Moral Harm?' (2005) 105 Columbia Law Review 1635, 1655; Harlon L. Dalton, '"Disgust" and Punishment' (1987) 96 Yale Law Journal 881, 902
[251] Joel Feinberg, *The Moral Limits of the Criminal Law: Volume Two - Offense to Others* (OUP 1985) 2; Tatjana Hornle, 'Legal Regulation of Offence' in Andrew von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing 2006) 138
[252] Husak, 'Disgust: Metaphysical and Emperical Speculations' 96
[253] Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 100; Simester and von Hirsch, 'Rethinking the Offense Principle' 274

The account of the offence principle offered by Feinberg suggested that a good reason to criminalise conduct would be if it "…*would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor and that it is probably a necessary means to that end*".[254] It is immediately apparent that Feinberg was not talking in certainties. He referred to the offence principle as *probably* being an effective way, rather than *being* an effective way, to prevent serious offence.

This probability of being an effective way to prevent serious offence goes to the heart of Feinberg's account of the offence principle: that of an affront to sensibilities whereby if enough people are affronted criminalisation is justified.[255] The inclusion of enough people being affronted is a necessary condition of the account for, without it, the account would be infinitely wide as to apply to any *prima facie* offensive conduct for there is arguably no conduct that does not cause offence to at least one person (though this is subject to it being wrong). The account therefore relies upon an expectation of offensiveness of a conduct: the more people *expected* to be offended the stronger the case for criminalisation.[256]

Feinberg's account of the offence principle also required that the offence be produced wrongfully however he did not offer a requirement that the *offended* should feel wronged.[257] Feinberg believed that there would always be a *wrong* whenever an offended state is produced in another without any justification or excuse.[258] A wrong is produced by B being offended (though not necessarily being wronged) by the conduct of A. This highlights the distinction between the wrong and the wronged: if A witnessed B breastfeeding her baby in public, A could be offended by it, though not wronged by having witnessed it. However, even if the conduct of B (breastfeeding her baby in public) could even slightly be considered a wrong, any wrongfulness is removed by virtue of the presence of a justification.

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[254] Feinberg 1
[255] Andrew von Hirsch, 'The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?' (2000) 11 King's College Law Journal 78, 81; Simester and von Hirsch, 'Rethinking the Offense Principle' 270-271
[256] Feinberg 27
[257] Ibid 2
[258] Ibid 2

The breastfeeding in public example highlights that the seriousness of any offence caused, in Feinberg's account, must be balanced against the reasonableness of the conduct.[259] Feinberg measured seriousness by reference to three standards: first, the intensity and extent of the offence produced (the extent of offence standard); second, the availability to avoid the offence (the reasonable avoidability standard); and, third, whether the witness has unwittingly assumed the risk of being offended (the *volenti* standard).[260] These standards would be weighed against the reasonableness of the conduct of the actor by assessing its importance to them, its social value, the availability of alternatives to them and the extent to which the offence is caused by spiteful motives.[261]

Feinberg's account of the offence principle is a balancing act to determine whether conduct can be considered offensive as to justify criminalisation.[262] The conclusion to be drawn from this balancing act is that no conduct is *per se* offensive, but instead it is a question of *circumstances* such as time, place, and the receptiveness and tolerance of those witnessing the conduct, rather than being the *prima facie* offensive conduct itself.[263] The Supreme Court of Canada case of *R v Labaye* provides an example to this point.[264] In this case, the court held that engaging in sexual intercourse at a member's only swinging club was not offensive given that those in attendance accepted the risk of witnessing the conduct. It was therefore the *circumstances* in which the conduct was being undertaken which prevented it from being offensive, rather than the nature of the conduct itself.

Feinberg's account of the offence principle can therefore be summarised as follows: it requires an affront to the sensibility of the victim, which was produced wrongfully, and which is assessed following a balancing act between the seriousness of the offence caused and the reasonableness of the conduct by the actor.

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[259] Ibid 26
[260] Ibid 26
[261] Ibid 26
[262] Ibid 26-27
[263] Ibid 26
[264] *R v Labaye* 2005 SCC 80; [2005] 3 SCR 728

The question therefore remains of, in applying Feinberg's account summarised above, whether consensual sexual activity between adult family members can be justified as being correctly criminalised? I shall briefly seek to answer this below.

Under Feinberg's account of the offence principle, an affront to sensibilities whereby if enough people are affronted criminalisation is justified. I do not consider that the question here just is whether *enough* people are affronted by consensual sexual activity between adult family members, but also who is affronted. One needs to think of first principles regarding sexual activity of any sort and remember that such activity usually takes place in private away from the eyes (and certainly the knowledge) of others. The affront therefore does not take place. Similarly, when the activity takes place in public (which is rare), the affront does not necessary take place due to the persons involved in the activity (adult family members) but rather because of the activity itself (sexual activity). Let us say that D and E are siblings, if they engage in consensual sexual activity in private, without the knowledge of anyone, there is an absence of an affront as not enough people are affronted by it (whether enough people are affronted by the *idea* of D and E engaging in sexual activity, regardless of whether they do or not, is a different question altogether). If they engage in consensual sexual activity in public, they may not be caught (as in scenario 3, below) and therefore no affront takes place, or they could be caught. The key to this aspect of affront is by *whom* they are caught by. There are two possibilities: D and E are caught by F, a person known to D and E who knows of the familial relationship between them, or D and E are caught by G, a stranger to both D and E. In the case of F, the affront could be from both the sexual activity and the familial relationship however, in the case of G, the affront could only be from the sexual activity. I argue that in the case of consensual sexual activity between adult family members there is unlikely to be any affront to sensibilities.

It follows from the above analysis that where there has been no affront (for example the activity goes unwitnessed) there can be no *wrong* as an offended state cannot be produced. When it is witnessed, one must ask whether it is the sexual activity or the familial relationship that produces the wrong (as to the latter, the proximity of the familial relationship must be considered). Feinberg concluded that no conduct is *per se* offensive but, rather, it is a question of circumstances. It is not possible to

definitively answer this aspect of Feinberg's account of the offence principle given the multitude of circumstances in which consensual sexual activity between adult family members can take place (I have highlighted some of the possibilities above).

In summary, I do not consider that Feinberg's account of the offence principle would justify the criminalisation of sexual activity between adult family members. I now turn to consider Simester & von Hirsch's account of the offence principle.

2.4.1.2 Simester & von Hirsch's account

An alternative account of the offence principle is given by Simester & von Hirsch. Their account is fundamentally the same account as Feinberg but with an additional requirement to provide reasons.[265]

The additional requirement of reasons that differs Simester & von Hirsch's account of the offence principle from the account advanced by Feinberg, is important. Under Feinberg's account, conduct is deemed offensive merely if it is experienced as being unpleasant: "*"we don't like it" suffices*."[266] Whereas, under Simester & von Hirsch's account, conduct is only *presumptively* offensive until such time as the reasons why it *is* offensive have been given.[267]

Feinberg, in his account, had disavowed the need for reasons.[268] The threshold for what activity constitutes as offensive (and therefore potentially criminal) would be lower without the need for reasons, as Simester & von Hirsch noted with their "we don't like it" gist. Feinberg however considered offence "*in the strict and proper sense it bears in ordinary language*",[269] the requirement was unnecessary because of the definition of "offence" in ordinary language: offence does not require a reason to exist. Simester & von Hirsch's account of the offence principle requires the person who is

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[265] von Hirsch 84, 85 & 86-87; Simester and von Hirsch, 'Rethinking the Offense Principle' 273 & 280; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 124
[266] Simester and von Hirsch, 'Rethinking the Offense Principle' 274
[267] von Hirsch 86-87
[268] Simester and von Hirsch, 'Rethinking the Offense Principle' 274; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 96
[269] Feinberg 2

offended to justify their own offence, something which they arguably have no control over in the first place: they did not ask to be offended.

Simester & von Hirsch advanced a two-stage test to consider the reasons for the offence and asked that the legislator should consider, first, the impact of the conduct upon its audience to determine the magnitude of the affront and, second, the importance of the offending conduct is examined from the actor's perspective, along with the broader social impact of the conduct.[270]

As to the first stage of the test, the impact of the conduct, Simester & von Hirsch ask the question: how is the conduct offensive? In answering this question, they suggested (in two articles) several circumstances as to when conduct can be "offensive". von Hirsch (alone) suggested three circumstances: privacy; insult; and unwarranted pre-emption.[271] Simester & von Hirsch (together) suggested four circumstances: insulting conduct; infringement of an anonymity; pre-emptive behaviour; and exhibitionism.[272]

By privacy, von Hirsch stated that purportedly offensive conduct is objectionable because it improperly intrudes upon another's privacy though, on the obverse side, a person should not be confronted with the private and intimate activities of others.[273] von Hirsch's privacy has similarities with Simester & von Hirsch's infringement of an anonymity. By the infringement of an anonymity, they state that people are entitled, when moving about in public space, to be left alone.[274] Though privacy could be subsumed by the infringement of anonymity, there is, in certain circumstances, a slight contradiction between von Hirsch's obverse side of privacy and the infringement of anonymity.

von Hirsch's obverse side of privacy emphasises that a person should not be confronted with the private and intimate activities of others.[275] Simester & von Hirsch's

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[270] Simester and von Hirsch, 'Rethinking the Offense Principle' 271; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 93
[271] von Hirsch 83-86
[272] Andrew von Hirsch and A.P. Simester, 'Penalising Offensive Behaviour: Constitutive and Mediating Principles' in Andrew von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing 2006) 120-122
[273] von Hirsch 83-84
[274] von Hirsch and Simester 121
[275] von Hirsch 84

infringement of an anonymity emphasises that people are entitled when in a *public space* to be left alone.[276] These do not necessary hold true when one considers the example of outdoor sexual activity; in such a circumstance, those engaging in the sexual activity ought to left alone but, at the same time, those that observe it ought not to be confronted by it. If the offence principle suggests that only activity which is offensive ought to be brought within the scope of the criminal law, this relates to activity that both *gives* offence and is *received* as offensive. However, can activity to which a person or persons wished to remain private (regardless of where it takes place) *give* offence? Let us examine both possible outcomes using the above examine of outdoor sexual activity.

> **Scenario 1:** A and B are engaging in sexual intercourse in some local woods (used frequently by dog walkers) to increase their own sexual pleasure. They have no wish to be caught. It is 10 o'clock at night and it is dark. They are caught by C, who is walking their dog. C is offended by A and B's activity.

> **Scenario 2:** A and B are engaging in sexual intercourse in some local woods (used frequently by dog walkers) to increase their own sexual pleasure. They have no wish to be caught. It is 10 o'clock at night and it is dark. They are caught by C, who is walking their dog. C is not offended by A and B's activity.

In both scenario 1 and 2, the actions of A and B are the same: they are engaging in sexual intercourse in some local woods used frequently by dog walkers. A and B are therefore engaging in activity that would have occurred in either scenario. In both scenarios, A and B have no wish to be caught but are engaging in this activity in any event. The initial question is whether A and B, by their activity, can be said to be *actively* seeking to confront another (C) with it? Before answering this, it is first necessary to consider a third scenario:

> **Scenario 3:** A and B are engaging in sexual intercourse in some local woods (used frequently by dog walkers) to increase their own sexual pleasure. They have no wish to be caught. It is 10 o'clock at night and it is dark. They are not caught by C, who is walking their dog.

In scenario 3, unlike in scenarios 1 and 2, C does not catch A and B at all and cannot, by definition, be offended by activity that they are not aware of. In all scenarios, the

[276] von Hirsch and Simester 121

actions of A and B remain the same. I return to my initial question: can it be said that A and B are *actively* seeking to confront C with their actions? Taking scenarios 1 and 2 only, A and B are not actively seeking to confront C for they have no wish to be caught. However, in scenario 1, C has been *impliedly* confronted due to C being offended, though C has not been so confronted in scenario 2. Confrontation depends upon the receptiveness of C, not the actions of A and B. In scenario 3, C did not catch A and B and therefore has not been confronted even though, again, the activity of A and B remains the same. Only in scenario 1 have A and B *given* offence due to being caught. In scenarios 2 and 3, they have not *given* offence as C is either not offended or does not know that the activity is taking place. Likewise, in scenarios 2 and 3, offence has not been *received* by C, again because C is either not offended or does not know that the activity is taking place. These scenarios show that the activity of A and B only *gives* offence based on the way C *receives* that activity.

Let us consider an alternative question, again using the above scenarios, are A and B entitled to their own privacy in their activity? This is an unequivocal yes in scenario 3 as C has no knowledge of A and B's activities and therefore there has been no privacy infringement.[277] It is 10 o'clock at night and it is dark however they are in local woods frequently used by dog walkers. Can A and B expect privacy? In both scenario 1 and 2, A and B can expect a degree of privacy (though they are outdoors, I refer here to the privacy of the act and not the privacy of the place) which means that regardless of whether C *receives* some offence or not that there has been no offence *given* by A and B.

By insult, von Hirsch stated that conduct may be offensive if it is insulting or demeaning. It would not suffice that the person affected only felt insulted, rather the conduct must be insulting, that it was intended and understood as being grossly derogatory.[278] This is synonymous with Simester & von Hirsch's insulting conduct. By insulting conduct, they state that insult involved by its very nature, disrespectful treatment and it is social convention that gives various words, gestures, or acts an insulting meaning.[279] As with the analysis of privacy and the infringement of anonymity,

[277] I do not argue in this thesis that there is, or is not, a general right to privacy.
[278] von Hirsch 84
[279] von Hirsch and Simester 120-121

this requires both the *giving* and *receiving* of offence: an “insult” is not an insult, unless it is received as such.

By unwanted pre-emption, von Hirsch stated that there are types of conduct which do not interfere with specific interests, but which nevertheless are obnoxious because they interfere with another’s ability to use and enjoy common resources and facilities.[280] This has similarities with Simester & von Hirsch’s pre-emptive behaviour and exhibitionism. By pre-emptive behaviour, they state that an actor making use of a space for his preferred activity does so in a manner that leaves reduced scope for others there to pursue their preference in peace,[281] and, by exhibitionism, they state that this is inconsiderate conduct, which denies others the peaceable use of public space by which someone is involuntarily included in the personal domain of another.[282] Both could be considered to subsets of unwarranted pre-emption. von Hirsch & Simester justify the addition of exhibitionism (as being different from reasons unwarranted pre-emption and pre-emptive behaviour) by emphasising that in viewing and witnessing someone naked in public draws the innocent bystander into the exhibitionist’s personal domain. However, this is different from an example of loud music they gave for pre-emptive behaviour. The justification does not give a sufficient explanation: there is no difference between someone playing loud music and not caring whether anyone else hears it and an exhibitionist who, likewise, does not care either way. The only flaw in this is that an exhibitionist may want to be seen for their own gratification, however engaging in a particular activity *per se* does not automatically imply that it is done for gratification, sexual or otherwise.[283]

As to the second stage of the test, the importance of the conduct, the question is how central is the conduct to the actor’s life?[284] They suggest that the question of importance to the actor is determined by way of mediating considerations, some of which are restraining, such as freedom of speech, avoidability and immediacy.[285]

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[280] von Hirsch 85
[281] von Hirsch and Simester 121-122
[282] Ibid 122
[283] See, for example, *R v B & L* [2018] EWCA Crim 1439; [2019] 1 WLR 3177; Andrew Beetham, '"Sexual Gratification" and the Presence of a Child' (2019) 83 Journal of Criminal Law 416
[284] Simester and von Hirsch, ‘Rethinking the Offense Principle’ 271
[285] von Hirsch 86; von Hirsch and Simester 127-128

As with Feinberg's account of the offence principle, the question remains of, in applying von Hirsch & Simester's account summarised above, whether consensual sexual activity between adult family members can be justified as being correctly criminalised? The comments made above regarding Feinberg's account of the offence principle apply equally to von Hirsch & Simester's account therefore I shall focus here upon the additional requirement in their account, that of the reasons.

Simester & von Hirsch advanced a two-stage test to consider the reasons for the offence: the impact of the conduct upon its audience to determine the magnitude of the affront and the importance of the offending conduct is examined from the actor's perspective, along with the broader social impact of the conduct.[286] As to the first stage, the question of impact, I consider that I have addressed this in my conclusions regarding Feinberg's account of the offence principle as the same issues apply to both accounts. As to the second stage, the question of importance, there is no guaranteed right to sexual intercourse and this applies to activity between family members and non-family members alike (this is an issue of consent) therefore the question of importance can only be addressed, as von Hirsch & Simester suggested, by reference to mediating considerations, particularly avoidability and immediacy. As I noted above, sexual activity usually occurs in private therefore consensual sexual activity between adult family members can be avoided by those that could be offended by it in the same way that other consensual sexual activity is avoided. The distinction that could be drawn, as noted above, is that it is the *idea* that such activity could be taking place that is offensive rather than the actual activity itself (and this relates to its immediacy) however the fact that something could be occurring is an insufficient basis upon to criminalise.

In summary, I do not consider that von Hirsch & Simester's account of the offence principle would justify the criminalisation of sexual activity between adult family members.

2.4.1.3 Summary

[286] Simester and von Hirsch, 'Rethinking the Offense Principle' 271; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 93

In summary, I do not consider that the offence principle (either in the accounts advanced by Feinberg or von Hirsch & Simester) is a basis upon which consensual sexual activity between adult family members can be justified as a criminal offence. Having considered that the offence principle is not the correct basis upon which to bring an activity within the scope of the criminal law, I turn to analyse legal moralism.

2.4.2 Legal moralism

In the previous section, I analysed the offence principle to determine whether consensual sexual activity between adult family members can be justified by reference to it. I concluded that it could not be justified. The offence principle is the weakest of the contemporary criminalisation principles in the analysis of consensual sexual activity between adult family members.

In this section, I analyse legal moralism to determine whether consensual sexual activity between adult family members can be justified by reference to it. There is no single philosophy of legal moralism and any definition employed is largely stipulative with philosophers' freedom to characterise it in any way they like.[287] I shall be focussing primarily, but not exclusively, upon Duff's account of legal moralism in *The Realm of Criminal Law*. I also briefly address the issue of "moral dumbfounding" in the assessment of moral judgments. Before considering both matters, I firstly discuss what can be described as the "general account" of legal moralism.

2.4.2.1 A general account

Legal moralism stems from the idea of a connection between morals and the law. Goodhart considered that this connection was so close that it would be impossible to understand the nature of English law without it.[288] However, the criminal law is *not* a moral law.[289] Legal moralism has been described as a vehicle for a miscellany of non-harmful and non-offensive based reasons in that if an activity cannot be justified by

[287] Douglas Husak, 'What's Legal About Legal Moralism?' (2017) 54 San Diego Law Review 381, 382
[288] A.L. Goodhart, *English Law and the Moral Law* (Stevens & Sons 1953) 8
[289] Duff, 'Political Retributivism and Legal Moralism' 180

reference to the harm or offence principles, it can find a home by being justified by reference to legal moralism.[290] It has also been said that legal moralism can "*advocate a kind of moral witch hunt*".[291] In this section, I shall provide an overview of legal moralism before turning to Duff's specific account.

Legal moralism "*picks out a family of views*" about the scope of the criminal law according to which the "*justification for criminalizing a given type of conduct depends on the moral wrongfulness of that type of conduct*".[292]

A distinction can be made between *positive* and *negative* versions of legal moralism. The *negative* version provides that moral wrongdoing is a necessary condition of criminalisation in that "*we should not criminalize a type of conduct…unless it is morally wrong*".[293] The *positive* version provides that "*the wrongness of a type of conduct gives us reason to criminalize it*."[294] The negative version therefore tells us when *not* to criminalise conduct, whereas the positive version, and this is a defect of it, can take any and every kind of moral wrongdoing to fall, in principle, with the scope of the criminal law.[295] According to Duff, some version of negative legal moralism is "widely accepted", even by theorists that do not consider themselves to be legal moralists.[296]

A second distinction can be drawn, this time within the positive version of legal moralism.[297] A distinction can be drawn between an *ambitious* and *modest* versions of the positive version. The ambitious version provides that *every* kind of moral wrongdoing is in principle worthy of criminalisation.[298] The modest version provides that only certain kinds of moral wrongdoing are even in principle worthy of

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[290] Joel Feinberg, *The Moral Limits of the Criminal Law: Volume Four - Harmless Wrongdoing* (OUP 1988) 3
[291] Duff, 'Towards a Modest Legal Moralism' 222
[292] Ibid 217; Duff, *The Realm of Criminal Law* 53
[293] Duff, 'Political Retributivism and Legal Moralism' 186; Duff, 'Towards a Modest Legal Moralism' 218; Duff, *The Realm of Criminal Law* 55
[294] Duff, 'Political Retributivism and Legal Moralism' 186; Duff, 'Towards a Modest Legal Moralism' 218; Duff, *The Realm of Criminal Law* 55
[295] Duff, 'Political Retributivism and Legal Moralism' 187
[296] Duff, *The Realm of Criminal Law* 56 (citing Joel Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others* (OUP 1984) 36 and Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 22)
[297] Duff, 'Towards a Modest Legal Moralism' 222
[298] Ibid 222 (citing Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press 1997)); Duff, *The Realm of Criminal Law* 73

criminalisation.[299] According to Duff, the "central task" of the modest version, which he favours, is to "*explain which kinds of wrongs are in principle criminalizable, and why*."[300] The conclusion therefore is that to accept a modest version of positive legal moralism is to accept that criminalisation is not appropriate in all cases.[301]

The wrongfulness of the conduct must be independent of criminalisation in that the "*conduct should be criminalized only if it is already wrongful*."[302] If the conduct must already be a wrong and not wrong by virtue of its criminalisation,[303] this requires us to determine what is already "wrong". Duff identifies three types of wrong: "pre-institutional", "pre-legal", and "pre-criminal" wrongs.[304] He defines them as follows: by a "pre-institutional" wrong, he states that "*the conduct in question can be committed and can be identified as wrongful prior to, and independently of, any institutional context in which it is set*"; by a "pre-legal" wrong, he states that "*the conduct in question can be committed and can be identified as wrongful prior to, and independently of, any legal provision (in particular any legal provision that prohibits it)*"; and by a "pre-criminal" wrong, he states that "*the conduct in question can be committed and can be identified as wrongful prior to, and independently of, its criminalization*".[305] Duff reminds us, after giving these definitions, that not all institutions are *legal* institutions, and not all laws are *criminal* laws.[306]

To be justified by virtue of legal moralism, Duff suggested that "*any legitimate route must pass through three gates*": conduct must be wrongful; it must require a collective response; and we must have a good reason to make the wrongful conduct worthy of a collective response.[307]

2.4.2.2 Duff's account

[299] Duff, 'Towards a Modest Legal Moralism' 222; Duff, *The Realm of Criminal Law* 75
[300] Duff, 'Towards a Modest Legal Moralism' 222; Duff, *The Realm of Criminal Law* 75
[301] Duff, 'Towards a Modest Legal Moralism' 230
[302] Ibid 219
[303] Duff, 'Political Retributivism and Legal Moralism' 188
[304] Ibid 189
[305] Ibid 189
[306] Ibid 189
[307] Duff, 'Towards a Modest Legal Moralism' 228

In giving a general account of legal moralism, I referred to both *positive* and *negative* legal moralism. In defending legal moralism as a criminalisation principle, Duff advocates that one ought to accept *negative* legal moralism as well as a qualified form of *positive* legal moralism (the modest version) in that "*we have a good reason to criminalize a type of conduct if and because it constitutes a moral wrong of the appropriate kind*."[308] The question for Duff is therefore what is the "appropriate kind" of moral wrong.

Duff seeks to answer this by reference to "traditional" distinction between public and private wrongs whereby what is the criminal law's business is any "*public moral wrong*".[309] However, he accepts that an appeal to public wrongs cannot, by itself, provide a substantive criterion of what is able to be criminalised.[310] Whilst a modest version of legal moralism focuses on "public wrongs", Duff considers that the starting point ought to be a focus on the *public* rather than the *wrongs*.[311] It is on this that I shall focus.

In making the distinction between what is public as opposed to what is private, this is both normative and contextual.[312] By normative, Duff states that the question is whether it concerns an identifiable "public" and, by contextual, the identify of that public and the scope of its legitimate interests.[313] One therefore needs to ask how the polity might define and identify its public realm.[314]

Duff's account of legal moralism argues that this can be done by attending to the idea of "civil order" and that the criminal law should function to sustain a polity's civil order.[315] Duff therefore considers that a polity uses its criminal law appropriately (by identifying appropriate moral wrongs) so long as it is using it to sustain its civil order.[316]

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[308] Duff, 'Political Retributivism and Legal Moralism' 185 & 187; Duff, 'Towards a Modest Legal Moralism' 221
[309] Duff, 'Political Retributivism and Legal Moralism' 187; Duff, *The Realm of Criminal Law* 75
[310] Duff, *The Realm of Criminal Law* 76 & 78-79
[311] Ibid 79. By focusing upon the public aspect (and not the wrong aspect), Duff considers that legal moralism need not be moralistic (ibid 79).
[312] Ibid 83
[313] Ibid 83
[314] Ibid 147
[315] Ibid 148 & 166
[316] Ibid 166. Duff however emphasises that it does not necessarily follow that one must accept as justified any criminal law that sustains the civil order of a particular polity (ibid 166).

There are several criticisms, which Duff himself noted, in this account.[317] One such criticism is that different polities have different civil orders and we do not have (or cannot find) the kind of unified political communities on which the account depends.[318] Duff however identified three mistakes to avoid in this regard: to exaggerate the kind or extension of agreement in values that is required; to exaggerate the difficulty in achieving agreement; and, where agreement cannot be reached, to claim that majority norms are binding upon the minority.[319] In specific regard to consensual sexuality activity between adult family members, these mistakes come to the for in the idea that unanimity is required for its removal from the scope of the criminal law when, in reality, unanimity is rarely required for an activity to be criminalised. An example is the possession and use of drugs. Further, if an agreement can be reached that consensual sexual activity between adults is an activity to be protected, it is only a short distance to agree that it ought to be protected for all regardless of sexual partners.

For Duff, how a polity conceives its criminal law will depend on how it conceives its civil order.[320] A public wrong therefore is a wrong that violates or threatens the civil order.[321] Therefore, in determining what should be criminalised, it is necessary to ask three questions: first, the political question of whether it is a matter which the polity has a proper interest; second, if so, what is the nature and scope of that interest; and, third, if a proper interest exists, what types of factors are relevant to the decision about whether and how to intervene.[322]

Does the polity have a proper interest in the matter of consensual sexual activity between adult family members? The answer to this question ultimately depends upon what and where one is focussing the “proper interest”: is the focus upon *the* activity itself or upon the possible *result* of the activity. Does the polity have a proper interest in consensual sexual activity between adults? I argue that the answer is no. This can be seen in that few consensual sexual relationships are subject to criminal provision. Currently, a familial relationship is one such example, the age of one of the participants

[317] See, for example, ibid 166-177
[318] Ibid 167 & 177
[319] Ibid 180-181
[320] Ibid 182
[321] Ibid 183
[322] Ibid 188

is another; the genders of the participants was once an example.[323] Whereas there is a proper interest, regardless of consent, in those who have not reached a particular age, there is no such proper interest in those of the same gender or of the same family.

Assuming for the moment that the polity have a proper interest in the matter of consensual sexual activity between adult family members, what is the nature and scope of that interest? The nature and scope of that proper interest must be a focus on protection. The question is protection from whom, or from what. The natural focus here is not upon the activity itself but upon the possible result. The possible result is of course pregnancy and the risk to children. However, the science behind this does not evidence the apparent fears that people have of it.[324] That a polity has a proper interest in the genetic health of its future generations is a valid concern however is it such a great concern at the present time that the criminal law ought to take steps now against an extremely small minority of people who engage in sexual activity with another adult family member? I argue not.

Again, assume that a proper interest exists, what types of factors are relevant to the decision about whether and how to intervene in consensual sexual activity between adult family members? Again, the natural focus here appears to be on the possible results rather than the activity itself. A criminal law is not the only way to intervene, preventative measures are also possible. Prevention is possible from within the family themselves if they feel it necessary (though, granted, this will be on a rare occasion). For example, in *R v Cole* a wife informed her husband of her concerns regarding his behaviour towards his own daughter (her step-daughter) and asked a police officer to speak with him before anything occurred (though, in this case, this was unsuccessful).[325]

The question remains of, in applying both the general and Duff's accounts summarised above, whether consensual sexual activity between adult family members can be justified as being correctly criminalised? I agree with Duff that the focus ought to be upon the public, rather the wrongfulness, of the activity. Duff however defines public

[323] See 3.4, below.
[324] See 2.2.4, above.
[325] *R v Cole* [2020] EWCA Crim 1818

as being what threatens or violates the civil order. This civil order is *not* a fixed and unchangeable structure of values.[326] The focus is upon common ground and agreement within the polity upon types of conduct. Regarding consensual sexual activity between adult family members, the focus has too often been upon "family members" in identifying the *wrong* whereas the focus ought to be upon "consensual" and "adult" to determine that it is not *public*. The interpretation above is of course only one interpretation and I do not suggest it is the correct one.

2.4.2.3 Moral dumbfounding

In this section I briefly address a criticism of (general) legal moralism, in it has no response to the idea that morals are formed in split-second decisions based upon our own subjective ideas of right and wrong (or when authority is weakest[327]) in which moral judgments are made, almost by default or assumption, and without ever being tested.

If judgments are made in a split-second, moral dumbfounding describes the maintenance of a judgment without supporting reasons for it.[328] Moral dumbfounding can be summarised simply as the expression of when someone *knows* that something is wrong, but they do not know *why*.[329] One of the examples used to test the theory of moral dumbfounding is that consensual sexual activity between two adult siblings: "the story of Julie and Mark".[330] The story goes as follows:

> "*Julie and Mark, who are brother and sister, are traveling together in France. They are both on summer vacation from college. One night they are staying alone in a cabin near the beach. They decide that it would be interesting and fun if they tried making love. At very least it would be a new experience for each of them. Julie was already taking birth control pills, but Mark uses a condom too, just to be safe. They both enjoy it, but they decide not to do it again. They keep that night as a special secret between them, which makes them feel even closer to each other*."[331]

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[326] Duff, *The Realm of Criminal Law* 182
[327] J.C. Flugel, *The Psycho-Analytic Study of the Family* (Hogarth Press 1972) 44
[328] Jonathan Haidt, Fredrik Bjorklund and Scott Murphy, *Moral Dumbfounding: When Intuition Finds No Reason* (2000) 1
[329] Ibid 10
[330] Ibid 11
[331] Ibid 18

In the study[332] conducted by Haidt, Bjorklund & Murphy, 20% of participants thought that Julie and Mark's conduct was acceptable in their *initial* judgment. When the participants were challenged upon their preconceptions and views, the level of acceptability rose to 32%.[333]

Moral dumbfounding allows for the testing of moral judgments. Haidt, Bjorklund & Murphy's 2000 study identified that one-fifth of the participants, on an initial reading of the story of Julie and Mark, found the behaviour acceptable. The story can of course be read in several ways, and, for some, key information is missing from it (for example the ages of Julie and Mark, why would it be interesting, who initiated the conversation, who led the decision making) however it does show that, of the hundred or so words of the story, the "moral" judgment is based upon no more than five words: "*who are brother and sister*". If the story is read without those five words, it would be difficult to see why the actions of the participants could be wrong, or morally wrong. The same would be true if we replaced "who are brother and sister" with "who are close friends". It would however be interesting to see is how the story could be played out by simply altering the "brother" and "sister" to some other familial relationships, for example cousins, to test the level at which in a split-second we *know* that something is wrong.

2.4.2.4 Summary

In summary, I do not consider that legal moralism is a basis upon which consensual sexual activity between adult family members can be justified as a criminal offence. I consider that, in applying Duff's account, there is an insufficient publicity to the activity. Having considered that both the offence principle and legal moralism are not the correct basis upon which to bring an activity within the scope of the criminal law, I turn to analyse the harm principle.

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[332] Other studies include Jonathan Haidt, Silvia Helena Koller and Maria G. Dias, 'Affect, Culture and Morality, or Is It Wrong to Eat Your Dog?' (1993) 65 Journal of Personality & Social Psychology 613; Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Institutionist Approach to Moral Judgment' (2001) 108 Psychological Review 814; Edward B. Royzman, Kwanwoo Kim and Robert F. Leeman, 'The curious tale of Julie and Mark: Unraveling the moral dumbfounding effect' (2015) 10 Judgment & Decision Making 296

[333] Haidt, Bjorklund and Murphy 15

2.4.3 The harm principle

In the previous sections, I analysed the offence principle and legal moralism to determine whether consensual sexual activity between adult family members can be justified by reference to them. I concluded that it could not be justified. In this section, I analyse the harm principle to determine whether consensual sexual activity between adult family members can be justified by reference to it.

The harm principle is recognised as the primary criminalisation tool of English law:[334] "…*the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant*."[335]

The harm principle is prospective and require a person to engage in some form of expectation.[336] As a result, the harm principle it is not intended to predict *actual* harm that can result from an activity, but rather the *expected* harm from that activity.[337] Though it is recognised as the primary criminalisation tool, it was not intended as such by Mill but rather as a general limitation on the amount of control which an individual might legitimately exercise over another.[338]

Whereas the harm principle is, *prima facie*, easily grasped, "harm" is conceptually vague.[339] Despite "harm" being the very essence of a criminal offence.[340] Conaghan uses the example of the smacking of children to highlight this vagueness. She emphasises that "*A generation ago, the physical disciplining of children was not only*

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[334] Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 108
[335] John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son 1859) 22
[336] Guyora Binder, 'Foundations of the Legislative Panopticon: Bentham's Principles of Morals and Legislation' in Markus Dirk Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014) 89
[337] Ibid 98
[338] John Klenig, 'Joel Feinberg's Harm to Others' (1986) 5 Criminal Justice Ethics 3, 4
[339] For example, it has been described as: vague and ambiguous (Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others* 31), conceptually foggy, susceptible to fictional applications and ideologizing (John Klenig, 'Crime and the Concept of Harm' (1978) 15 American Philosophical Quarterly 27, 27), and incapable of being reduced to a strictly physical, financial, or psychological commodity (Hill 16).
[340] Albin Eser, 'The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests' (1966) 4 Duquesne University Law Review 345, 345

acceptable, it was widely seen as a necessary component of responsible parenting."[341] However, there has now been a change in social attitude as well as the law:[342] thirty years ago, smacking (when used in moderation) did not register as harmful and if you were smacked you had not been harmed. Today the circumstances are different, though the physical act of moderately smacking a child has not changed. The law determines what is harmful but also responds to what are considered socially to be harms. This dual role allows the law to respond to harms that are created due to changing circumstances of everyday life (in a general sense, harms involving computers would not be possible without computers existing, and the law has responded to this) and to re-assess (or transform) the harm that an activity poses. For example, earlier in this chapter, I identified the grounds of justification for bringing sexual activity between family members within the scope of the criminal law, several of these grounds were not used to enact the 1908 Act but were used to retain the offence within the 2003 Act. The "harm" of the offence may not have been present in 1908 but was in 2003 (and vice versa).

Though the changing nature of harm could be argued to be a weakness of the harm principle as a contemporary criminalisation principle in that what was harmful in, for example, 1908 may not be considered to have been so in 2003, I do not consider that this reduces the overall strength of the harm principle as a criminalisation principle. This changing nature of what is, or is not, harmful (and which could be viewed differently in other societies) does allow a reconsideration of harm from time-to-time. Whereas the same can also be true of legal moralism and the offence principle (the changing nature of what is moral and offensive), the nature of harm is more visible than morals and offence. Visibility is an important factor when considering whether to bring an activity within the scope of the criminal law. If a person holds a particular moral view of an activity, it is invisible unless they manifest it or asked about it. The same is true of offence, a person's offence is invisible unless they manifest it or are asked about it. Though harm can also be invisible (financial harm, for example) it is

[341] Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22 Legal Studies 319, 322
[342] Ibid 322

more readily associated with being visible: a broken arm or any external injury is immediately apparent.[343]

Whilst "harm" can be described both positively and negatively (harm*ful* and harm*less*) it is most readily associated with the positive with the belief that any conduct which suggests harm ought to be brought within the scope of the criminal law.[344] To determine whether a particular activity ought to be brought within the scope of the criminal law, a two-stage test has now transposed into a single test. Whereas a two-stage test asked whether an activity is harmful and, if so, how harmful is the activity? This has now descended into the single question of "how harmful is the activity?" This single question, I argue, reduces the possibility of an objective assessment of harm to the extent that, if an activity is even remotely considered as suitable for being brought within the scope of the criminal law, it is automatically assumed that it is harmful. But, as harm is widely assumed to be self-evident, it is not a concept upon which people frequently dwell.[345] Perhaps this is most evident regarding those whose function it is to consider whether an activity ought to be brought within the scope of the criminal law. As harm is seen as something that "happens",[346] it by-passes the essential question of whether an activity is harmless. To view all activities within a prism of harmfulness, given its everyday occurrence, places an activity on a scale of how harmful it is rather than asking whether it is harmless.

Eser argued that harm has three functions within the criminal law therefore the concept does not change, rather the way it is used does.[347] The first function is that of harm as a substantive element of a criminal offence. If an activity is to be brought within the scope of the criminal law an external element of harm must be manifested or prevented. This suggests that if an activity is not harmful it ought not to be brought within the scope of the criminal law. The second function is as part of *mens* rea or the validity of consent. Harm is only harmful if it is intended to be harmful. This suggests

[343] This has been an issue regarding rape with the external and apparent injury being more readily appreciated as a criminal act: see Susan Estrich, 'Rape' (1986) 95 Yale Law Journal 1087.
[344] See generally Bernard E. Harcourt, 'The Collapse of the Harm Principle' (1999) 90 Journal of Criminal Law & Criminology 109.
[345] Conaghan 321
[346] Ibid 321; Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (2001) 11 Oxford Journal of Legal Studies 1, 2: "Harm refers to the injury done or risked by the act…"
[347] Eser 346

that if no harm was intended to be used, the activity ought not to be punishable. The third function is as a measure of punishment. The more harmful the activity the greater the punishment and *vice versa*. This suggests that the more harmful the act the greater the punishment and the less harmful the lesser the punishment. I use all these functions in this thesis when considering harm, however for present purposes, I am focusing on the first function: harm as a substantive element. Eser himself considered that:

> "*If we enquire about what harm conduct must cause in order to be punishable, we not only raise a theoretical question but we also undertake a fight for the freedom of human activity which, in our day, is threatened by a state anxious to be protected against activities which are perhaps quite harmless*."[348]

The harm principle emphasises that the wrongfulness of a criminal offence consists of more than a mere disobedience of a prohibition and requires something extra of legislators.[349] The harm principle is therefore "something extra", it is a "reason" beyond disobedience (which would be sufficient for legal moralism) that justifies an activity being brought within the scope of the criminal law.

2.4.3.1 Feinberg's and Simester & von Hirsch's accounts

Feinberg argued that: "*It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values*."[350]

Feinberg identified two senses of harm: harm as a setback of interests; and harm as a wrong to another person.[351] As a setback of interests, one's interests consist of all things in which one has a stake, and it is only when such an interest is thwarted or set-back that its possessor is harmed in a legal sense. Feinberg suggested that the test was "…*whether that interest is in a worse condition than it would otherwise have been*

[348] Ibid 347
[349] Ibid 349
[350] Feinberg, *The Moral Limits of the Criminal Law: Volume Four - Harmless Wrongdoing* xix
[351] Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others* 33-34

in had the invasion not occurred at all."[352] Harm as a setback of one's interests needs to be judged in terms of its effect upon those interests.[353] It is an important limitation. Whilst harm cannot be defined specifically, it must not however be defined too generally.[354] The harm must be linked to the aim or purpose of the proposed prohibition. If one's interests are incapable of being set back in a specific incidence, one cannot be said to have been harmed when an attempt is made in a general way to set them back. If this is the case, a setback of one's interest does not need to be wrongful.[355] As a wrong to another person, to say that A has harmed B is to say the same as A has wronged B.[356] For Feinberg it is the overlap of these two senses that properly counts as harm.[357] Though, he does not conclude that the combination of the two senses of harm *must* lead to criminalisation.[358]

To determine harm, one must ask whether these two senses of a setback of interests and a wrong to another must be established independently of one another? To answer this, Duff suggested that one should imagine a gladiatorial contest. If one accepts that the gladiator can be harmed without any wrong being done to them then, if they freely engage in a fight to the death, they cannot be wronged (as a wrong to another person) even though they can be harmed by the contest (as a setback of interests).[359] This example establishes that harm and wrong are independent and conduct is not wrong by virtue of it being harmful (and *vice versa*).[360] Another example may be one of sexual intercourse. If sexual intercourse is engaged in with consent the physical act is not harmful in that it does not set back a person's interests or wrong another, rather it is some *additional* element that makes it so. Such additional elements can include a young age, a mental incapacity on the part of one of the participants and, though I argue to the contrary, a familial relationship existing between the participants.

Feinberg does not conclude that the combination of the two senses of harm *must* lead to criminalisation as he offered a series of meditating principles. Such mediating

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[352] Ibid 34
[353] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quartlerly Review 225, 240
[354] Eser 411
[355] R.A. Duff, 'Harms and Wrongs' (2001) 5 Buffalo Criminal Law Review 13, 17
[356] Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others* 34
[357] Ibid 36
[358] Ibid 189-191
[359] Duff, 'Harms and Wrongs' 32
[360] Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 39 & 48

principles included, first, there must be a *de minimis* threshold to ensure that the law does not do more harm than good by concerning itself with minor harms.[361] This mediating principle is a return to a two-stage question of when an activity ought to be brought within the scope of the criminal law, though is a reversed way by asking whether the activity is harmful at the end, rather at the beginning. Second, there must be some empirical generalisations about the likely effect of the conducts in that the risk must be more probable than not.[362] Such generalisations however impose a real risk of injustice to those that engage in activities that are perceived to be risky or otherwise. To say that because an activity is risky for one person, it must automatically follow that it is risky for all people or, even, that it is risky for all people and ruling out the lack of risk in individual cases can be a cause of injustice. For example, to suggest that all sexual intercourse between family members will automatically lead to defective children is a generalisation that rules out the possibility that this will not occur and to punish based upon such a likelihood. Third, there must be a relative importance factor considering the importance of the conduct to the actor, to those affected by it and to society.[363] This is a balancing act with risk on one side of the scales and magnitude on the other.[364] Feinberg uses the example of shooting a rifle into the air and the bullet coming down to Earth. There is a low probability that the bullet will hit anyone however, if it did so, it would inflict a high magnitude of harm.[365] Again, this is a question of the freedom to act balanced against the risk of injustice and whether it is right to bring (or retain) an activity within the scope of the criminal law based on a low probability of harm. With the example of the rifle used by Feinberg, there would be a high magnitude of harm if the bullet hit the head or a major organ of someone once the bullet returned to Earth however there is also the possibility of a low magnitude of harm if the bullet hit non-vital areas. The fact of the former, the firing of the bullet, does not inexorably result in the latter, the *certain* high magnitude of harm, only the *possibility* of high magnitude of harm. This is linked to consensual sexual activity between adult family members: to say that a genetic defect is possible (even a non-serious one) is equating a possibility with a certainty and suggesting that both ought to be treated the same.

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[361] Feinberg, *The Moral Limits of the Criminal Law: Volume One - Harm to Others* 189
[362] Ibid 190-191
[363] Ibid 191
[364] Ibid 191
[365] Ibid 191

The question remains of, in applying Feinberg's account summarised above, whether consensual sexual activity between adult family members can be justified as being correctly criminalised? Feinberg's account determines that harm is the setback of interests or as a wrong to another person. Regarding consensual sexual activity between adult family members, it is difficult to see how, or where, the harm (by either reference) could exist. The gladiatorial contest example refers to a harm without a wrong. The same can apply to sexual activity. The distinction between a harmful and a harmless act is the presence or absence of consent: the activity is identical however it is state of mind that alters the harmfulness (or lack thereof).

Psychological as well as physical harm, if it were incurred, would be sufficient to meet the requirements of the harm principle.[366] There is ample literature that suggests that psychological harm can be incurred by engaging in sexual activity between adult family members.[367] Several potential harms have been identified in the literature that include anti-social behaviour, depression, long-term psychological impacts, murder, promiscuity, prostitution, and other sex work, relationship issues, seizures, self-harming and suicide, social isolation, substance abuse, and victims becoming perpetrators of sexual offences. Whilst such harms have been reported, they are not incurred in every case of sexual activity between adult family members, consensual or not. The incurring of psychological harm would be a sufficient setback of interests of the person to whom the harm was incurred; indeed, such a setback would also be a wrong to that person.[368]

Genetic risks have the potential to meet the requirements of the harm principle. However, issues of genetic risk do not apply to the non-genetic prohibited relationships included within the 2003 Act. Similarly, with the use of assistive reproductive technologies, a parent may not be as genetically linked to their child as they otherwise would have been, and nor would the extended relationships be similarly genetically linked. For example, if A uses one of her own eggs as a surrogate for her sister, B (who cannot conceive children), B's genetic relationship with the child would be

[366] In *R v Chan Fook* [1994] 1 WLR 689 it was held that psychological harm was sufficient to meet the definition of actual bodily harm (Offences against the Person Act 1861, s.47).
[367] See 1.2.1, above.
[368] The answer may be different if the sexual activity was engaged in consensually.

reduced from 50 percent to 25 percent.[369] Similarly, if B uses the eggs of a third-party, A's genetic link to the child will be reduced from 25 percent to zero percent.

The harm principle relates to expected, and the risk of, harm and genetic risk relates to the probability of a genetic defect therefore it relates to the expectation of a possibility and, ultimately, depends upon the harm, if any,[370] that is incurred by the future-person. It may occur or it may not. There is a probability of an expectation of harm and a probability of an expectation of the absence of harm.[371]

Whether genetic risks can be considered as harmful must also be assessed against the non-identify problem.[372] One of the premises of this problem is to ask whether an unborn child can be harmed *if* it would not have otherwise existed except in a "harmed" form. The following scenarios highlight the problem:

> **Scenario 1**: A has a child with her brother, B, and has a child, C^1. C^1 is born with a genetic defect.
> **Scenario 2**: A has a child with someone she met while at university, D, and has a child, C^2. C^2 is born without a genetic defect.

The child born in scenario 1 (C^1) is not the same child born in scenario 2 (C^2). For C^1 to have been born, requires the combination of A and B. Likewise, for C^2 to have been born requires the combination of A and D. If A and B, or A and D, had not had sexual intercourse together in either scenario, neither C^1 nor C^2 would have been born at all. The question, therefore, is whether C^1 can be considered to have been "harmed" by the sheer fact of being born when the alternative is to not being born at all. To suggest that C^1 is in fact harmed is to suggest that not being born at all is *equal to* or *better than* being with a genetic defect.[373]

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[369] Fifty percent is the average shared DNA a parent has with their child (the other 50 percent being from the other parent). Twenty-five percent is the average shared DNA an uncle/aunt has with their nephew/niece.
[370] Coleman 258-259: it is not possible to say in advance that genetic defects *will* be incurred.
[371] Luke Harris, 'The State, the Family and the Private Sphere: Reconstructing the Liberal Vision' (2000) UCL Jurisprudence Review 278, 289
[372] See generally Derek Parfit, *Reasons and Persons* (Clarendon Press 1984) and Stuart P. Green, *Criminalizing Sex: A Unified Liberal Theory* (OUP 2020) 269
[373] A similar, though not identical, comparison is the birth of a child following a rape. If a child is born from a rape, the mother, without being raped, would not have had that specific child as having a child with another man from a consensual act of sexual intercourse would not have resulted in the same child.

Simester & von Hirsch have also advocated the use of the harm principle as a criminalisation principle. Simester & von Hirsch recognised that the attractiveness of the harm principle derived from it being applied to "immediate harms",[374] i.e., eventual harm if it were to occur immediately.[375]

Simester & von Hirsch's account of the harm principle is similar to Feinberg's account, which they described as the "standard harms analysis" and which contained three steps. First, consider the gravity of the eventual harm and its likelihood. Second, weigh the gravity against the social value of the conduct and the degree of intrusion upon the actor's choices that criminalisation would involve. Third, certain side-constraints should be observed.[376] Like Feinberg, they emphasised that activity should not automatically be criminalised whenever the criteria were met.[377]

The question remains of, in applying Simester & von Hirsch's account summarised above, whether consensual sexual activity between adult family members can be justified as being correctly criminalised? Given the similarity of both accounts, the same conclusions apply to Simester & von Hirsch's account and to Feinberg's account.

2.4.3.2 Summary

In summary, the harm principle is recognised as the primary criminalisation tool of English law, and whilst I do not disagree with that conclusion, I disagree with the application of that principle to consensual sexual activity between adult family members. I argue that criminalisation ought to only be possible based on actual harm, rather than generalisations of when harm may possibly occur.

2.5 Conclusion

[374] Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 53
[375] Ibid 55
[376] Ibid 55
[377] Ibid 55

In this chapter I have sought to determine whether sexual activity between family members is correctly criminalised.

I considered firstly the identified grounds of justification upon which the criminalisation of sexual activity between family members, rather than specifically between adult family members, were based. These grounds of justification have included reasons that were used both to initially *bring* sexual activity between family members within the scope of the criminal law and to *retain* it within scope. These grounds of justification were grouped into groups A to D. I concluded that the grounds of justification do not offer any form of coherent doctrine, either collectively or individually and that the grounds of justification contained within Groups A, B and C are piecemeal. The only grounds of justification which come close to forming coherent doctrine are in Group D.

Having identified the grounds of justification for the criminalisation of sexual activity between family members, I discussed the theoretical framework of criminalisation before analysing the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. I concluded that the harm principle is the correct basis upon which to bring an activity within the scope of the criminal law however, regarding consensual sexual activity between adult family members, that criminalisation is not justified.

In this chapter, I argued that whether an activity is brought within the scope of the criminal law is to be determined by reference to the harm principle. However, by itself, this is insufficient when making the final determination of whether to bring an activity within the scope of the criminal law. Something *more* is required. In the next chapters, I argue that the something *more* is autonomy. For criminalisation to be justified, it must cause harm *and* does not impact upon a person's autonomy.

Chapter 3: The Foundations of Autonomy

3.1 Introduction

In the previous chapter, I considered whether sexual activity between family members was correctly criminalised by reference to the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. I concluded that though the harm principle was the correct contemporary criminalisation principle to apply, that consensual sexual activity between adult family members was not correctly criminalised by reference to it unless actual harm occurred.

I argued that whether an activity is brought within the scope of the criminal law is to be determined by reference to the harm principle. However, I further argue that, by itself, this is insufficient when making the final determination of whether to bring an activity within the scope of the criminal law. Something *more* is required. I argue that the something *more* is autonomy. For an activity to be brought or retained within the scope of the criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy.

Before so arguing, I consider the foundations of autonomy by establishing the link between the harm principle and autonomy,[378] the link between autonomy and consent,[379] before, finally, considering autonomy as a human rights principle.[380] In the next chapter, I turn to an alternative form of autonomy: that of relational autonomy.

3.2 The link between the harm principle and autonomy

I argue that whether an activity is brought within the scope of the criminal law is to be determined by reference to the harm principle. However, I further argue that, by itself, this is insufficient when making the final determination of whether to bring an activity within scope. Something more is required. I argue that the something more is to consider autonomy. For an activity to be brought or retained within the scope of the

[378] See 3.2, below.
[379] See 3.3, below.
[380] See 3.4, below.

criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy.

To establish this, it is necessary to establish the link between the harm principle and autonomy. This, however, is easily established and can be considered briefly for autonomy is a principle that is naturally inbuilt into the harm principle. The harm principle advocated by Mill's was that: "…*the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant*."[381]

Autonomy is therefore inbuilt into the harm principle in two ways. First, by reference to power being exercised "*against his will*". For Mill, if something can be done against a person's will, it implies that person has a will to exercise in the first place. Such a will, in the liberal tradition, must be autonomous. Second, by reference to "*His own good, either physical or moral, is not a sufficient warrant*." If something can be done for a person's own good, this implies that a person can also decide for themselves what is for their own good. Again, deciding for oneself what is in one's own best interests, in the liberal tradition, must be autonomous.

Both the harm principle and autonomy are predominant factors in the criminal law,[382] especially regarding sexual activity, where autonomy assumes a fundamental importance.[383] Autonomy plays three crucial roles within the criminal law.[384] First, autonomy justifies the *existence* of the criminal law: the criminal law arguably exists to prevent autonomous agents from interfering in the lives of another. A cannot do what they like if it interferes with B (again highlighting the link with the harm principle). Second, it restricts the *extent* of the activities that are included with the criminal law: it is only where activity causes a significant amount of harm to others (as I have argued) that the criminal law is justified in imposing bans upon all activity whatsoever. Third, it

[381] John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son 1859) 22
[382] Jonathan Herring, *Criminal Law: Text, Cases and Materials* (8th edn, OUP 2018) 18
[383] Chrisje Brants, 'The State and the Nation's Bedrooms: The Fundamental Right of Sexual Autonomy' in Peter Alldridge and Chrisje Brants (eds), *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Hart Publishing 2001) 132
[384] Herring 17

justifies censure. As an autonomous agent a person is free to make “bad” or “wrong” choices and the autonomy explains *why* a person is liable for making such a choice (they can thus be seen to be consenting to punishment).

I argue that as an override or mediating principle, autonomy focuses upon this second crucial role: it restricts the *extent* of the activities that are included with the criminal law. There are several areas of criminal law in which this is evidenced (sexual offences and offences against the person are the obvious examples). The role of autonomy in limiting the *extent* of the criminal law shows that it is an important factor within the criminal law. Without autonomy as an overriding, mediating, or limiting principle, any action against another could be the subject of a criminal charge no matter how trivial or consensual. I argue that as autonomy plays all these roles, that it ought to play such a role in determining whether consensual sexual activity between adult family members ought to remain within the scope of the criminal law: autonomy overrides, mediates, and limits the role of the criminal law to individual choice.

In the next section, I turn to consider the link between autonomy and consent.

3.3 Autonomy and consent

In the previous section, I briefly considered the easily established link between the harm principle and autonomy. Autonomy is inbuilt into the harm principle for two reasons: power can be exercised against a person’s will and things can be done for a person’s own good. In this section, I seek to establish the link between autonomy and consent (and therefore the link between harm, autonomy, and consent).

Autonomy and consent are inseparably connected,[385] to the extent that they are often thought to be synonymous. For example, personal autonomy is the core value that consent seeks to protect.[386] Similarly, legal rules on consent are often enacted in

[385] Sharon Cowan, ‘"Freedom and capacity to make a choice": A feminist analysis of consent in the criminal law of rape’ in Vanessa E. Munro and Carl F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge 2007) 51

[386] Catherine Elliott and Claire de Than, ‘The Case for a Rational Reconstruction of Consent in Criminal Law’ (2007) 70 Modern Law Review 225, 231

response to criticisms that the existing rules fail to protect sexual autonomy.[387] Both of these examples suggest a link between autonomy and consent.

Consent "*functions as the gatekeeper of bodily integrity*".[388] Whilst there is an undoubted link between consent and autonomy, I do not argue that the concepts of autonomy and consent are synonymous. Rather, I argue that both autonomy and consent are linked because they give expression to one another in both positive and negatives way.

Autonomy provides a vehicle for the expression of consent or non-consent; consent provides a vehicle for the expression of autonomy.[389] Consent however cannot provide a vehicle for a decision that is not autonomous for, without autonomy, the consent is invalid.[390] Autonomy is an expression of positive and negative consent in the sense that an individual can choose to engage in a sexual activity with another (positive) but also choose not to engage in such an act with another (negative). A negative expression is also a positive expression: a choice *not* to engage in a sexual activity is as much an expression of positive choice than a decision to engage. It is the result of the choice that gives it a positive or negative connotation. Both, however, need to be balanced against the other, with the undoubted result that one must give way to the other. For example, if A wants to have sexual intercourse with B and B reciprocates, both A and B's expression of positive sexual autonomy will prevail. However, if B does not reciprocate, the negative sexual autonomy of B must prevail. Expressions of non-consent by one always override expressions of consent on the part of the other.

If autonomy and consent provide vehicles for the expression of the other, the general question arises of whether this is true in a practical sense. Does English law recognise consensual activity as being autonomous? This question is important for, if the answer is no, then the question arises of why consensual sexual activity between adult family

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[387] Cowan 52

[388] Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 11

[389] Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) 5; Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press 2008) 135

[390] Brants 134 ("…*autonomous activity is activity to which one has knowingly consented*.")

members should be removed from the scope of the criminal law when other (equally) consensual and autonomous activities remain within the scope of the criminal law.

Two questions can be asked: is consensual activity recognised (by the law) as being autonomous and why would consensual activity not be recognised (by the law) as being autonomous? The questions, though similar, lead down separate paths.

The first leads one down a path of identifying areas of the criminal law which disprove the rule i.e., areas in which autonomy is not recognised. The second leads one down a path of actively advocating that autonomy is, and therefore ought to be, recognised in other areas of the criminal law. I am not however ready to ask this second question as the traditional liberal account of autonomy is not the correct basis upon which to base the answer.

In asking the first question, two issues are raised. First, the criminal law makes a distinction between factual consent and legal consent. Second, the criminal law addresses consent in different ways depending upon the nature of the criminal offence. Consent is addressed differently in sexual offences than it is in, for example, offences against the person. It also does not address consent in specific instances, for example in age-based offences and sex with an adult relative.[391]

In addressing the distinction between factual and legal consent, we have a general sense of what consent means,[392] though this “general sense” may not recognise the nuances (or conceptions of consent) embedded within consent. One such nuance, employed by the criminal law, is the distinction between factual consent and legal consent: whether a consensual activity is recognised as being autonomous depends upon whether the consent element of an offence requires factual consent or legal consent. Consent is factual by nature[393] and legal consent is irrelevant without the presence of factual consent.

[391] Sexual Offences Act 2003, ss. 5-8 & 64-65
[392] Peter Westen, *The Logic of Consent: The Diversity and Deceptoveness of Consent as a Defense to Criminal Conduct* (Routledge 2016) 2
[393] Ibid 4

To expand upon this point, definitions of factual and legal consent are required. Factual consent is the subjective attitude or expression of a person's want or desire.[394] Factual consent is the most basic form of consent that a person can give. For example, if A wants to be touched by B, A has factually consented to the touching. Legal consent is the recognition, acceptance, objection, or rejection of the factual consent given by a person. For example, I may give my consent to a particular course of action relating to my body however the State may object to my course of action and not give legal recognition to my factual consent.[395] As consent is factual by nature, without factual consent, legal consent need not be sought.

The law on sexual offences, prior to the enactment of the 2003 Act, provides a good example of the factual and legal consent distinction.[396] As the law then stood, a woman (of any age) could give factual consent to sexual intercourse to prevent the man from being convicted of rape: a girl of 13 could give *factual* consent to sexual intercourse to prevent a conviction for rape.[397] Such factual consent however would not prevent a man from being convicted of unlawful sexual intercourse when a girl was under the age of 16.[398] This example highlights that for a girl under the age of 16, factual consent was sufficient to remove criminality for the offence of rape but not for the offence of unlawful sexual intercourse as her factual consent was not recognised or accepted by the State. The example above also highlights that legal consent is secondary to factual consent. In the example, the girl of 13 gave factual consent to sexual intercourse and this prevents a conviction for rape, though not for unlawful sexual intercourse. If she had not given her factual consent (and the sexual intercourse occurred without consent) then a conviction for rape would not be prevented and there would be no need for her consent to be overridden as there was nothing to override. Legal consent therefore only overrides factual consent when the factual consent is present and not when it is absent.

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[394] Ibid 4-5
[395] See, for example, *R v Brown* [1994] 1 AC 212
[396] See *R v Harling* [1938] 1 All ER 307
[397] Though I refer to a woman of any age in the example, I accept the premise that the younger she is the less likely factual consent would exist.
[398] Sexual Offences Act 1956, ss. 5 (intercourse with girl under 13) & 6 (intercourse with girl between 13 and 16)

In addressing the nature of the criminal offence, the criminal law addresses consent in different ways depending upon the nature of the criminal offence. This in turn affects the way in which consensual activity is recognised as autonomous. I focus here upon sexual offences, though there is a clear link between these issues and how they relate to offences against the person.[399]

Before the enactment of the 2003 Act, consent remained broadly undefined.[400] However, since enactment, specific provisions exist relating to consent which apply only to sexual offences and not to all offences generally.[401] A by-product of the inclusion of consent provisions into the governing Act is to determine which activity is consensual and which is not consensual, and punishing the latter. In offences against the person cases, a factual consent given may still result in criminal liability upon the inflictor of an assault,[402] the presence of a factual consent in sexual offence cases, removes all possible liability in respect of the more serious offences.[403] The traditional liberal account formula of consent *equals* autonomy applies.

There is a distinction in how consent and autonomy are viewed that is, perhaps oversimplified, depending upon whether the offence is sexual or violent. It appears that the criminal law has a greater recognition and respect for consent in sexual cases (than in, for example, offences against the person cases). This is perhaps due to the traditional liberal account of autonomy's influence upon the criminal law whereby sexual cases are more likely to take place in private than in public, unlike offences against the person cases (exceptions to this are domestic violence cases and sexually violent cases). The basis for this greater recognition and respect, again stemming from the traditional liberal account, is perhaps that of the perceived levels of harm that are incurred with a focus upon *outward* harm (which are perhaps greater in offences against the person cases) than in *inward* harm (which are perhaps greater in sexual offence cases).

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[399] For example, in some cases the link between sex and violence, and sexual offence and offence against the person, can be distorted: *R v Wilson* [1997] QB 47
[400] Victor Tadros, 'Rape Without Consent' (2006) 26 Oxford Journal of Legal Studies 515, 520
[401] Sexual Offences Act 2003, ss. 74-76
[402] *R v Brown*
[403] I refer here to the offences contained within Sexual Offences Act 2003, ss. 1-4

If this is ultimately the case regarding sexual offences cases, however, why is consensual sexual activity between adult family members treated differently to other sexual cases? Consensual sexual activity between adult family members is included within the 2003 Act therefore, in Parliament's eyes, it is a sexual offence. Despite this, when the issue of consent is concerned, it is treated (given the lack of a consent element to establish the offence) more like a violent offence whereby factual consent is not recognised and respected by the criminal law (beyond a certain level). Consensual sexual activity between adult family members is treated more like a violence case than a sexual case. This appears to be due to sexual activity between family members being perceived as something which no one would *willingly* engage in and, if they did engage in it at all, it *must* have been without consent. When considered in this light, the lack of a consent requirement may make sense (though I dispute this).

In this section, I examined the link between consent and autonomy and how consent is inbuilt into the traditional liberal account of autonomy, whether consensual activity is recognised as being autonomous by the criminal law and whether autonomy can be used as an override (or mediating principle) to harmful activity which would otherwise be brought within the scope of the criminal law. I concluded that autonomy is an important factor within the criminal law that plays the role of an override (or mediating principle) to otherwise harmful activity which would otherwise be within the scope of the criminal law. The role of autonomy is not therefore to supplant the harm principle as the basis for bringing activity within the scope of the criminal law but, rather, to determine which otherwise harmful activity ought to remain outside scope.

In the next section, I turn to consider autonomy as a human rights principle.

3.4 Human rights and autonomy

In the previous sections, I considered the links between the harm principle and autonomy, and between autonomy and consent, and thereby establishing the link between harm, autonomy and consent. In this section, I argue that a reliance upon autonomy can also be based upon a human rights argument to consider autonomy itself as a human rights principle specifically regarding the matter of sexuality.

Human rights and autonomy arguments combine when considering issues of sexual orientation and there are substantial comparisons, in terms of arguments to remove it from the scope of the criminal law, between homosexual activity and sexual activity between adult family members.[404] I do not go so far as to say that there is a right to engage in sexual activity with another adult family member as I believe this, as a standalone statement, cannot be supported in the same way as there is no right to engage in any form of sexual activity. Rather, I argue that if there is a right of sexual orientation (as evidenced in the jurisprudence of the European Court of Human Rights and other courts) and that those that engage in sexual activity with members of their own family are a minority because of their sexual orientation then that activity is worthy of protection and, as such, laws preventing it must be considered in that light.

In this section, I consider the right of sexual orientation and the jurisprudence of the European Court of Humans Rights (and other courts) before applying it specifically to sexual activity between adult family members.

3.4.1 Right of sexual orientation

Human rights can be defined as the rights held by all individuals, anywhere they are, for the mere fact of being human.[405] The focus of this section is upon a particular aspect of human rights, the right of sexual orientation.

While the European Convention on Human Rights does not mention the notion of sexuality, "*the idea of the subject of human rights as a sexual being is evident*."[406] The subject of such a sexual being has been a "*normative-heterosexual*",[407] however this has been extended to protect the rights of homosexuals as well.[408] To take a binary approach to sexual orientation whereby it is treated as sexual attraction to either a member of one's own sex or of the opposite sex seriously limits the notion of "sexual

[404] J. R. Spencer, 'Incest and Article 8 of the European Convention on Human Rights' (2013) 72 Cambridge Law Journal 5, 5
[405] Damian A. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart 2019) 1
[406] Ibid 60
[407] Eric Heinze, *Sexual Orientation: A Human Right* (Martinus Nijhoff Publishers 1995) 33
[408] Gonzalez-Salzberg 61

orientation". Sexual orientation "*fluctuates*" and has no clear or stable boundaries "*either from one individual to the next, or even within one individual*".[409] The result is that sexual orientation "*could encompass any sexual attraction of anyone toward anyone or anything*."[410] Sexual orientation denotes: "…*real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm*."[411] Sexual orientation therefore can include, given the reference to "identity", heterosexuals that engage in cross-dressing or sexual intercourse with those that do. It can include individuals that engage in sexual activity with members of their own gender, or those that identify as a different gender.

Sexual minorities denote: "…*people whose preferences, intimate associations, lifestyles, or other forms of personal identity or expression actually or imputedly derogate from a dominant normative-heterosexual paradigm*."[412] Though there is an overlap of these definitions, a sexual minority only derogates "*from a dominant normative-heterosexual paradigm*" whereas sexual orientation can "*conform to or derogate from a dominant normative-heterosexual paradigm*". A sexual minority is a subset of sexual orientation in that they are a minority *because* of their orientation.

If one subscribes to the view that "*rights of sexual orientation derive from rights of personhood, privacy, liberty, equality, conscience, expression, and association, then they derive from the oldest of rights traditions*…"[413] then one must subscribe to the view that sexual minorities also share such rights. It is this acceptance that goes to the heart of, and the respect for, human dignity.

If one accepts that to, for example, engage in consensual sexual activity with a person of one's own gender or who wears the clothes of a different gender, is a "*preference*" then a person who engages in consensual sexual activity with an adult family member is, equally, expressing their preference. "Preference" is however a flexible concept and is difficult to define. It can alter from one moment to the next or can last for long periods

[409] Heinze 45
[410] Ibid 46
[411] Ibid 60
[412] Ibid 61
[413] Ibid 85

of time, nor can it be limited to specific activities. For example, a person who identifies as bisexual may have a current preference to engage in sexual activity with a person of their own gender and, at some other point, a person of a different gender; their sexual orientation (of bisexual) has not altered however their preference has meaning that at some point they can be considered a sexual minority and at other points not. Similarly, to a person who non-exclusively engages in consensual sexual activity with an adult family member is at some point similarly a sexual minority, and at other points not.

The right of sexual orientation has been accepted. I would argue that as a "sexual minority" is a subset of sexual orientation (they are a minority *because* of their orientation, and this includes consensual sexual activity between adult family members) that this also ought to be accepted and protected.

Before analysing, in the next section, the jurisprudence of the European Court of Human Rights and other courts regarding sexual orientation (and homosexuality specifically) to determine whether the outcomes can be similarly applied to consensual sexual activity between adult family members, it is necessary to provide some brief preliminary context to that jurisprudence as it relates to the United Kingdom.

In 1957 the Wolfenden Report was published. Its major conclusion was that: "*It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined*."[414] In December 1957, within two months of its publication, Lord Pakenham moved a debate in the House of Lords calling for the conclusions to be enacted. Lord Pakenham praised the report as an important social document[415] and summarised what he thought to be its conclusion (regarding homosexuality) as: "…*if a man…is doing wrong the law must not intervene to stop him unless he is harming someone else*…"[416] He however stated that legal toleration should not be confused with moral approval.[417] The Government (who were

[414] Home Office, *Report of the Committee on Homosexual Offences and Prostitution (Cmnd 247)* (HMSO 1957) para. 14
[415] HL Deb 4 December 1957, Vol. 206, col. 733
[416] HL Deb 4 December 1957, Vol. 206, col. 737
[417] HL Deb 4 December 1957, Vol. 206, col. 744

represented in the debate by the Lord Chancellor, Viscount Kilmuir, who had set up the committee whilst he was Secretary of State for the Home Department) was not persuaded to enact legislation that quickly.[418] A debate in the House of Commons on the report did not occur until November 1958, during which the Secretary of State for the Home Department, Rab Butler MP, stated that:

> "…*what is clear, after taking this time to think it over and to receive all the impressions and consider the perplexities of this problem, is that there is at present a very large section of the population who strongly repudiate homosexual conduct and whose moral sense would be offended by an alteration of the law which would seem to imply approval or tolerance of what they regard as a great social evil*."[419]

The Government therefore did not propose legislation to carry out the recommendations of the report.[420] It was not until the passage of the 1967 Act that the recommendations were enacted and consensual homosexual activity in private between persons aged 21 was removed from the scope of the criminal law.[421] The 1967 Act however only applied to England & Wales, and not to Scotland or Northern Ireland.[422]

In 1978 the Standing Advisory Commission on Human Rights recommended to the Secretary of State for Northern Ireland that "*the law of Northern Ireland should be brought into line with the 1967 Act*."[423] A draft Homosexual Offences (Northern Ireland) Order was prepared however on 2 July 1979, in response to a written question, the Secretary of State for Northern Ireland stated that as there was "a substantial body" opposed to bringing the law in line with 1967 Act, "*the Government propose to take no further action in relation to the draft Homosexual Offences Order*."[424]

3.4.2 Jurisprudence of the European Court of Human Rights and other courts

[418] HL Deb 4 December 1957, Vol. 206, col. 773
[419] HC Deb 26 November 1958, Vol. 596, col. 370
[420] *Norris v Attorney General* [1984] IR 36, 61 (O'Higgins CJ): "*The caution shown by successive British Governments and Parliaments is understandable*…"
[421] Sexual Offences Act 1967, s. 1(1)
[422] Ibid, s. 11(5)
[423] Standing Advisory Commission on Human Rights, *Third Report: Annual Report for 1976-77 (HC 199)* (HMSO 1978) para. 36
[424] HC Deb 2 July 1979 Vol. 969, col. 466W

In the previous section, I reviewed the right of sexual orientation. I made the distinction between sexual orientation and sexual minorities and argued that the latter was a subset of the former and, as such, as consensual sexual activity between adult family members can be considered as a sexual minority those that engage in it are deserving of similar protections as those relating solely to sexual orientation.

In this section, I review the jurisprudence of the European Court of Human Rights (and other courts) specifically regarding homosexuality[425] to determine the extent of those protections (and in what form) before, in the next section, applying them to the specific case of consensual sexual activity between adult family members.

The majority of judgments of the European Court of Human Rights relating to sexual orientation and same-sex sexuality have been decided "*from a perspective centred on the right to respect for private life*"[426] under Article 8 of the Convention.[427] However, despite the applications being made for alleged violations of Article 8, Gonzalez-Salzberg considered that the Court tended to base their decisions "*on the belief that sexuality is an important part of an individual's private life*".[428]

In *Dudgeon v United Kingdom*, the Court found of a violation of Article 8[429] however they emphasised that they were "*not concerned with making any value-judgment as to the morality of homosexual relations between adults males*."[430] Rather, the case "*concerns a most intimate aspect of private life*."[431] *Dudgeon* considered the law as it stood in Northern Ireland.[432] In the rest of Ireland, the Supreme Court of Ireland held that the judgment of the European Court of Human Rights in *Dudgeon* was not binding upon it.[433] In *Norris v Ireland*, however, the European Court of Human Rights held that

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[425] In particular, *Dudgeon v United Kingdom* (1981) 4 EHRR 149, *Norris v Attorney General*, *Norris v Ireland* (1988) 13 EHRR 186, *Modinos v Cyprus* (1993) 16 EHRR 485, *Bowers v Hardwick* (1986) 106 SCt 2841, and *Lawrence v Texas* (2003) 123 SCt 2472.
[426] Gonzalez-Salzberg 62
[427] Article 8 provides that: "*Everyone has the right to respect for his private and family life, his home and his correspondence*."
[428] Gonzalez-Salzberg 62
[429] *Dudgeon v United Kingdom* [63]
[430] Ibid [54]
[431] Ibid [52]
[432] *Northern Ireland (Homosexual Offences) Order 1982* (SI 1982/1536), art. 3, brought the law of Northern Ireland in line with the Sexual Offences Act 1967. See HC Deb 25 October 1982 Vol. 29, cols. 833-853
[433] *Norris v Attorney General* 67 (O'Higgins CJ) & 69 (Henchy J)

the case of *Norris* was "*indistinguishable*" from the *Dudgeon*.[434] A similar conclusion of a violation of Article 8 was found in *Modinos v Cyprus*,[435] where the Government admitted that prosecution had occurred "*before the implications of the Dudgeon decision were properly understood*".[436]

The emphasis upon not making value-judgment upon the outward expression of homosexuality, yet still finding a violation of Article 8, places the focus of the judgment upon the sexual orientation of the applicant. *Being* homosexual (or any other sexual orientation) is one thing, the *expression* of that sexual orientation is another,[437] and it is usually the latter that is prosecuted and criminalised rather than the former.[438] In *Dudgeon*, the Court found that actions that resulted from the applicants *being* homosexual were violations of Article 8, regardless of any outward expression of homosexual activity,[439] as the legislation as it existed in Northern Ireland was the violation.

If there is a distinction to be made between the *being* and the *expression* of a sexual orientation, but the latter may not be worthy of protection under, for example, Article 8, the question that could be asked is what is the actual purpose of the protections offered by the Convention? The protections are not designed to be theoretical, but living and practical, therefore to some extent the *being* and the *expression* are inextricably linked and, if so, the expression is equally worthy of protection.

Dudgeon can therefore be compared to *Laskey*. Whereas the former concerned *the law*, the latter concerned the expression and application of the law. The question therefore was why, in *Dudgeon*, was a violation of Article 8 found, but not in *Laskey*?[440] One possible reading taken from the partial dissent of Judge Walsh, if the focus is on sexual orientation, is that the outward (external) expression of homosexuality does not necessarily relate to the internal orientation of the person: expression is not indicative

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[434] *Norris v Ireland* [38]
[435] *Modinos v Cyprus* [26]
[436] Ibid [21]
[437] *Dudgeon v United Kingdom* [39]; *Laskey v United Kingdom* (1997) 24 EHRR 39
[438] *Dudgeon v United Kingdom* [39]
[439] Offences against the Person Act 1861, ss. 61-62; Criminal Law Amendment Act 1885, s. 11; Sexual Offences Act 1956, ss. 12-13
[440] *Laskey v United Kingdom* [45]

of a sexual orientation (though it can be in a temporal sense at any given time, if one considers the definition of sexual orientation offered in the previous section) and it is the sexual orientation that ought to be protected and not the expression of it.[441] It is by upholding the sexual orientation, whilst not condoning the expression of that orientation, that human dignity is respected.

The cases of *Dudgeon*, *Norris* and *Modinos* all show a violation of Article 8 based upon prohibitions that "*continuously and directly affects that applicant's private life*."[442] The focus has not been upon the expression of sexual orientation, rather upon the sexual orientation itself. The fundamental mistake is to think that the expression of sexual orientation is the core of that person; the mistake is to consider homosexual sexual activity as being the right to be protected, whereas it is the right to be free to be homosexual (or any other sexual orientation) that is to be protected. This mistake has been the subject of the United Supreme Court cases of *Bowers v Hardwick* and *Lawrence v Texas*.[443]

In *Bowers*, Hardwick was arrested and charged for committing sodomy with another man contrary to the Georgia statute criminalising such activity. After a preliminary hearing the case was dropped unless further evidence came to light. Hardwick filed a claim that the Georgia statute was unconstitutional. In opening the case for Bowers (the Attorney General of Georgia) his counsel stated that: "*This case presents the question of whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy*."[444] The State therefore sought to place homosexual activity front and centre as a negative activity that was immoral. In giving the majority judgment of the Court, White J stated that:

> "*This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are*

[441] *Dudgeon v United Kingdom* [12] (partial dissent of Judge Walsh); *Norris v Attorney General,* 80 (McCarthy J): "*One does not have to be a homosexual to commit an offence under any of the three sections; it is the act or deed itself that constitutes the offence*."
[442] *Modinos v Cyprus* [24]
[443] The roles of the European Court of Human Rights and the United States Supreme Court are of course different, as are the powers conferred upon each regarding enforceability.
[444] Bowers v Hardwick, oral argument 31 March 1986 <https://www.oyez.org/cases/1985/85-140> (accessed 10 March 2017)

> *wise or desirable. … The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy*…"[445]

Again, the focus was upon the expression of sexual orientation, rather than upon the sexual orientation itself.[446] In *Lawrence*: "*The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct*."[447] This is the same question as in *Bowers* but phrased in a way that emphasises liberty in sexual orientation, rather than the expression of it.

The jurisprudence of the European Court of Human Rights indicates that the protections afforded by Article 8 resulted from the applicants *being* homosexual, regardless of any outward expression of homosexual activity. The focus was therefore upon their sexual orientation rather than any expression of their sexual orientation. Whereas in *Modinos* criminal sanctions had been incurred by the applicant, this was not the case in *Dudgeon* and *Norris*, though all lived under the fear of criminal sanction because of their sexual orientation.

In the next section, I consider how this jurisprudence applies to sexual activity between adult family members.

3.4.3 Application of the jurisprudence to sexual activity between adult family members

In the previous section, I reviewed the jurisprudence of the European Court of Human Rights (and other courts) specifically regarding homosexuality to determine the extent of those protections (and in what form). In this section, I consider how this jurisprudence applies to sexual activity between adult family members.

Whereas being homosexual is a recognised sexual orientation, the same is not necessarily true for those who engage in sexual activity between family members. It is first necessary to remind ourselves of the definition of sexual orientation and sexual

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[445] *Bowers v Hardwick* 2843
[446] In his dissent, Blackmun J, highlighted this mistake (ibid 2848).
[447] *Lawrence v Texas* 2475 (Kennedy J)

minorities. Sexual orientation denotes: "…*real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm*."[448] Sexual minorities denote: "…*people whose preferences, intimate associations, lifestyles, or other forms of personal identity or expression actually or imputedly derogate from a dominant normative-heterosexual paradigm*."[449] The focus here is on the reference to "preferences".

Whereas the attraction between family members can be included as a "preference", what distinguishes it from homosexuality is the expression of that preference. Whereas a person can be homosexual and not express their homosexuality in an outward sexual way by engaging in sexual activity with someone of the same sex, the preference for one's own family members does not relate to their sex therefore it *requires* the expression of the preference to be effective. It is however a sexual minority because of this: a homosexual does not *need* to engage in sexual activity for their sexual orientation to be apparent, a person with a preference for family members must outwardly express their preference by engaging in sexual activity. Without the outward expression, there is no evidence of sexual orientation or membership of a sexual minority which ought to be protected.

In this section, I ask how the jurisprudence of the European Court of Human Rights discussed in the previous section can be applied to consensual sexual activity between adult family members. Fortunately, this is not a theoretical question as the Court has had the opportunity to consider the matter of consensual sexual activity between adult family members in the case of *Stübing v Germany*.[450]

In *Stübing* the applicant contended that his conviction for incest[451] violated Article 8.[452] The facts of the case are as follows.[453] The applicant was born in 1976 and, at three (approx. 1979), he was placed into care. At seven (approx. 1983), he was adopted by

[448] Heinze 60
[449] Ibid 61
[450] *Stubing v Germany* [2013] 1 FCR 107
[451] German Criminal Code, s. 173 (see *Stubing v Germany* [27])
[452] *Stubing v Germany* [3]
[453] Ibid [4- 12]

his foster parents and had no further contact with his biological family. In 1984, the applicant's sister was born (given the dates, he did not know of her existence). He reinstituted contact with his biological family in 2000 and, following the death of their mother, he and his sister's relationship intensified. From January 2001, he and his sister began to engage in consensual sexual intercourse, and she gave birth (between 2001-2005) to a total of four children. Following the birth of the youngest child he had a vasectomy. Between the births of their first and second child, he was convicted of incest and received a suspended sentence and placed on probation. Following the birth of the third child he was again convicted and sentenced to ten months imprisonment. Finally, following the birth of the youngest child, he was convicted and sentenced to sixteen months imprisonment. The applicant's sister had also been convicted but due to a "…*serious personality disorder…in conjunction with established mild learning disabilities*…" a sentence was not imposed upon her. The Dresden Court of Appeal rejected his appeal, but considered that there were doubts as to the constitutionality of *section 173*.[454] He alleged that *section 173* violated his right to sexual self-determination, had discriminated against him, was disproportionate and interfered with his relationship with his children.[455] The German Federal Constitutional Court rejected the complaints.[456]

Before the European Court of Human Rights, he submitted that his criminal convictions for incest had interfered with his right to respect for his family life by preventing him from participating in the upbringing of his children and that the convictions had interfered (and continued to interfere) with his sexual life.[457] The Court concluded that though Article 8 was violated,[458] but that *section 173* pursued a legitimate aim within the meaning of Article 8(2).[459]

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[454] Ibid [13]
[455] Ibid [14]
[456] Ibid [15]; *Incest Case* (2008) 120 BVerfGE 224. The Court rejected the complaints seven to one, the sole dissenter (Hassemar) was the only criminal lawyer on the panel.
[457] *Stubing v Germany* [34]. He also submitted that there had been no pressing social need for his convictions, the ban on incest was not suited to protect the family unit, incest between siblings would not jeopardise or destroy the family unit, criminal liability did not protect the interests of potential children and did not lead to potential overlapping roles, the convictions had not protected his sister's right to sexual self-determination, and the convictions could not be justified by the protection of morals (ibid [35-41]).
[458] Ibid [55]
[459] Ibid [57] (namely the protection of morals: ibid [61])

Stübing, due to its similarity to *Dudgeon* and *Norris*, was (unsurprisingly) initially found to be an interference with private life by the Court, which affirmed that sexual life (which includes "*the manifestation of a person's sexuality*"[460]) ought to be respected.[461] However, they rejected an overall violation of Article 8. The decision has been criticised for several reasons. Spencer, for example, criticised the Court for looking for utilitarian reasons by which it could "*distinguish the criminalisation of incest from the criminalisation of homosexual acts*."[462] Welstead took a more cynical view and suggested that the Court had "*simply abdicated its responsibility towards the protection of human rights*".[463] The judgment has been described as "*weak*"[464] and "*disappointing*".[465]

What distinguishes *Dudgeon* from *Stübing*? It is certainly not the arguments in favour of removing consensual sexual activity between adult family members from the scope of the criminal law for these are essentially the same as the arguments in favour of removing homosexual activity from scope.[466] If then it is not the theoretical and practical arguments, I would argue that it may be the way in which sexual orientation is viewed in the particular contexts of homosexuality and sexual activity between family members. As stated above, if both are viewed as a sexual orientation or a sexual minority with both internal and external (expressive) aspects then it is the former that has been considered by the Court to be worthy of protection rather than the outward expression of sexual activity between family members. A key issue in *Dudgeon*, *Norris* and *Modinos* was the liability of the applicants to prosecution for their activities.[467] In *Stübing* there was no suggestion of this, yet by the time of his application to the Court, he had already been convicted and sentenced three times for his consensual sexual activity with his adult sister. The Court was therefore presented with ample evidence (including four children) of his expression of his sexual orientation.[468]

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[460] Ibid [59]
[461] Ibid [55]
[462] Spencer 6
[463] Mary Welstead, 'The criminalisation of consensual sexual relationships between adult siblings and human rights: Stubing v Germany"' (2012) International Family Law 402, 402
[464] Ibid 406
[465] Pierre Thielborger, 'Judicial Passivism at the European Court of Human Rights' (2012) 19 Maastricht Journal of European & Comparative Law 341, 342
[466] Spencer 5
[467] *Dudgeon v United Kingdom* [41]; *Norris v Ireland* [20]; *Modinos v Cyprus* [12]
[468] There was no suggestion or description in *Stübing* of the use of "sexual orientation" as I am using it in this context.

Whereas the Court has been willing to uphold a violation of Article 8 regarding one aspect of sexual orientation and sexual minority (homosexuality), they have been unwilling to uphold a similar violation regarding another aspect of sexual orientation and sexual minority (sexual activity between family members).[469]

In this section, I have applied the jurisprudence of the European Court of Human Rights regarding homosexuality to the specific case of consensual sexual activity between adult family members. I conclude that the Court's view appears to be that the protections afforded by Article 8 resulted from the applicants *being* homosexual, regardless of any outward expression of homosexual activity. But, in cases where additional sexual orientations or sexual minorities are concerned (consensual sexual activity between adult family members), the Court has been unwilling to extend the same protections to them. The reason may be as follows: "*In truth it is hard to resist the conclusion that it was really the "yuck factor", rather than the utilitarian reasons, which ultimately led the Strasbourg Court to decide this case as it did*."[470]

3.4.4 Summary

In this section, I considered how human rights and autonomy arguments combine when considering issues of sexual orientation. I considered the right of sexual orientation, specifically regarding homosexuality and sexual activity between adult family members, and analysed the jurisprudence of the European Court of Human Rights. I applied the jurisprudence it to the specific case of sexual activity between adult family members. I concluded that the Court's view appears to be that the protections afforded by Article 8 resulted from the applicants *being* homosexual, regardless of any outward expression of homosexual activity. But, in cases where additional sexual orientations or sexual minorities are concerned (consensual sexual activity between adult family members), the Court has been unwilling to extend the same protections to them.

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[469] *Modinos v Cyprus* 496 (concurring opinion of Judge Matscher)
[470] Spencer 7

3.5 Conclusion

In this chapter, I have considered the foundations of autonomy by analysing how autonomy is inbuilt into the harm principle, how autonomy is linked to consent and autonomy as a human rights principle. I argue that for an activity to be brought or retained within the scope of the criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy.

I argued that autonomy is inbuilt into the harm principle in two ways. First, by reference to power being exercised "*against his will*" and, second, by reference to "*His own good, either physical or moral, is not a sufficient warrant*." I argue that deciding for oneself what is in one's own best interests, in the liberal tradition, must be autonomous. I further argued that though the harm principle is the correct contemporary criminalisation principle, autonomy can override, mediate, and limit the role of the criminal law.

Autonomy and consent are inseparably connected, to the extent that they are often thought to be synonymous. The extent of this connection is evidenced in the traditional liberal account formula of consent *equals* autonomy. I considered how the role of consent is viewed by the criminal law and make the distinction between sexual and violent offences. I concluded that autonomy is an important factor within the criminal law that plays the role of an override (or mediating principle) to otherwise harmful activity which would otherwise be within the scope of the criminal law. The role of autonomy is not therefore to supplant the harm principle as the basis for the bringing activity within the scope of the criminal law but, rather, to determine which otherwise harmful activity ought to remain outside scope.

Finally, I considered how human rights and autonomy arguments combine when considering issues of sexual orientation. I considered the right of sexual orientation and analysed the jurisprudence of the European Court of Human Rights. I concluded that the Court's view appears to be that the protections afforded by Article 8 resulted from the applicants *being* homosexual, regardless of any outward expression of homosexual activity. But, in cases where additional sexual orientations or sexual

minorities are concerned (consensual sexual activity between adult family members), the Court has been unwilling to extend the same protections to them.

In the next chapter, I turn to consider an alternative form of autonomy, that of relational autonomy.

Chapter 4: Relational Autonomy: An Alternative Approach to Autonomy

4.1 Introduction

In chapter 2, I considered whether sexual activity between family members was correctly criminalised. I argued that, though the harm principle was the correct contemporary criminalisation principle to apply, consensual sexual activity between adult family members was not correctly criminalised by reference to it unless actual harm occurred. I further argued that, by itself, the harm principle was insufficient to determine whether to bring an activity within the scope of the criminal law and that something *more* is required. I argue that the something *more* is autonomy: for an activity to be brought or retained within the scope of the criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy. In chapter 3, I considered the foundations of the principle of autonomy by analysing its grounding in the criminal law and its interactions with the harm principle, consent, and human rights.

In this chapter, I consider alternative approaches to the traditional liberal account of autonomy. I argue that the criminal law ought to employ a relational autonomy approach as the current meaning of autonomy based upon a traditional liberal account may fail to protect some vulnerable (and adult) family members whose ostensible consent may not be true consent.[471] Such ostensible consent can be achieved, for example, by subliminal grooming or blatant abuses of power and oppression. I also consider a further alternative, advanced by Fineman, with a focus upon vulnerability rather than dependency.[472] I then turn to consider the implications of this alternative approach regarding the formula that consent equals autonomy.[473]

When discussing autonomy, and autonomy-based arguments, it is essential to know what one is discussing. There are many forms of autonomy: one could be seeking

[471] See 4.2, below.
[472] See 4.2, below.
[473] See 4.3, below.

autonomy *from* something or someone (or the State), autonomy *to* do something,[474] autonomy to *have* choices, or to have one's autonomy respected.[475] To some extent, autonomy arguments encapsulate all these forms of autonomy and I seek to argue that they exist in one form or another regarding consensual sexual activity between adult family members. For example, a consensual choice to engage in sexual activity with another adult family member involves the autonomy to have a choice, the autonomy to put that choice in action, to have that autonomous choice respected so that one is autonomous from any repercussions from the State.

Under a traditional liberal account of autonomy, a consensual decision is automatically regarded as an autonomous one. Any other conclusion would be viewed as an interference and an infringement of the general *laissez faire* tenet of liberalism. This link between consent and autonomy is such an automatic one under the traditional liberal account that one can suggest the formula: consent equals autonomy; autonomy equals consent. However, the relationship between consent and autonomy goes deeper than these formulae suggest, and the traditional liberal account has difficulty reflecting *context*.

There is an important distinction between "circumstances" and "context".[476] Whereas the former can be described as simply the events that occurred – *A* gave the ball to *B* – the latter reflects the background in which these events occurred as well as what allowed those events to occur – why did *A* give the ball to *B*? Regarding sexual interactions, the question moves from "*did X consent?*", to the more important question, "*what led X to consent?*"

Relational autonomy addresses context rather than merely circumstances therefore, when considering consensual sexual activity between adult family members, it would allow the law to make the distinction between ostensible and true consent by being

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[474] Martha L.A. Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 258

[475] John Christman, 'Autonomy, Respect, and Joint Deliberation' in James F. Childress and Michael Quante (eds), *Thick (Concepts of) Autonomy: Personal Autonomy in Ethics and Bioethics* (Springer 2022) 68

[476] *R v Clinton* [2012] EWCA Crim 2; [2013] QB 1, [39] (Lord Judge CJ): "…*events cannot be isolated from their context*."

able to address situations such as subliminal grooming or blatant abuses of power and oppression.

Relational autonomy is a feminist reconceptualisation of autonomy.[477] However, it is not a single conceptualisation, rather it is more of an "umbrella term".[478] Relational autonomy's basic premise is that of shared conviction: the idea that people are socially embedded and that their identities are formed within the context of social relationships and shaped by complex intersecting social determinants such as race, class, gender, and ethnicity.[479]

Relational autonomy is an appropriate methodological framework to use as it attempts to address the "behind the scenes" issues that a traditional liberal account is unable to account for. There are several interconnected examples (which are relevant to the issue of consent) which highlight the inabilities of the traditional liberal account of autonomy.

First, the type of relationship that exists between the adult family members. A traditional liberal account presumes that a relationship between two autonomous adults is an equal one whereas relational autonomy examines the relationship and asks whether the relationship is constructive or destructive therefore it is better at accounting for power differentials which may be present or may be difficult to identify. This example identifies that there may be inequality in power.

Second, the impact of internalised oppression: is the relationship between the adult family members one which is subject to oppression, and which renders one of them more likely to consent or otherwise consent when they would otherwise not? A traditional liberal account of autonomy presumes that in an equal relationship there is no such oppression however relational autonomy recognises that even in apparently

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[477] Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) 4; Natalie Stoljar, 'Feminist Perspectives on Autonomy' (2018) <https://plato.stanford.edu/archives/win2018/entries/feminism-autonomy/> §1 (accessed 15 February 2019)

[478] Mackenzie and Stoljar 4; Jonathan Herring, 'Relational Autonomy and Rape' in Shelley Day Sclater and others (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing 2009) 54

[479] Mackenzie and Stoljar 4

"equal" relationships oppression can take a form which is not recognised as "oppression" in a traditional sense, for example subliminal grooming. This example identifies that inequality in power has an impact upon decision-making.

Third, the impact that socialisation and other societal pressures may have upon decisions to consent: is the decision truly consensual or is the consent brought about because that is what society expects of the individual? A traditional liberal account of autonomy discounts entirely the possible impact of socialisation upon a person's ability to consent whereas relational autonomy takes such socialisation into account.

I now turn to consider the alternative approach of relational autonomy substantively.

4.2 An alternative approach to autonomy: relational autonomy

Relational autonomy cannot be used to "*grind out answers*"[480] to determine which relationships are certainly autonomous and which not, or which context is certain (or only likely) to remove autonomy. Rather, relational autonomy provides a vehicle to allow such questions to be determined. Relational autonomy allows enquiries into the issue of context to attempt to answer questions of internal oppression and oppressive conditions that can undermine personal autonomy in a way that the traditional liberal account cannot. For example, relational autonomy attempts to resolve issues such as socialisation and the role it can play in determining whether consent was autonomous. Relational autonomy accepts that "*Compromises to our autonomy are the norm, not the exception*" hence the need for a relational approach.[481]

Relational autonomy, due to it its employment of a multi-layered approach to context, allows relationships to be seen in not necessarily *the* correct context but, rather, a *more* correct context. Relational autonomy views relationships in what I describe as a "bubble model".

> **Bubble model**. You are doing the washing up. You add washing up liquid to the water and individual bubbles are created. Some of the bubbles are large, some

[480] Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press 2008) 137
[481] Quill R. Kukla, 'A Nonideal Theory of Sexual Consent' (2021) 131 Ethics 270, 270

> small, though they all interact with each other until they reach a point when they can be picked up all (or almost all) at once as they are no longer *individual* bubbles but a *collection* of bubbles. No single bubble can be disconnected from the others, they form a link and to describe one bubble is a description of them all as each bubble has a relationship to the ones it connected with.

This bubble model can be applied to any specific familial relationship or family. Take, for example, a sibling relationship: the siblings have a relationship with each other, as well as separate, but nonetheless interacting, relationships to other siblings and to their parents whilst, at the same time, additional relationships with their own circle of friends, colleagues, employers, and other family members in an exponential way.[482]

Relational autonomy does not just focus on relationships *per se* as being central to autonomy, rather, it makes the important distinction between relationships which are constructive, those which are destructive and those which are manifestations of both at any given time. Autonomy requires the interaction of constructive relationships[483] as only these relationships provide the necessary positive aspects of context (and therefore consent). Likewise, destructive relationships provide negative aspects of context. As such, the mere *existence* of a relationship is not proof of it being "autonomy-enabling",[484] rather it is the existence of constructive and positive aspect enhancing relationships. Some relationships do *not* enhance a person's autonomy but merely diminish it at the *expense* of another[485] however it is important that conclusions as to autonomy are not made solely on the *type* of relationship (family or otherwise). The destructive nature of a relationship does not annul autonomy, rather it diminishes it[486] due to the inter-relationship of both positive and negative aspects of context.

In the next section, I analyse the theoretical approaches to relational autonomy.

4.2.1 The theoretical framework of relational autonomy

[482] Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11(1) Hypatia 4, 24
[483] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2011) 118; Yael Braudo-Bahat, 'Towards a Relational Conceptualization of the Right to Personal Autonomy' (2017) 25 American University Journal of Gender, Social Policy & the Law 111, 133
[484] Leckey 20
[485] Ibid 20-21
[486] Braudo-Bahat 134

In the previous section, I introduced relational autonomy. In this section, I analyse the theoretical framework of relational autonomy.

In 1989, Nedelsky "*sketched out*"[487] an argument that feminism required a new conception of autonomy.[488] Nedelsky argued that, though autonomy was central to feminism, feminist theory itself, to retain the "*value*" of autonomy, had to reject "…*its liberal incarnation*."[489] I argue that this is partially true. That while a feminist and relational account of autonomy does provide methodological assistance to the argument that consensual sexual activity between adult family members ought to be removed from the scope of the criminal law, there are aspects of the traditional liberal account of autonomy that ought to remain.

Nedelsky's argument for this new conception of autonomy (which we now call relational autonomy) was that there needed to be shift in focus and language from understanding autonomy as a concept that emphasised self-determination in a *liberal* way to one that emphasised it in a *relational* way.[490] There had to be, in concert with other feminist theories, a social and *relational* interaction between individuals. The source of autonomy therefore was not isolation, but relationships: "…*relationships – with parents, teachers, friends, loved ones – that provide the support and guidance necessary for the development and experience of autonomy*."[491] It was through these relationships that the capacity for autonomy could be supported and grow along with "…*the internal sense of being autonomous*."[492]

In 1989 Nedelsky had, by her own admission, only sketched out the concept of relational autonomy. By 2011, when her book "*Law's Relations*" was published, she had developed her theory and, by that time, others had also published their views on relational autonomy. Her book focuses on the *groundwork* of relational autonomy, rather than the *accounts* of relational autonomy.

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[487] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law & Feminism 7, 11
[488] Ibid 7
[489] Ibid 7
[490] Ibid 8 & 9-10
[491] Ibid 12
[492] Ibid 25

In Nedelsky's view, as expressed in her 2011 book, was that:

> "…*each individual is in basic ways constituted by networks of relationships of which they are a part – networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming*."[493]

For Nedelsky, we are all members of networks (whether we know it or not) that extend far beyond our own circles. We are in a network with our partners, who in turn, are in networks of their own, of which we are only one member. We have friends with whom we are in networks with, work colleagues, but also with the State simply by being a members of it. Whilst liberalism itself does not wholly reject the idea of relationships, it in no way goes as far as Nedelsky suggests. I am in a relationship with my supervisors for the purpose of completing this thesis. Whilst I *may* have been able to complete it without them in complete isolation, being a part of the network of supervisor and supervised, with all that entails, has no doubt made my thesis better therefore being in a relationship with others, rather than being alone, promotes each of us.

When viewed in the way Nedelsky describes it, it seems almost obvious that this would be the case. However, some find this relational approach off-putting because: "*it seems both infantilizing and feminizing: it treats mature adults as the relationally dependent creatures we know children to be and grants the kind of important to relationship associated with women*."[494] In this sense, I believe, Nedelsky is referring to those that view the idea of being *children* or being *women* as perhaps insulting. This is not in reality the case. To say that someone is "dependent" is not to say that they are not "independent", rather both descriptions are points on the same scale: under relational autonomy, to be "independent" is to be *less* dependent.[495]

We are all dependent on one another for some things, even if we do not know it, and even for the most basic things. An employee is dependent upon their employer to pay them on pay day, a person in care is dependent upon a carer to feed them, a driver is

[493] Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* 19
[494] Ibid 20
[495] Ibid 28

dependent upon other road users to drive in a safe and responsible way. The relationships of dependence can therefore be long term (cared for and carer), medium term (employer and employee), and short term (driver and other road users), and these relationships of dependence are ever changing.[496] The existence of that dependence does not therefore impact upon our own perceived notions of independence.[497] Dependence is a fact of life and does not infantilise or feminise.[498]

Nedelsky does not however live in her own view of a social utopia, she is alive to the realities of the world, particularly to women. For example, she notes that "*Young women are raised with a sense of the ever-present threat of sexual violence*" and that "*Both young men and women grow up learning that male violence against women is to be expected*."[499] Nedelsky emphasises that there are some relationships that are harmful and some that are not.[500] Autonomy requires constructive relationships.[501] As a result of this interplay between relationships that are constructive and those that are destructive (for not all relationships can be just one type), autonomy and what it means to be autonomous are on a continuum.[502]

Constructive relationships are key to both autonomous and consensual decisions. They foster the context in which to build autonomy. This could include, for example, a close loving, caring, and trusting relationship with the (proposed) sexual partner as well as the absence of any restraining factors. It could also include the willingness to perform safe sex, respecting of sexual limits as well as more everyday factors such as enjoying that person's company for the days or weeks before hand or whether the favourite football team has won or lost that day. More longer-term elements may also be included, for example between siblings, that they have always been close, they protected each other from other relatives or even from former partners. Positive aspects could also be immediate, they are present on that day because of other internal or external factors. What these factors are, however, are unique to the

[496] Ibid 22
[497] Ibid 29
[498] Ibid 32
[499] Ibid 23
[500] Ibid 26
[501] Ibid 52
[502] Ibid 46

individuals concerned and cannot be definitively listed except to be described in, at best, the most general way as I have done above.

Kukla identified a series of constructive and positive elements upon which one can "*scaffold consent and help make it possible*."[503] She suggested that this scaffold included:[504] "*Background trust between everyone involved – trust that everyone cares about the other's safety, desires, boundaries, and comfort*", "*The concrete ability to exit an activity at will, without recrimination or extended negotiation, in a way everyone involved can immediately recognize*", "*Competent uptake from each partner, including skills at understanding and responding to what each is communicating*", "*A broader social context that does not undermine the agency of people who engage in the sexual activities at hand*", "*Avoidance of activities that are agency undermining in virtue of their content*", "*Meaningful epistemic agency*", "…*redress if their consent is violated*", and "…*having a support network*".

Destructive relationships are unsupportive of an autonomous and consensual decision. Though, by and large, examples of destructive and negative elements are opposites of positive ones (such as a fearing relationship or the presence of restraining factors such as force, violence, economic coercion), they are not limited to them. Several possible examples of destructive and negative elements were suggested by McGorrey & McMahon in the context of coercive control. For example, they referred to demands to monitor a partner's mobile telephone usage, call lists, emails, and social media accounts, the setting up of surveillance cameras and tracking systems to monitor a partner's movements and, persistent telephone calls "*to keep an eye on* [them]".[505]

It is of course important to note that positive and negative elements that are evidence of a constructive and destructive relationship do not cancel each other out. For example, a caring relationship does not cancel out the use of economic coercion.

[503] Kukla 286
[504] Ibid 286-288
[505] Paul McGorrery and Marilyn McMahon, 'Criminalising "the Worst" Part: Operationalising the Offence of Coercive Control in England and Wales' (2019) Criminal Law Review 957, 958-960

Positive and negative elements, like the relationships themselves, inter-relate between the individuals, and at any given time both aspects may be present.

I argue that where the relationship *is* a constructive one, it is autonomy enabling regardless of the specific relationship involved (or the societal view of that relationship). Two examples can be provided here as to types of relationship which may be considered societally as "out of the norm", and the same considerations can apply for both types of relationships: a consensual (sexual) relationship between adult family members and a polyamorous relationship.[506] Provided that the relationships are consensual, there is informed consent, and can be considered to be mutually beneficial overall, then they ought to be considered to be constructive and therefore autonomy-enabling. Societal views on the specifics of relationships does not impugn the constructiveness or autonomy enabling nature of them.

Given the relationship between autonomy and dependence highlighted by relational autonomy, Nedelsky poses two distinct puzzles that relational autonomy gives rise. First, how can people be autonomous if they are dependent on relationships with others for that autonomy? Second, how can people know that they are autonomous?[507] Nedelsky answers both puzzles by emphasising that autonomy is not a tangible thing, it is not something one has or does not in the same way one owns a car, a house, or a book, rather autonomy is a *mode* of interacting with others whereby autonomy is impacted by that interaction.[508] Autonomy is not something that we have or we do not – Nedelsky considers such a dichotomy associated with the traditional liberal account to be illusionary[509] – rather, there is an irreducible tension that exists.[510]

Nedelsky is alive to the realities of violence against women. Nedelsky argues that relational autonomy best reveals the nature of this problem, and the potential solutions.[511] I agree. Nedelsky describes rape as not, essentially, being about the

[506] A polyamorous relationship is an intimate, romantic, or sexual relationship between more than two people with the informed consent of all people involved. It can involve more than two people being involved in a relationship together, or with one person acting as a hinge for others.
[507] Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* 54
[508] Ibid 55
[509] Ibid 130
[510] Ibid 132
[511] Ibid 200

crossing of a particular physical boundary, but rather being about the relations of coercion leading to unwanted sex.[512]

The question I ask is whether this is the same for (consensual) sexual activity between adult family members. I agree with Nedelsky on the role of coercion in relationships between family members however I argue that *if* a relationship with the other adult family member is a constructive one, and free from coercion, then relational autonomy would uphold such a relationship as autonomy-enhancing with the conclusion that a decision on consent between the participants is an autonomous one. The current problem, however, is that this is not taken to its logical conclusion in the application of the criminal law.

This groundwork of Nedelsky has been developed by others whereby two theoretical accounts of relational autonomy have developed. Mackenzie & Stoljar, for example, divide these accounts into *procedural* accounts and the *substantive* accounts of autonomy.[513] They argue that procedural accounts encounter difficulties reconciling autonomy with socialisation but that substantive accounts face difficulty in explaining the difference between autonomous critical reflection and non-autonomous critical reflection.[514]

I now turn to analyse the procedural account of autonomy, before analysing the substantive account and, finally, giving my preferred account of relational autonomy.

4.2.2 The procedural account

In this section, I analyse the procedural account of relational autonomy. On a procedural (or "content-neutral") account: "…*the content of a person's desires, beliefs, or emotional attitudes is irrelevant to the issue of whether the person is autonomous with respect of those aspects of her motivational structure and the actions that flow from them*."[515]

[512] Ibid 217
[513] Mackenzie and Stoljar 13
[514] Ibid 13
[515] Ibid 13

To be autonomous under the procedural account, there is no value or set of preferences that a person *must* endorse.[516] A theory of autonomy should not impose ideals upon agents in the name of autonomy.[517] A procedural account considers the possibility that "*a person's desires, beliefs, or emotional attitudes*" *could* be wrong however it does not start (or end) from a position whereby that *must* be wrong. Any theory of autonomy with "must" contained within it, is not autonomy at all.

The essential focus of the procedural account is whether the person has subjected their motivations and actions to the "appropriate" or "right" kind of critical reflection.[518] Mackenzie & Stoljar suggest that this appropriate critical reflection can be determined by structural, historical, or hierarchical approaches.[519] How this critical reflection is performed is not the same person-to-person, however, provided that a person can critically reflect upon their proposed choices it will be regarded as autonomous under a procedural account of autonomy.

When applied to consensual sexual activity between adult family members, the procedural account, would not view the fact that the sexual activity was being engaged in (or would be engaged in) with a family member with any specific relevance. Rather, with whom the sexual activity was to be engaged in with would be one factor to be considered when critically reflecting upon it.

To give an example. Let us assume that A wishes to engage in sexual activity with a non-family member, B. A weighs up the factors on whether to do so or not, and critically reflects on them. Now let us assume that A wishes to engage in sexual activity with a family member, C. Let us assume that B and C are identical in all relevant ways save only that C is a family member of A, whereas B is not. From A's perspective, given that B and C are identical in all relevant ways, the factors that they would critically

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[516] Stoljar §4
[517] Ibid §4
[518] Mackenzie and Stoljar 13-14; Stoljar §4; Danielle M. Wenner, *Non-Domination and the Limits of Relational Autonomy* (2019) *6; Johann S. Ach and Arnd Pollman, 'Self-Confidence, Self-Assertiveness, and Self-Esteem: The Triple S Condition of Personal Autonomy' in James F. Childress and Michael Quante (eds), *Thick (Concepts of) Autonomy: Personal Autonomy in Ethics and Bioethics* (Springer 2022) 54
[519] Mackenzie and Stoljar 14-17; Stoljar §4

reflect on for B would by *x* and for C *x+1*. The fact that C is a family member is only one factor to critically reflect on, however it is not a factor that means, automatically, that A would not engage in sexual activity with C. The critical reflection *process* therefore would be the same if the question were "*Do I want to have sex with my sibling?*", "*Do I want to have sex with my employer?*", or "*Do I want to have sex with this person I have just met?*" If, following some form of critical reflection, a person does decide to engage in the sexual activity, the consent ought to be be regarded as autonomous.

Under the procedural account of autonomy, critical reflection is the key issue. The questions therefore are: how does one go about critically reflecting upon their decision-making process *and* upon what does one specifically reflect on? Autonomy is not just about *choosing* for oneself, but it is also about *thinking* for oneself before the choice has been made.[520] Friedman argues that the fact that a person has *thought* about the choice makes that choice distinctly their own and can therefore, legitimately, be called their own.[521] What Friedman does not say is what internal process a person has to go through in order to make that choice (and thought) their own. What is important is that the thinking for oneself and the choice of one's own is free from coercion and constraint,[522] not how one went about thinking for oneself. The distinction is an important one, especially regarding consensual sexual activity between adult family members, whereby autonomy can in some way be achieved not only by *choosing* to engage in such activity but also by even *thinking* about doing so. Any form of critical reflection would be piecemeal at best with reflection upon a particular choice or aspect of one's life.[523] Choosing what one wants for dinner, for example, does not involve the critical reflection upon one's entire life choices up until that point therefore critical reflection is a *specific* reflection on the choice to be made.

Friedman, in her enquiry into critical reflection, suggested two different explications of critical reflection as being autonomy-conferring. First, that the critically reflective self

[520] Marilyn A. Friedman, 'Autonomy and the Split-Level Self' (1986) 24 Southern Journal of Philosophy 19, 20
[521] Ibid 20
[522] Ibid 20
[523] John Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge University Press 2009) 145

has a special ontological role in constituting the "true self" or, second, that the process of critical reflection may culminate in a person "identifying" with a particular motivation and is therefore autonomous in respect of that motivation.[524] In respect of the former, by suggesting that only the true self was able to critically reflect, or tying the process of critical reflection to the true self, this suggests that autonomy is possible only if the motivation was truly wanted.[525] Christman, however, suggested that it was not about "identifying" with a particular motivation having critically reflected upon it that was important, rather it was a question of "alienation".[526] He suggested that provided a person does not feel deeply alienated from a choice, having critically reflected upon it, it is autonomous.[527] He considered that the alienation test was stronger than an identifying test and that, whereas the notion of identification is "problematically ambiguous" in that "identifying" with something can simply mean just *accepting* something, "alienation" requires positive action to repudiate the choice.[528] Provided that a person is not alienated from the choice or, even, cannot find any reasons against it, it can be regarded as autonomous.

For Friedman, one critically reflects by "identifying" with the choice. For Christman, the same is true if one is not "alienated" from the choice. The difficulty with both tests is that they can both, despite assertions to the contrary, be framed in the positive and the negative, almost simultaneously in the same statement. For example, one can say that one identifies with something simply by not disagreeing with it or one is not alienated by something because no thought is given to it. To identify with something may require a positive action to agree with a choice or motivation and to not be alienated by something almost seems like identifying but by default. Christman may however have conceded this point when he stated that upon self-reflecting, "*a person may judge a factor to be repellent or unacceptable on normative grounds, say, but neither desire to change it nor feel particularly bad about it*".[529]

[524] Friedman 23
[525] Ibid 24
[526] Christman, 'Autonomy, Respect, and Joint Deliberation' 71
[527] Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* 143
[528] Ibid 143
[529] Ibid 144-145

As to which test of critical reflection to employ seems to be entirely dependent upon the subject matter. This is for the following reasons. First, there is a link between alienation and disgust: one is alienated from what one is disgusted by. This however raises a difficulty as to *source*. Critical reflection is more of a thought process whereas disgust is more appropriately described as an emotion process. This is, in turn, linked with the next reason. Second, as sexual activity between family members is considered taboo, including the accompanying element of socialisation, is it possible to be anything other than alienated from it as a matter of course without first freeing oneself from it by being autonomous? Third, the outcomes from an identify test and an alienation test are not synonymous, depending on subject matter. For example, a person may not identify with sexual activity between family members though not be alienated by it.

In specific regard to consensual sexual activity between adult family members (and any kind of sexual activity in general), it seems that the more appropriate test is one of “identification”. One only engages in such sexual activity usually if one identifies with it, rather than because one is not alienated by it. For example, one may identify with the overall activity of “sex” and some of the activities that are involved in the overall activity but be alienated from other of the activities that are involved. The alienation from these activities does not prevent the identification with the overall activity. If one were alienated from the overall activity, then it would not matter whether one was alienated from the some of the activities involved due to not undertaking it at all. One may be alienated from sexual intercourse with a sibling, but not from sexual intercourse *per se*.

If the appropriate test of critical reflections is one of identification, the question becomes one of how *deep* of a critical reflection must be undertaken? Though I have yet to discuss the substantive account, it appears that a *minimum* level of critical reflection is needed to justify the making of a particular decision for it to stand up to scrutiny under the procedural account. This is for the following reasons. First, proponents of a procedural account emphasise that content-neutrality requires less of a person than a substantive account. For example, Friedman argues that the fewer

the requirements the more widely applicable it would be.[530] This goes back to my point above whereby it is the purpose which determines which account of autonomy to use. Second, the level of critical reflection ought to be the same across the board in that just because a proposed decision to be critically reflected upon is *prime facie* more serious does not automatically mean that a greater level of critical reflection is needed. Third, it is not the decision *per se* that is more serious, it is the importance that a person places upon that decision which is important and not the importance someone else would place upon your decision. Wenner made this point. She argued that any conception of autonomy that is likely to label the choices and actions of the oppressed as "non-autonomous" invites additional disrespect to their choices and, ultimately, invasive paternalism.[531] Fourth, a procedural account allows for a greater diversity of life choices to be recognised as autonomous rather than being restricted to a few.[532]

The procedural account emphasises the need for critical reflection however critics of this are concerned that the critical reflection that does take place may not be *truly* reflective in that: first, non-autonomous outcomes might be wrongfully conceived as autonomous merely because they are the product of critical reflection;[533] and second, a person may be reflecting in accordance with internalised oppressive norms as a result of socialisation.[534] The substantive account aims to respond to these issues.

4.2.3 The substantive account

Theories that maintain that the procedural account must be supplemented by some non-neutral condition are called substantive accounts.[535] Whereas a procedural account considers that decisions are autonomous if they have been made with a degree of critical reflection, the substantive account, on the other hand, looks at the validity of the reasoning in reaching the decision to determine whether the decision is truly autonomous.

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[530] Marilyn A. Friedman, *Autonomy, Gender, Politics* (OUP 2003) 23
[531] Wenner *7
[532] Natalie Stoljar, 'Autonomy and the Feminist Intuition' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) 95
[533] Braudo-Bahat 126
[534] Wenner *6
[535] Mackenzie and Stoljar 19

There are two basic categories of substantive theory, and both respond to objections in the procedural theory that derive from socialisation: the strong substantive theory and the weak substantive theory.[536] The strong substantive theory rejects the content-neutrality of the procedural theory by requiring specific contents of the autonomous preferences of agents.[537] For example, a decision to refuse life-saving treatment may be regarded as non-autonomous.

The central idea of the strong substantive theory is that of normative competence: "*to be autonomous, agents must be competent, or have the capacity, to identify the difference between right and wrong*."[538] The theory focuses entirely on the idea of competency. A traditional liberal account of autonomy also relies upon competency however, under that account, it is competency for bare agency and choice. However, under the strong substantive account, to be regarded as autonomous a person must have the capacity to understand (or know) the difference between right and wrong.

The difference between right and wrong, however, seems to be one of preference formation (itself a form of socialisation) in that the difference could be simply what one was brought up to believe or sharing a same, dominant, belief. The idea of normative competence does have a seemingly circular ring to it whereby to determine autonomy one must first ask whether a person's preferences or beliefs were formed autonomously.[539] Whether a person's preferences were formed autonomously is surely dependent upon *when* the preference was formed. For example, a person may have brought up to believe that X is right, and *Y* is wrong and then, having matured and perhaps having had the opportunity of reflecting upon it, altered this view to Y is right and X is wrong. The conclusion to be had is that despite preference formation being "imprinted" at an early age, a person can alter their views as to the "rightness" or otherwise of a particular activity.

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[536] Ibid 19
[537] Ibid 19
[538] Ibid 19
[539] John Christman, 'Autonomy: A Defense of the Split-Level Self' (1987) 25 Southern Journal of Philosophy 281, 282-283

Preference formulation is directed by socialisation – by parents, family, advertising or by culture and society – and if strongly directed, it can controvert autonomy.[540] Though, not all forms of socialisation is oppressive and lessens autonomy.[541] For example, socialisation can affect men in the same way as women though this does not mean that it *oppresses* men in the same way as women.[542] Socialisation can at times reflect the views of men and therefore is not readily picked up or attributed by men as socialisation.

The key criticism made of the procedural theory is that it does not respond to the problem of socialisation which adopts two forms:[543] coercive; and false belief. The former inflicts penalties for non-compliance with unjustifiable norms and the latter instils beliefs that prevent people from discerning genuine reasons for acting.[544] Of the two forms of socialisation suggested by Benson, both play a role in determining the autonomy or otherwise of a decision to engage in consensual sexual activity between adult family members.

The strong substantive account closes the door on *potentially* autonomous choices even before the choice has been made on the basis that it would be considered "wrong", harmful, or out of the norm:[545] no autonomous person would autonomously choose such an option. I have highlighted this point before regarding consensual sexual activity between adult family members. Under a strong substantive account, as the choice of a sexual partner from within one's own family would be regarded as out of the norm it would be regarded as being non-autonomous.

The weak substantive theory rejects content-neutrality by suggesting further necessary conditions on autonomy that operate as constraints on the contents of desires that are capable of being held by autonomous agents.[546] To be regarded as

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[540] Diana T. Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 Journal of Philosophy 619, 623
[541] Paul Benson, 'Autonomy and Oppressive Socialization' (1991) 17 Social Theory & Practice 385, 385; Diana T. Meyers, 'Feminism and Women's Autonomy: The Challenge of Female Genital Cutting' (2000) 31 Metaphilosophy 469, 479
[542] Benson 403
[543] Ibid 388-389
[544] Meyers, 'Feminism and Women's Autonomy: The Challenge of Female Genital Cutting' 478
[545] Leckey 11; Wenner *8
[546] Mackenzie and Stoljar 19

autonomous, under the weak substantive account, a person must have a sense of worthiness to act which involves regarding oneself as being competent to answer for one's conduct in light of normative demand that, for one's point of view, others might appropriately apply to one's actions.[547] On this account, preference formation and socialisation still play the same role, but the focus is upon the impact it has upon undermining the self.[548]

A person who lacks self-trust, self-confidence, or self-esteem will fail to be autonomous.[549] There is a mix-matching of terms regarding the self. Stoljar refers to self-trust, self-confidence, and self-esteem however Ach & Pollman refer to self-confidence, self-assertiveness, and self-esteem:[550]

Stoljar	**Ach & Pollman**
Self-trust	Self-confidence
Self-confidence	Self-assertiveness
Self-esteem	Self-esteem

Self-trust or self-confidence refers to "*the actor's rational, motivational, imaginative, or emotional characteristics and abilities*".[551] To be autonomous they must have "*an elementary confidence in her most important abilities*".[552] Anyone who therefore does not trust themselves to make decisions or does not trust their own decision-making processes is "*already fundamentally incapable of autonomy*".[553] Self-confidence or self-assertiveness refers to a person having and acting with "*a positional reference towards her own self*".[554] To be autonomous they must be able to take a position on a particular activity and what the limits of that position are. Self-esteem refers a person "*whose wishes and convictions are relevant to the impending decision*".[555] To be autonomous they must have a *minimal* feeling of self-esteem.[556] Each facet of the self

[547] Stoljar, 'Autonomy and the Feminist Intuition' 107
[548] Wenner *9
[549] Stoljar, 'Autonomy and the Feminist Intuition' 107
[550] Ach and Pollman 55-56
[551] Ibid 55
[552] Ibid 55
[553] Ibid 55 (here Ach & Pollman revert to the reference to "trust" used by Stoljar)
[554] Ibid 55
[555] Ibid 56
[556] Ibid 56

refers to a different reference to the person. Self-trust/confidence is an *affirmative* reference to the self, self-confidence/assertiveness a *positional* reference, and self-esteem an *evaluative* reference.[557]

When considering the three aspects of the self it is difficult to talk or analyse with any degree of certainty in a *prospective* way, rather it is *retrospective* in outlook. This is especially true when considering consensual sexual activity between adult family members. The self, and the aspects of the self, are unique to individuals (and this problem is not unique to the substantive account). This account does however appear to be autonomy for autonomy's sake in the sense that autonomy emerges from *acting* in a way that is *perceived* to be autonomous by others upon retrospective analysis.

In the next section, I give my preferred account of relational autonomy.

4.2.4 Preferred account

Having considered both the procedural and substantive accounts of relational autonomy, I now give my preferred account.

There is no consensus as to whether the procedural or the substantive account is the correct one.[558] Stoljar suggests that "…*the answer depends on intuitions about which view best captures the notion of agency that is one's own*."[559] As the focus is upon autonomy, whichever account is used in specific circumstances must be the one that enhances autonomy. This raises a further issue of how *much* autonomy is enough autonomy?[560] Is the intention or goal to achieve autonomy but only to a minimal level, or is the intention or goal to achieve autonomy to a greater extent than currently exists in the individual? This is one of the distinctions between the procedural and substantive accounts. I argue that the *use* of a specific account depends upon what it is being used for. For example, some decisions and choices are made, and only

[557] Ibid 56
[558] Stoljar, 'Feminist Perspectives on Autonomy' §9
[559] Ibid §9
[560] James Stacey Taylor, 'How Much Understanding Is Needed for Autonomy?' in James F. Childress and Michael Quante (eds), *Thick (Concepts of) Autonomy: Personal Autonomy in Ethics and Bioethics* (Springer 2022) 101-116

require, a split-second ("*Do you want to walk the dog?*"), others require more thought ("*Do you agree to the removal of your kidney*"). One could argue that one should use the right tool for the right job and not to impose a stronger or more difficult process than is otherwise required to obtain the aim or goal. Taylor argues that, when considering how much autonomy is needed, it is the descriptive element of the activity that is relevant to the question of autonomy, rather than the reasons for the activity.[561] His concluded that "*the simple answer to the question of how much understanding is required for autonomy is: Very little.*"[562]

One reason for the lack of consensus as to which account is correct is the need to increase the autonomy of all women. By limiting the circumstances in which a person can be regarded as exercising autonomy, this has the result of reducing autonomy. The lower the threshold, the more autonomous the agent, the higher the threshold, the less autonomous the agent. Under the strong substantive account, with a higher requirement for demonstrating autonomy, more people will be labelled as lacking autonomy and this would have real consequences, especially if it is embedded in the criminal law. This appears to be the reason why Friedman advocates the procedural account as it requires less from a person to constitute autonomy.[563] Friedman argued that if both the procedural and substantive accounts are equally convincing then, from a pragmatic approach never mind anything else, the procedural account ought to be preferred.[564]

I argue that the account of autonomy that ought to be applied depends entirely upon its subject matter. If the overall aim is to increase autonomy *carte blanche*, then the procedural account is to be *preferred* for it increases overall the autonomy of agents, rather than the autonomy of only some agents.

The procedural account provides a critical reflection test that can be easily applied to all to give an answer on whether a person is acting autonomously or not. The substantive account, with a higher requirement for demonstrating autonomy, is more

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[561] Ibid 107
[562] Ibid 115
[563] Friedman, *Autonomy, Gender, Politics* 23
[564] Ibid 23

difficult to apply in a legal context. The substantive account has the potential to categorise otherwise autonomous decision-making as non-autonomous based upon the gravity of the decision to be made. A procedural account makes no distinction between trivial and grave decisions, the test is the same: has the decision been the subject of critical reflection. A substantive account, on the contrary, does make such a distinction and because a person is competent to autonomously make a trivial decision it does not follow, automatically, that they are competent to make a graver decision. This would require the criminal law to categorise decisions based upon how grave they are, or perceived to be, and this has an objective and paternalistic aspect to it.

The reasoning of the previous paragraph can be applied to the criminal law and specifically to consent and decision-making. The criminal law is more reflective of the procedural account in this regard: a deeper examination can take place in the form of a critical reflection of the context. An example is the case of *R v Blaue*.[565]

In *Blaue*, the victim was stabbed. To save her life, she required a blood transfusion however she refused one on religious grounds and she died the next day. In this case, the law employed a face-value approach to the victim's religious beliefs; she professed to being a Jehovah's Witness, she signed a waiver to the effect that she was refusing a transfusion on this basis and the conviction for the stabbing was upheld. Lawton LJ held that: "*It does not lie in mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable*."[566] The Court accepted at face-value (though it was assisted by the signed waiver) that religious beliefs prevented the blood transfusion. The Court did not examine, after the event, whether this was the *correct* decision by the victim. The choice the victim made was accepted at face-value.

4.2.5 A vulnerability approach to autonomy[567]

[565] *R v Blaue* [1975] 1 WLR 1411
[566] Ibid 1415
[567] See 5.4, below.

In the previous sections, I considered relational autonomy as an alternative approach to the traditional liberal account of autonomy. Whereas the focus of relational autonomy is dependency, in this section I consider a further alternative approach with a focus upon vulnerability.

In authoring a vulnerability approach to autonomy, Fineman has argued that "*the "vulnerable subject" must replace to autonomous and independent subject asserted in the liberal tradition*."[568] Fineman bases this approach on the "*universal and constant*" acceptance that vulnerability is "*inherent in the human condition*"[569] therefore "*the vulnerable subject is a more accurate and complete universal figure to place at the heart of social policy*."[570] Whereas relational autonomy is based upon dependency, a vulnerability approach to autonomy differs from it in several ways.[571] For example, Fineman considers that analyses centred upon vulnerability are more political potent than those based on dependency, and understood as a state of harm, vulnerability cannot be hidden (unlike dependency).[572] Ultimately, Fineman's argument is that vulnerability should not supplant dependency, rather than vulnerability is more theoretically powerful.[573] Similarly, vulnerability, like dependency, "*positions us in relation to each other as human beings*".[574]

Fineman defines "vulnerability" not as an absolute and not regarding any group of people, but as part of the very thing of what it means to be human: that vulnerability *is* the human condition.[575] The result is that a vulnerability analysis must consider both individual position and institutional relationships[576] to the ultimate conclusion that "*no one is an autonomous, independent individual*."[577]

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[568] Martha L.A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 2; Martha L.A. Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha L.A. Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 17
[569] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 1
[570] Ibid 11
[571] Ibid 11
[572] Ibid 11
[573] Ibid 11
[574] Fineman, 'The Vulnerable Subject and the Responsive State' 255
[575] Ibid 266
[576] Ibid 269
[577] Ibid 274

Though a vulnerability analysis is useful to the extent of its similarly to dependency in a relational autonomy analysis, Fineman was clear that the idea of a "vulnerable subject" was "*a stealthily disguised human rights discourse, fashioned for an American audience*"[578] and that the human right (though more upon the *human* than the *right*[579]) upon which it was focused was that equality and equal protection.[580] Equality is an issue that I have not specifically touched upon in a substantive way, except in regard to sexual orientation in the previous chapter.[581]

4.2.6 Summary

In this section, I have considered the procedural and substantive accounts of relational autonomy. I have concluded that a procedural account is to be preferred with its emphasis upon critical reflection. I argue that, provided there has been some form of critical reflection, consensual sexual activity between adult family members ought to be regarded as autonomous. In the next section, I reconsider the traditional liberal account formula of consent *equals* autonomy having considered the relational account of autonomy.

4.3 The formula of consent equals autonomy revisited

In this section, I reconsider the traditional liberal account formula of consent *equals* autonomy. I argue that the formula stands up to scrutiny if consent and autonomy are modified to be viewed in a relational way. Such a modification provides the vehicle for a deeper examination into consent.

Autonomy and consent are inseparably connected,[582] so much so that they are often thought to be synonymous. Where the traditional liberal account of autonomy suggests the formula of consent *equals* autonomy, relational autonomy would suggest a

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[578] Ibid 255; Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' 13
[579] Fineman, 'The Vulnerable Subject and the Responsive State' 255
[580] Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' 14-16
[581] See 3.4, above.
[582] Sharon Cowan, '"Freedom and capacity to make a choice": A feminist analysis of consent in the criminal law of rape' in Vanessa E. Munro and Carl F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge 2007) 51

modification to the meaning of consent and autonomy which allows the formula to stand up to scrutiny.

A relational meaning of consent is "*what led X to consent?*", and not "*did X consent?*" Provided that such an approach is undertaken the meaning of consent within the formula stands up to scrutiny. To look at this in the reverse, I argue that a decision to engage in sexual activity with another adult family member will be considered as autonomous *if* the question of consent has been examined by way of a deeper examination. I argue that a deeper examination into the issue of consent is mandated by the procedural account of relational autonomy (in the form of critical reflection). It is unclear what information is needed to make decision on consent.[583]

A relational autonomy approach and the need for critical reflection focuses upon *context* which rests upon the need for a deeper examination into consent taking place to identify the root of consent by considering, not only the *prima facie* views of participants, but also their deeper views. Such an examination is not only retrospective, but also prospective: a deeper examination can place *before* a *prima facie* decision to consent (to determine whether that they *think* they want to do is *really* what they want to do) or *after* (whether they *really* wanted to do what they just *did*). By conducting a deeper examination into consent, necessitated by a need to critically reflect, strengthens the decision to consent (or not to consent) by showing it is *truly* consensual as reflecting their deep-seated wishes. If so conducted, it is more likely that the decision arrived at is an autonomous one and therefore ought to be given respect and recognition by the criminal law.

A deeper examination strengthens decisions relating to consent. However, a deeper examination into the context of consent does not mean that any *prima facie* decision reached will automatically be reversed (either in the person's own mind or, if conducted by another, in their mind too). A deeper examination is not a vehicle for the *automatic* reversal of decisions, but one for consensual decisions to be realised, both in theory and in practice in the criminal law. If a *prima facie* consensual decision is

[583] Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 Journal of Criminal Law 178, 179

subject to a deeper examination, this will not automatically lead to a conclusion that it was, in fact, non-consensual (or *vice versa*). A deeper examination may lead to further evidence of consent to reinforce a *prima facie* decision.

Examples of where this may have already occurred can be found in the cases of *R v C* and *London Borough of Haringey v FZO*.[584]

In *C*, the appellant was the complainant's ("N") stepfather. For approximately 20 years (between the ages of 5 and 25) N was sexually abused by C. The indictment against C contained 18 counts, 9 counts relating to when N was under 16 and 9 counts when aged 16 and over. C denied that any sexual activity had occurred while N was under 16 however, regarding the sexual activity which occurred after N turned 16, C asserted that it was entirely consensual. The evidence on the post-16 activity did appear to suggest, *prima facie*, that C and N were engaging in a full consensual sexual relationship. Despite this, this evidence was not to be taken in isolation and out of context. Whilst it is correct for a jury to focus upon each count individually so that being found to be guilty of one count does not mean that they *must* be guilty on other counts, they must take the evidence as a whole and not to build in an artificial distinction between pre-16 and post-16 activity as if the age of 16 magically cleanses the record and removes any negative aspects from N's mind.[585] The Court of Appeal held that what had occurred before N was aged 16 was "*plainly relevant*" to whether N consented after the age of 16.[586]

In *FZO*, the respondent was sexually abused by a teacher ("AA") who was employed by the local authority ("LBH"). At the age of 13, FZO was raped by an unknown man.[587] AA recognised that something was amiss and FZO confided in him. AA used this as an opportunity to groom FZO and sexually abuse him himself. For example, FZO was told that he was gay and that he would be rejected by his community and AA also took him "cruising" and exposed him to men having sex in public toilets. The abuse continued after FZO had left school, until he was 21. At first instance, the court found

[584] *R v C* [2012] EWCA Crim 2034; *London Borough of Haringey v FZO* [2020] EWCA Civ 180
[585] *R v C* [5] (Lord Judge CJ)
[586] Ibid [4] (Lord Judge CJ)
[587] Though this activity occurred before the enactment of the Criminal Justice and Public Order Act 1994, s. 142, no issue was raised as to description of the conduct as "rape".

for FZO. In LBH's appeal, they asserted that the judge had been wrong in law to conclude that FZO did not consent to the sexual activity with AA after he had left school (a similar approach to the indictment in *C*). The Court of Appeal dismissed LBH's appeal on the ground that FZO's "consent" was not genuine as it had been overridden by psychological coercion which derived from the grooming and abuse by AA.[588] The Court held, citing *C*, that "*a truly "conditioned consent", resulting from a grooming process, is not true consent in law*."[589]

In both *C* and *FZO*, the relational question of "*what led X to consent?*" was asked and which led to ultimate liability. However, the outcomes are, similarly, unsurprising when one bears in mind the definition of consent within the 2003 Act and its reference to agreeing by choice and the freedom to make that choice.[590]

4.4 Conclusion

In this chapter, I considered an alternative approach to the traditional liberal account of autonomy: that of relational autonomy. I set out the theoretical framework of relational autonomy, including the advanced accounts (procedural and substantive). I concluded that a procedural account, with a focus upon critical reflection, is to be preferred and I advanced an argument that consent, if arrived at following a process of critical reflection, ought to be respected by the criminal law.

I also reconsidered the traditional liberal formula of consent *equals* autonomy following the conclusions regarding relational autonomy. I concluded that relational autonomy does not alter the formula rather it modifies the meaning of "consent" and "autonomy" within the formula whereby consent would only *be* consent if it were identified following a process of critical reflection.

In the next chapter, I consider whether this alternative approach to autonomy is reflected in the criminal law and in specific regard to the guidance issued by the Crown Prosecution Service.

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[588] *London Borough of Haringey v FZO* [128] (McCombe LJ)
[589] Ibid [129] (McCombe LJ)
[590] Sexual Offences Act 2003, s. 74

Chapter 5: Could the Alternative Approach be Reflected in the Current Law?

5.1 Introduction

In chapter 2, I considered whether sexual activity between family members was correctly criminalised by reference to the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. Though I argued that the harm principle was the correct contemporary criminalisation principle to apply, consensual sexual activity between adult family members was not correctly criminalised by reference to it unless actual harm occurred. I further argued that, by itself, the harm principle was insufficient to determine whether to bring an activity within the scope of the criminal law and that something *more* is required. I argued that something *more* was autonomy: for an activity to be brought or retained within the scope of the criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy. In chapter 4, I argued that the account of autonomy to be used was not a traditional liberal account but rather relational autonomy, in particular the procedural account with its focus upon critical reflection.

In this chapter, I consider whether the alternative approach to autonomy – relational autonomy – could be reflected in the current law relating to sex with an adult relative.[591] To determine whether this is the case, I firstly consider the legislative history of the sexual activity between family members provisions to consider the context in which the offence was brought within the scope of the criminal law in the first place and to consider what would be required for it to be removed from scope.[592] I conclude that there is a lack of desire to alter (or repeal) the sex with an adult relative provisions beyond that of maintaining the *status quo* with the continuation of the offence in its current form. As coercion is a key factor to be considered when dealing with both consent under the 2003 Act and the alternative approach to autonomy, I examine the consent provisions and coercion specifically as a prelude[593] to analysing whether the sex with an adult relative provisions, rather than be removed from the scope of the

[591] Sexual Offences Act 2003, ss. 64-65
[592] See 5.2, below.
[593] See 5.3, below.

criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions.[594] I conclude that rather than remove the sex with an adult relative provisions from the scope of the criminal law, the provisions could be amended to better reflect the above guidance, or be otherwise applied in a more uniform way, but that statutory intervention would be required.

5.2 Legislative history of the sex with an adult relative provisions

In this section, I consider the legislative history of the sexual activity between family members provisions to determine whether the sex with an adult relative provisions could be repealed.

The initial criminalisation of sexual activity between family members was a political "hot potato". Legislation had been enacted in the form of the Criminal Law Amendment Act 1885 "*to make further provision for the Protection of Women and Girls*".[595] However, such protection did not include the specific relationships within the family, only protection from men *generally*. Though a father could be convicted of the "defilement" of his daughter,[596] there was a three-month time limit imposed upon a prosecution and, if a father could prevent a complaint being made within that time, no conviction could occur.[597] The absence of a criminal provision relating to sexual activity between family members was an oversight in the legislation.

Initial attempts to bring sexual activity between family members within the scope of the criminal law occurred in 1896 with the introduction of two Criminal Law Amendment Act 1885 (Amendment) Bills. The first Bill was introduced in February 1896, but was withdrawn less than a month later without a Second Reading.[598] The second Bill was introduced two weeks after the withdrawal of the first Bill and fared no better in that its Second Reading was deferred thirteen times between April-May 1896 and never took

[594] See 5.4, below.
[595] Criminal Law Amendment Act 1885, long title
[596] Ibid, ss. 4 & 5
[597] Ibid, s. 5
[598] *Criminal Law Amendment Act 1885 (Amendment) Bill (No 1)* (1896) (HC Bill 61): HC Deb 11 March 1896, Vol. 38, col. 714

place.[599] Both Bills were drafted in identical terms regarding the bringing of sexual activity between family members within the scope of the criminal law and proposed that: a male who had carnal knowledge of a female over the age of 13 knowing them to be their granddaughter, daughter or sister would be guilty of a misdemeanour liable to penal servitude of between 3-7 years; and a female above the age of 18 who had carnal knowledge of a male knowing them to be their grandfather, father or brother would be guilty of a misdemeanour liable to penal servitude of between 3-7 years.[600]

A further attempt to bring sexual activity between family members within the scope of the criminal law was made in 1899 with the unambiguous title of the Incest (Punishment) Bill.[601] As with the 1896 Bills, a Second Reading never occurred on the Bill.[602] The Bill proposed an incest offence for a male in identical terms to the 1896 Bills. Regarding a female, the proposed offence was also in identical terms to the 1896 Bills with the exception that liability would be incurred by a female aged 16 (rather than 18).[603] The identical Incest Bill 1900 was presented in the next year but again failed to have a Second Reading.[604]

The introduction and failure of the two 1896 Bills, the 1899 Bill and the 1900 Bill is evidence there was an acknowledgment that the law needed to be reformed but given that lack of a substantive Second Reading on any of the Bills there was no intention by Parliament to enact a change in the law.

Further acknowledgment came in 1903 with the introduction of the Incest Bill 1903.[605] This Bill was identical to the 1899 and 1900 Bills therefore it is not immediately apparent as to why this Bill progressed further than the two previous Bills. The change cannot be put down solely to the previous general election in 1900 as the Conservative government continued in office. When Lord Alverstone, the Lord Chief Justice,

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[599] *Criminal Law Amendment Act 1885 (Amendment) Bill (No 2)* (1896) (HC Bill 156). The Second Reading was deferred on 21, 22, 23, 24, 27, 28, 29 & 30 April as well as on 1, 7, 8, 11 & 14 May 1896.
[600] *Criminal Law Amendment Act 1885 (Amendment) Bill (No 1)*, cl. 3(1) & 4(1); *Criminal Law Amendment Act 1885 (Amendment) Bill (No 2)*, cl. 3(1) & 4(1)
[601] *Incest (Punishment) Bill* (1899) (HC Bill 127)
[602] See HC Deb 19 April 1899, Vol. 69, col. 1609 and HC Deb 24 April 1899, Vol. 70, col. 500
[603] *Incest (Punishment) Bill*, cl. 1(1) & 2
[604] *Incest Bill* (1900) (HC Bill 136)
[605] *Incest Bill* (1903) (HC Bill 51)

introduced his Prevention of Cruelty to Children (Amendment) Bill 1903[606] he stated at Second Reading that he would not press the clauses relating to sexual activity between family members so as not to "*endanger the Bill*".[607]

The Second Reading of the 1903 Bill was opened by the Parliamentary spokesman for the National Vigilance Association, Col. Lockwood, who made the surprising statement that "…*he had no wish to enter into any detailed explanation of this Bill, which dealt with a rather disagreeable subject*."[608] This highlights that there was an acceptance that something ought to be done but there remained a partial unwillingness to go into details which may prove upsetting or "*disagreeable*". In response, Sir Robert Finlay (the Attorney-General) indicated that the Government shared the feelings behind the Bill but it "*required very careful consideration in regard to its provisions*."[609] This was again evidence of a willingness to that something ought to have been done but that further study would be required in the short-term for further review in the long-term. The Bill passed its Second Reading. The Bill was considered by a Standing Committee and amended. When the amended Bill was considered again by the House of Commons, it was accepted that "*It was desired now to make the offence of incest punishable as a crime*"[610] and by the passing of the Bill at Third Reading.[611]

Whereas the 1903 Bill was the fifth time that such a Bill had been introduced into the House of Commons, it was the first time that it had been introduced into the House of Lords in June 1903 (since Lord Alverstone's attempt was dropped in March 1903). As in the House of Commons, the Second Reading in the House of Lords began with a statement by the Lord Donoughmore that "*I do not wish to enter into any detailed explanation of this Bill*…"[612] Similarly, Lord Halsbury (the Lord Chancellor) considered the subject to be "…*one which renders it repulsive to everybody to discuss it*."[613] Indeed, the Lord Chancellor also considered that he did not think the subject had been

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[606] *Prevention of Cruelty to Children (Amendment) Bill* (1903) (HL Bill 17): *A Bill to amend the Prevention of Cruelty to Children Act 1894 and to provide for the punishment of incest*"
[607] HL Deb 27 March 1903, Vol. 120, col. 408
[608] HC Deb 5 March 1903, Vol. 118, col 1683
[609] HC Deb 5 March 1903, Vol. 118, col 1684
[610] HC Deb 26 June 1903, Vol. 124, col. 700
[611] HC Deb 26 June 1903, Vol. 124, col. 706
[612] HL Deb 16 July 1903, Vol. 125, col. 820
[613] HL Deb 16 July 1903, Vol. 125, col. 822

"*sufficiently discussed*" in the House of Commons.[614] These views were shared by Lord Davey who questioned "…*whether it is expedient at the present time, or at any time, except in peculiar circumstances, to pass this Bill*."[615] Both of these lawyers and judges are expressing stage 1 (pre-acknowledgment) by failing to see that the law needed to be reformed at all. This stage is further evidenced by the fact that Lord Donoughmore, after the short speeches of Lords Halsbury and Davey, sought to withdraw the Bill without any resistance.[616]

It would not be until 1907 that a Bill was reintroduced to attempt to bring sexual activity between family members within the scope of the criminal law.[617] This Bill was again identical to the previous Bills and passed its Second Reading in the House of Commons without debate.[618] It was also considered by a Standing Committee and amended however it failed due to the ending of the Parliamentary session. Given the lack of any debate whatsoever it is not possible to assess the stage in 1907.

The 1907 Bill (as amended), however, was re-introduced the following year as the Incest Bill 1908.[619] It passed its Second Reading without debate.[620] There were however opponents to the Bill who sought further consideration on the basis that "*The House…should hesitate before making a sweeping addition to the criminal law of England at a late period on a Friday afternoon at the instigation of a private Member*"[621] and that the House of Commons "…*should be very careful in dealing with a question of this kind not to make a crime of an offence which had never before been treated as crime in this country*."[622] Despite this, the Government expressed support for the passage of the Bill.[623] The Bill duly passed its Third Reading.[624] The involvement of

[614] HL Deb 16 July 1903, Vol. 125, col. 822
[615] HL Deb 16 July 1903, Vol. 125, col. 823 (Lord Davey at the time was a sitting Lord of Appeal in Ordinary)
[616] HL Deb 16 July 1903, Vol. 125, col. 823
[617] *Incest Bill* (1907) (HC Bill 173)
[618] HC Deb 4 June 1907, Vol. 175, col. 607
[619] *Incest Bill* (1908) (HC Bill 127 & HL Bill 124). This Bill would eventually be enacted as the Punishment of Incest Act 1908.
[620] HC Deb 10 March 1908, Vol. 185, col. 1436
[621] HC Deb 26 June 1908, Vol. 191, col. 279
[622] HC Deb 26 June 1908, Vol. 191, col. 280
[623] HC Deb 26 June 1908, Vol. 191, col. 284
[624] HC Deb 3 July 1908, Vol. 191, col. 1090

the Government in the passage of the Bill was evidence of an active attempt to change the law.

In the Second Reading in the House of Lords, this Government involvement was expressed in a more subtle way by Lord Beauchamp (the Lord Steward) when bringing to the House's notice that whilst the Government was not taking responsibility for the Bill, they hoped that the House would "*see your way to pass the Bill into law*."[625] In 1903, the major (and influential) opponents had been Lords Halsbury and Davey. In 1908, Lord Halsbury was not present at Second Reading to exercise his influence and Lord Davey had died the previous year. One of the sources of Lord Halsbury's discontent had been to bring incestuous conduct to the mind of the public so that, instead of reducing the activity, it would in fact increase it. As a compromise for the passage of the Bill Lord Halsbury insisted upon an *in camera* clause to the Bill. This was duly inserted into the Bill and agreed by both Houses.[626]

In enacting the 1908 Act a degree of Government support was required. The Private Member's Bills of 1896, 1899, 1900, 1903 and 1907 Bills had always been unable to engage Parliament to bring sexual activity between family members within the scope of the criminal law, what was needed was the push by Government to take the lead. Government involvement cannot however be considered the sole cause for bringing sexual activity between family members within the scope of the criminal law and it must not be read in isolation as being a single uninterrupted thread through public and Parliamentary life. Rather, the 1900s saw several important pieces of legislation regarding the welfare of children and adults alike and the 1908 Act must be read as part of whole tapestry, rather than as a single thread.[627] That being so, it is difficult to point to any sole cause or "critical mass event" which prompted the bringing of sexual activity between family members within the scope of the criminal law. Equally, the stage has not been set for the repeal of the sex with an adult relative provisions.

[625] HL Deb 2 December 1908, Vol. 197, col. 1409
[626] HL Deb 9 December 1908, Vol. 198, col. 397; HC Deb 16 December 1908, Vol. 198, col. 1972
[627] See, for example, Prevention of Cruelty to Children Act 1904 (the incest aspects were dropped to allow passage, see above) and Children Act 1908.

There is a general lack of desire to alter (or repeal) the sex with an adult relative provisions beyond that of maintaining the *status quo* with the continuation of the offence in its current form. The offence has not substantively altered since the 1908 Act. In substance, the provisions of the 1908 Act are no different to the sex with an adult relative provisions. The reason for this lack of difference in the provisions may be that Members of Parliament are unwilling to be seen to support any lessening of the offence (most especially the removal from the scope of the criminal law) which may result in negative publicity. For example, in specific regard to the 2003 Act, Spencer noted that there was a need to avoid headlines such as "*Blunkett legalises incest*".[628] However, as was noted in *Dudgeon*, "*"Decriminalisation" does not imply approval…*"[629]

In the next section, I consider whether the consent provisions in the 2003 Act reflect the alternative approach to autonomy.

5.3 The consent provisions and coercion

As coercion is a key factor to be considered when dealing with both consent under the 2003 Act and the alternative approach to autonomy. In this section, I examine the consent provisions and coercion specifically as a prelude before analysing, in the next section, whether the sex with an adult relative provisions, rather than be removed from the scope of the criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions.

Consent is addressed in the 2003 Act as follows: a general definition of consent;[630] evidential presumptions about consent;[631] and conclusive presumptions about consent.[632] These consent provisions must be read together though, in practice, they can be viewed as providing "*three separate routes*".[633] The direct route is the

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[628] J. R. Spencer, 'The Sexual Offences Act 2003: Child and Family Offences' (2004) Criminal Law Review 347, 358
[629] *Dudgeon v United Kingdom* (1981) 4 EHRR 149 [61]
[630] Sexual Offences Act 2003, s. 74
[631] Ibid, s. 75
[632] Ibid, s. 76
[633] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent' (2004) Criminal Law Review 328, 334

conclusive presumptions about consent and the longest route is the general definition of consent. The relationship between the consent provisions is hierarchical in which if a conclusive presumption can be established, there is no need to rely on evidential presumptions or the general definition.[634] Despite this hierarchy, only the general definition applies generally throughout Part 1 of the 2003 Act; the conclusive and evidential presumptions about consent only apply to specific offences.[635] Temkin & Ashworth noted that it would only be in an "*unusual*" case that one of the presumptions would not apply, with the result that the general definition would "*assume a heightened importance*."[636]

The general definition of consent, which can be read in a positive and a negative way, is that: "*For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice*." The general definition can be positively read as providing a "non-exhaustive" list of circumstances in which a person *can* consent.[637] It is written to state that "…*a person consents if*…" and not "…*a person does not consent if*…" Defining consent this way implies that the 2003 Act is supportive of personal and sexual autonomy whereby if a person has freedom and capacity to make a choice and they agree to it, then that choice ought to be respected. This respect does not provide a "blank cheque" for all sexual activity as a person cannot act as they wish if that action constitutes an offence, and to what activity the definition is limited. These two items combine to ensure that only activity which is covered by Part 1 of the 2003 Act is covered by the definition of consent and not all sexual activity.

The definition of consent can also be read negatively, it has been described by Tadros as "*vague in its scope and ambiguous in its terms*" and "*unclear and paradoxical*."[638] For example, one of the criticisms advanced by Tadros was that the definition remained silent on the issue of whether "no" always meant "no" though it does allow for the possibility that "yes" does not always mean "yes".[639] Criticisms of the general

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[634] Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 Journal of Criminal Law 178, 183
[635] They apply to Sexual Offences Act 2003, ss. 1-4
[636] Temkin and Ashworth 346; see, for example, *R v B* [2006] EWCA Crim 2945; [2007] 1 WLR 1567 and *R v Jheeta* [2007] EWCA Crim 1699; [2008] 1 WLR 2582
[637] Alan Reed, 'Criminal Law' (2007) All England Law Reports Annual Review 128, 129
[638] Victor Tadros, 'Rape Without Consent' (2006) 26 Oxford Journal of Legal Studies 515, 518 & 520
[639] Ibid 520

definition of consent do seem valid if one considers that the very existence of presumptions about consent suggests that this definition of consent is inadequate.

Having provided a general summary of the general definition, I now turn to highlight the consent provisions. As I noted above, both evidential presumptions about consent and conclusive presumptions about consent are provided for in the 2003 Act. The purpose of the presumptions about consent under the 2003 Act is not to undermine the general definition in any way or even to practically show where consent is absent but, rather, to provide a feature that is constitutive or indicative of where it is absent.[640] For Tadros, the reasoning behind the need for presumptions in the first place is due to the awareness that the definition of consent as "*inadequate to determine rape cases in practice*."[641]

The presumptions about consent provide circumstances in which, if they are proven by the Crown to have existed at the time of the relevant act, places the Defendant, in regard to the evidential presumptions, in a position whereby they are under an evidential burden to adduce sufficient evidence to raise the issue as to consent of the complainant, or in regard to the conclusive presumptions, a position whereby they *cannot* raise any issue as to consent of the complainant and the Defendant's own absence of a reasonable belief in consent is conclusively proved. The evidential presumptions can be summarised as follows: that violence was to be used against oneself or another or that there was a fear of such, unlawful detention, asleep or unconsciousness, physical disability preventing communication on consent and substance administered to stupefy or overpower. The conclusive presumptions can be summarised as follows: intentional deception as to the nature and purpose of the act and induced consent by impersonation of someone personally known to them.

The presence, or the suggested presence, of grooming (a form of coercion), is one of the major reasons for an alternative approach to autonomy. I argue that it is insufficient to retain within the scope of the criminal law a prohibition based upon a *suggestion* of grooming. I argue, whilst not denying that grooming may exist in cases of consensual

[640] Ibid 523 & 525
[641] Ibid 523

sexual activity between adult family members, that if it does exist it ought to be established that it does, rather than suggesting, assuming, or implying, that it does. Where it does exist, this is sufficient to vitiate consent (thereby meaning, because of the absence of consent, that another offence may have been committed) however where it does not exist, this is insufficient to retain such activity within the scope of the criminal law. To be clear, I do not deny that grooming exists *per se*, rather, I argue that it needs to be established in *each* case and not assumed to exist in *every* case. The challenge, therefore, is to determine at what point the criminalisation of consensual sexual activity with an adult family member "*enhances or diminishes…sexual autonomy*."[642]

Grooming is a form of coercion, and coercion vitiates consent therefore it is a key concern to those advocating a substantive account of relational autonomy. If sexual activity between adult family members is not consensual it ought not to be charged under the sex with an adult relative provisions, but rather charged as, for example, rape. As grooming vitiates consent, it therefore vitiates autonomy (both in a traditional liberal account and in the alternative approach to autonomy).[643] Palmer makes the distinction between two forms that the violation of sexual autonomy can take. She identified *acute* violations and *chronic* violations. By acute violation of sexual autonomy, she suggested that this results from "*an identifiable event*", such as rape.[644] By chronic violation of sexual autonomy, she suggested that this is the result of "…*long-term erosion of sexual autonomy, which can be distinguished from a series of acute violations*."[645] This includes grooming, sexual activity between family members and, as Palmer noted, engaging in desired sexual activity but in a manner that is unwanted.[646]

In acute violations, a person's sexual autonomy is effectively "*overridden by another*" however, in chronic violations, a person's sexual autonomy "*is gradually chipped away*

[642] Markus Dirk Dubber, 'Policing Morality: Constitutional Law and the Criminalization of Incest' (2011) 61 University of Toronto Law Journal 737, 748
[643] Mollie Gerver, 'Consent and Third-Party Coercion' (2021) 131 Ethics 246, 250
[644] Tanya Palmer, 'Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law' (2020) 84 Journal of Criminal Law 573, 574-575
[645] Ibid 575
[646] Ibid 582

over a longer period of time often using a more insidious web of tactics".[647] Palmer's argument is that the criminal law is more focused on acute violations of sexual autonomy, for example in the form of rape and other short-identifiable events, rather than on more chronic violations.[648] She does not argue that chronic violations ought to take precedence ("*in a hierarchy*") over acute violations, but that the current framework of the criminal law does not "*easily accommodate*" chronic violations of sexual autonomy.[649] But she accepts that the relationship between the two is complex.[650]

In examining the complex relationship between acute and chronic violations of sexual autonomy, Palmer illustrated the link that such violations have with coercive control by using the case of *R (F) v Director of Public Prosecutions* as an example.[651] In this case, "F" reported her husband ("D", the Intervenor) to the police for the sexual violence inflicted upon her during their marriage. The Crown Prosecution Service decided against charging D and F sought to judicially review that decision. F was successful in her claim. Palmer refers to a particular part of the judgment in which Lord Judge CJ gave an overview of the relationship between F and D and, like Palmer, I think it is important to give the paragraph almost in full:[652]

> "*Miss Levitt quotes the claimant directly: "almost all sex with (the intervener) involved him displaying dominance, control and emotional detachment or aggression…occasionally sex would begin intimately but then (the intervener's) demeanour would suddenly change and he would become detached and domineering, often pinning me by my throat…as the relationship progressed I felt less and less like I had the right to say no to his sexual demands. He impressed upon me verbally that as his Muslim wife I should fulfil his sexual needs unquestionably. I felt it was not acceptable to him for me to refuse to be intimate for any reason and as time went on, due to reactions I encountered in him, I became increasingly fearful about saying no to him because of the potential consequences of doing so". Miss Levitt observes: "I have taken it that she means that she was fearful that he would leave her if she did not go along with his demands". He would taunt her by telling her (using the claimant's own language): "we both know you are not strong enough to get rid of me".*"

[647] Ibid 577
[648] Ibid 589
[649] Ibid 578
[650] Ibid 584
[651] Ibid 585; *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin); [2014] QB 581
[652] *R (F) v Director of Public Prosecutions* [8]; Palmer 585

As Palmer noted, the relationship between F and D was motivated by an atmosphere of intimidation and fear with F being all too aware of "*saying no to him because of the potential consequences of doing so*".[653] I argue that, when considering consent in specific regard to coercion and grooming (to which the alternative approach to autonomy is better suited to address), this is a key question to ask: what are the consequences of saying "no"? This, in turn, provides an example of the importance of making a distinction between what is circumstance and what is context. If no consequences arise, this *suggests* (though I do not go so far as to say definitively) that there is a lack of coercion as the person being asked has the freedom of choice. Alternatively, if some consequences arise (either immediately or later), this *suggests* that there is coercion as the person being asked does not have the freedom of choice.

Such a question can arise in other situations, however, and not just with sexual relationships, or intimate partners. For example, take the following non-sexual violation scenario.

> **Non-sexual violation scenario**. A lives with B. In exchange for paying reduced rent, A is expected to help B around the house upon demand, and sometimes without warning. Though A is free to come and go as they please, they are a private person and likes to keep themselves to themselves. As such, A is aware that if they go out unexpectedly or at strange times, questions will be asked by B about where they have been and what they have been doing, which A does not want to answer. A therefore restricts themselves as much as possible to a routine known by B. A has their own life, earns some money, and has things they want to do. B frequently requests that A undertakes various jobs around the house, even when A is busy with other things. A complies due to paying reduced rent and would find it difficult and inconvenient to have to move at that time.

In the circumstances of the question posed above: what are the consequences of saying "no"? Is A being coerced? If A says no, there is the risk that B would ask them to leave, though they may not be able to sustain themselves in the short-term. If A agrees, they keep B happy but at the expense of their own tasks, which then incur other consequences. This scenario, to which I do not have an answer, shows that when focusing on "consequences", this allows issues of coercion to be addressed in other areas and not just regarding sexual consent.

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[653] Palmer 586

The distinction between violations of sexual autonomy that are acute and chronic does provide some assistance when examining sexual activity between family members. For activity between adults and children the criminal law is looking for the acute violation, as Palmer noted, if does go unnoticed and continues into adulthood (as well as between adults) this encapsulates a chronic violation of sexual autonomy (and may ultimately lead to multiple acute violations).[654] In such circumstances, we would call this chronic violation, grooming. However, the difficulty that arises, as Palmer noted, is that it can be a "*more insidious web of tactics*" that are used.[655] Such a web can however go unnoticed, especially in a familial context.

In chronic violations of sexual autonomy, a web of insidious tactics could be used to ensure consent to sexual activity. Such a web is possible when the coercer and the coerced are in regular contact with each other, such as in a family relationship. I argued above that the question that ought to be asked is: what are the consequences to saying "no"? This does however have a limitation. An element of grooming is its subtlety: the person being groomed does not usually know that they are being groomed until it reaches the point when some specific activity is requested. Likewise, knowing that there are consequences, requires the coercion to be apparent or blatant. This implies a distinction between coercion and grooming (though grooming is considered a form of coercion to vitiate consent).

According to Liberto, "…*coercion takes a valuable conjunction of good things away from a coercee into choosing the best option left – the option of the coercer's choice*."[656] Does this imply however that the coercee must *know* that the options have been removed or not? Grooming, involving a web of insidious tactics, necessarily implies that the person being groomed does *not* know that the ability to choose has been taken away until the point is reached when the one groomed tries to do something to which the groomer takes issue (the critical time). Grooming therefore implies a "non-apparent" form of coercion (non-apparent until the critical time that is). As it is non-apparent, consent is still possible *until* the critical time. Likewise, coercion implies autonomy in the person being coerced: if autonomy were absent there would

[654] Ibid 592
[655] Ibid 577
[656] Hallie Liberto, 'Coercion, Consent and the Mechanistic Question' (2021) 131 Ethics 210, 214

be no need for the coercion. Knowledge of the consequences of saying "no", makes the coercion "apparent". This provides the need for an alternative approach to autonomy into the issue of consent.[657]

The distinction between apparent and non-apparent coercion could also apply to the coercer as well as to the coercee. Though this is unlikely in sexual cases (the coercer is likely to know what they are doing) however, if we take the non-sexual violation scenario from above, is A coerced *if* B do not know how A feels or are unaware of their concerns? If B do not know, do they coerce A?

Kukla recently sought to develop a realistic understanding of consensual sex, which did not make full autonomy a condition for legitimate consent.[658] She argued that consent only requires some minimum measure of autonomy, not full autonomy.[659] Kukla therefore accepted that diminished autonomy did not render consent invalid. Power differentials, she argues, can "*undercut*" autonomy but, she says, "*It is all too easy to just condemn sex across power differentials because of their impact on autonomy*" because "…*this would rule out basically all sex, since it is rare for two people to have exactly equal social power*."[660] A power differential (or apparent differential) is indicative of coercion. However, given the need for only a minimal measure of autonomy, Kukla emphasises that when we choose to do some activity which is "…*substantially out of step with their prior experiences and desires*" this does not imply that they were coerced into so doing.[661]

In this section, I examined the consent provisions and coercion specifically as a prelude to analysing, in the next section, whether the sex with an adult relative provisions, rather than be removed from the scope of the criminal law, could be

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[657] See 4.3, above.
[658] Quill R. Kukla, 'A Nonideal Theory of Sexual Consent' (2021) 131 Ethics 270, 273-274. Kukla did not define what she meant by "full autonomy" as she considered it to be "*an unreachable and ultimately unhelpful ideal*" (ibid 270).
[659] Ibid 274 & 289 (suggesting the steps suggested by Agnieszka Jaworska, 'Caring, Minimal Autonomy and the Limits of Liberalism' in Hilde Lindeman, Marian Verkerk and Margaret Urban Walker (eds), *Naturalized Bioethics: Toward Responsible Knowing and Practice* (Cambridge University Press 2009) 88)
[660] Kukla 278
[661] Ibid 285

amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions.

5.4 The Crown Prosecution Service guidelines

In this section, I analyse whether the sex with an adult relative provisions, rather than be removed from the scope of the criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions.

5.4.1 The current guidance of the Crown Prosecution Service

The current guidelines stating the policy of the Crown Prosecution Service are contained with their legal guidance entitled "*Rape and Sexual Offences*".[662] Chapter 7 of the guidance deals with "Key Legislation and Offences".[663] Whereas the *previous* guidelines emphasised that "*The SOA 2003 is aimed particularly at protecting the vulnerable, especially children*…",[664] the *current* guidelines make no such statement and remind prosecutors that "…*all adult parties will commit an offence providing they either commit or consent to the act*…"[665]

Regarding charging practice, both sets of guidelines remain consistent in their approach. The four key points ["KP"] (with my own emphasis), which the guidance refers to as "public interest factors", are as follows:[666]

- **[KP1]** The offences should primarily be reserved for situations where a history of abuse against a child family member continues into adulthood or where a suspect sexually exploits an adult relative who is vulnerable.
- **[KP2]** Prosecutors should consider the circumstances in which the relationship first arose and how long it has existed.

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[662] The guidelines were updated on 8 July 2022 therefore the current guidelines will be considered.
[663] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 7: Key Legislation and Offences' (2022) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences> (accessed 22 July 2022)
[664] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 2: Sexual Offences Act 2003 - Principal Offences and Sexual Offences Act 1956 - Most commonly charged offences' (2019) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and> (accessed 10 May 2020)
[665] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 7: Key Legislation and Offences'
[666] Ibid

- **[KP3]** Where a history of exploitation and grooming can be shown, at least in the early stages of the relationship, a prosecution for non-recent offences of rape, sexual assault or similar may be appropriate in addition to any offence committed under sections 64 and 65.
- **[KP4]** The offences are either way and attract a maximum sentence of two years imprisonment.

In addition to this charging practice, the guidance, under the heading "Code for Crown Prosecutors" asks prosecutors to "*bear in mind*" ["BM"] the following (with my own emphasis):[667]

- **[BM1]** In the absence of factors in favour of a prosecution and where the relationship can be shown to have arisen between adults, without coercion or exploitation, a prosecution is unlikely to be required.
- **[BM2]** Any potential adverse impact of a prosecution on the child or children born as a result of the relationship requires careful consideration.
- **[BM3]** Where the family is subject to social services intervention, prosecutors should carefully consider whether a prosecution, over and above any civil proceedings and supervision, is required in the public interest.
- **[BM4]** Where the parties make it clear that the relationship has ended and will not resume in future, this is an additional factor, which may suggest that the public interest does not require a prosecution.
- **[BM5]** Conversely, cases in which the relationship continues beyond a decision to advise that no action be taken on public interest grounds will need very careful consideration. In the event of such circumstances being further investigated and referred for a charging decision, the fact that a previous decision has been made not to prosecute on public interest grounds will mean that a prosecution is more likely to be in the public interest on any subsequent occasion.

5.4.2 The points to be drawn from the guidance

[667] Ibid

Several of the "key points" and "bear in mind" points addressed in the previous section overlap therefore it is necessary to address them individually. The following emphasised points can be drawn from the above. **(1)** The offence is reserved for abuse that commences in childhood. **(2)** It is reserved for where one of the adults is vulnerable. **(3)** The circumstances of the relationship should be considered. **(4)** A history of exploitation and grooming can be evidenced. **(5)** Alternative offences may be more appropriate. **(6)** The maximum sentence is two years imprisonment. **(7)** Adult and non-coercive relationships do not require prosecution. **(8)** Impact to a child should be given careful consideration. **(9)** Social services intervention. **(10)** The relationship has ended. **(11)** A prosecution is more likely for a further charge. I shall consider each of these emphasised points in turn, below.

[KP1] The offence is reserved for abuse that commences in childhood. [BM1] Adult and non-coercive relationships do not require prosecution. The guidance suggests that the charging of an offence under the sex with an adult relative provisions is reserved for abuse that commences in childhood and continues into adulthood. This is an instance when consent is clearly in issue whereby it is unclear whether the sexual activity that has been occurring in adulthood is truly consensual or whether it is a continuation of "consent" that has been "achieved" in childhood.

In *R v C*,[668] which I referred to in the previous chapter,[669] the appellant was the complainant's ("N") stepfather. For approximately 20 years (between the ages of 5 and 25) N was sexually abused by C. The indictment against C contained 18 counts, 9 counts relating to when N was under 16 and 9 counts when aged 16 and over. C denied that any sexual activity had occurred while N was under 16 however, regarding the sexual activity which occurred after N turned 16, C asserted that it was entirely consensual. The evidence on the post-16 activity did appear to suggest, *prima facie*, that C and N were engaging in a full consensual sexual relationship. The Court of Appeal held that the evidence of consent could not be taken in isolation or out of context and that what had occurred before N was aged 16 was "*plainly relevant*" to whether N consented after the age of 16.[670]

[668] *R v C* [2012] EWCA Crim 2034; see also *London Borough of Haringey v FZO* [2020] EWCA Civ 180
[669] See 4.3, above. The facts are repeated here for ease.
[670] *R v C* [4] (Lord Judge CJ)

Prosecution was plainly correct in *C*, nor do I dispute this in this thesis. I agree with the Crown Prosecution Service guidance that prosecution ought to be reserved for activity which has occurred before the family member was able to consent or in a position to critically reflect upon any decision. The activity that occurred in childhood plainly blinds the person in adulthood to what can be considered as consensual sexual activity. Likewise, this marries upon with another part of the guidance which emphasises that prosecution is not required for adult and non-coercive relationships. I have argued throughout this thesis that consensual sexual activity between adult family members ought to be removed from the scope of the criminal law and have placed great emphasis on the consensual and adult aspects of such relationships. The guidance agrees with me that such relationships are not worthy of prosecution.

These points collectively employ the alternative approach to autonomy. The alternative approach focuses on the relationships between the parties and where sexual activity is consensual (evidence of a constructive relationship) and without any evidence of coercion (evidence of a destructive relationship) and commences in adulthood, the autonomy of the parties is respected.

[KP1] The offence is reserved for where one of the adults is vulnerable. The guidance suggests that the charging of an offence under the sex with an adult relative provisions is reserved for activity where one of the adults is vulnerable. This is a further instance when consent is clearly in issue whereby it is unclear whether the sexual activity that has been occurring in adulthood is truly consensual or whether it is "achieved" due to the person's vulnerability. In *R v Cole*,[671] a father and daughter were both convicted under the sex with an adult relative provisions in which the daughter had being diagnosed with a personality disorder and autism.[672] The daughter was described as "*a particularly vulnerable young woman*."[673] As with *C*, prosecution was plainly correct in *Cole*, again, not do I despite this in this thesis.

[671] *R v Cole* [2020] EWCA Crim 1818
[672] Whereas the father received a sentence of imprisonment, the daughter was sentenced to a community order (ibid [3]).
[673] Ibid [12] (McGowan J)

[KP2] The circumstances of the relationship should be considered. [BM4] The relationship has ended. [BM2] Impact to a child should be given careful consideration. The guidance suggests that the circumstances of the relationship should be considered, including whether it has ended or not, and the impact upon any child of the family. I have sought in this thesis to argue that the whole context ought to be considered, rather than just the circumstances, and all three points collectively can be included in that context. These points collectively employ the alternative approach to autonomy as the context of the relationship is considered (whether it is constructive or destructive) and includes a further relational aspect regarding any potential children.

[KP3] A history of exploitation and grooming can be evidenced. [KP3] Alternative offences may be more appropriate. [KP4] The maximum sentence is two years imprisonment. The guidance suggests that the charging of an offence under the sex with an adult relative provisions is perhaps necessary when it involves a history of grooming. Grooming, as discussed above, cuts to the heart of consent and is therefore correctly within the scope of the criminal law when it does occur.[674] However, the guidance suggests that alternative offences may be more appropriate in the absence of consent. I argue that where consent is denied, the more appropriate course of action is to charge for a non-consensual offence under the 2003 Act (perhaps one with a sentence with a maximum that exceeds two years imprisonment) which more adequately reflects the non-consensual nature of the activity.

[BM3] Social services intervention. The guidance suggests that the charging of an offence under the sex with an adult relative provisions is perhaps unnecessary when some other form of intervention is, or has, taken place. This form of intervention could take place within the family (for example if a parent observes activity occurring between two of their children on the cusp of adulthood) or, as the guidance suggests, by social services or civil court intervention. However, if social services are involved this may *indicate* (and I put it no stronger) that some potential harm may be involved to children of the family.

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[674] *R v C*

[BM5] A prosecution is more likely for a further charge. The guidance suggests that the charging of an offence under the sex with an adult relative provisions is perhaps necessary when a decision has previously been made not to charge. This would seem to indicate that the tolerance level for consensual sexual activity between adult family members does stretch to a single occurrence, but not to more than that.

The above guidance suggests the following:

- Consensual sexual activity between adult family members in the absence of coercion or violent is not in the public interest to prosecute.
- That it is in the public interest to prosecute activity which commenced when one party was still in childhood, or is otherwise vulnerable.
- The full circumstances of the relationship ought to be considered.
- Non-consensual offences ought to be alternatively charged, though the sex with an adult relative offences could be left as an alternative.
- A criminal disposal may be unnecessary when a family or civil court disposal will resolve the issue just as well.
- A single instance of consensual sexual activity between adult family members is unlikely to result in a charging decision being made.
- There is an apparent distinction being made in the Crown Prosecution Service guidance between consensual and non-consensual activity when determining whether to charge under the sex with an adult relative provisions. This apparent distinction is being made despite the absence of any consent element in the sex with an adult relative provisions.

It would seem *prima facie* that rather than remove the sex with an adult relative provisions from the scope of the criminal law, the provisions could be amended to better reflect the above guidance, or be otherwise applied in a more uniform way.

5.4.3 The reasons for statutory intervention

Whereas I have *prima facie* concluded that the sex with an adult relative provisions could be amended to better reflect the Crown Prosecution Service guidance, or otherwise be applied in a more uniform way, it should be emphasised the guidance as it is currently drafted is merely “guidance” and would therefore require statutory

intervention to take away the discretion of individual Chief Crown Prosecutors to apply the current guidance as they see fit.[675]

A decision to prosecute may, for example, come down to individual prosecutors views on the family relationships involved, notwithstanding the current guidance. For example, in a 1987 British study relating to the seriousness of sexual activity between the core family members, father/daughter was considered the most serious and sister/sister the least serious.[676] Other conclusions are possible to be drawn from the 1987 study.[677] Sexual activity involving a father was always viewed as the most serious (regardless of the sex of the child) which indicated that the sex of the parent is more important that the sex of the child.[678] Sexual activity involving a parent was always viewed as more serious than sexual activity involving a sibling. Male-male sexual activity was viewed as more serious than female-female sexual activity.

Small conducted a study in relation to the prosecution of statutory rape cases in the United States and, whilst the offence of statutory rape is not like-for-like with the sex with an adult relative provisions, the conclusions are of relevance.[679] Small found that by distinguishing victimisation and consent prosecutors rely on commonplace notions of *appropriate* sexual behaviour which are informed by cultural ideologies about age, gender, race, and sexual identity.[680] One must assume that similar conclusions regarding consensual sexual activity between adult family members are arrived at by the same factors. Both statutory rape and sexual activity between family members are activities which some people consider must *not* be engaged in. The challenge is "*to strike a delicate balance between prosecutorial advocacy…and legal recognition of the realities of teenagers'* [or adults] *sexual lives*."[681]

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[675] Jamie L. Small, 'Conceptualizing Consent: How Prosecutors Identify Sexual Victimization in Statutory Rape Cases' (2020) 45 Law & Social Inquiry 111, 118
[676] N. Eisenberg, R. Glynn Owens and M.E. Dewey, 'Attitudies of Health Professionals to Child Sexual Abuse and Incest' (1987) 11 Child Abuse & Neglect 109
[677] I accept that the study is now approx. 30 years old and this is a serious limitation upon its conclusions.
[678] A similar conclusion was reached by Katharine N. Dixon, L. Eugene Arnold and Kenneth Calestro, 'Father-Son Incest: Underreported Psychiatric Problem?' (1978) 135 American Journal of Psychiatry 835, 838.
[679] The offences akin to statutory rape are contained within Sexual Offences Act 2003, ss. 5 & 9
[680] Small 113
[681] Ibid 114

The problem with discretion as to charge or prosecution is that it can be used (or not used) almost without limit.[682] Whilst a small number of participants may be charged for engaging in consensual sexual activity with an adult family member, there is likely to be a vast majority of similar participants' whose activity does not come to the attention of the police or the Crown Prosecution Service or is otherwise overlooked.[683] Whilst certain sexual activity is likely to be reported due to its seriousness, for example sexual activity between an adult and a child, activity between siblings is less likely to be reported, perhaps due to a perception of a lack of seriousness. The reality is that the Crown Prosecution Service (and any other prosecutorial organisation) makes its own assessment of the propriety of the relationship in determining whether to charge or prosecute. Small, for example, makes the link between sexual activity, gender and sexual orientation whereby older homosexual males engaging in sexual activity with younger homosexual males was prosecuted in a way that was disproportionately high.[684]

It is not possible to determine (given the absence of statutory intervention on how to apply the guidance) when the police, Crown Prosecution Service, or the criminal courts come across such cases how they are viewed. One possible way is to view the number of prosecutions: for example, between April 2016 and March 2017 there were 849 cases recorded by police (not all ended in prosecution). As a comparison, the total number of rape offences recorded by police during the same period was 41,186.[685] Under a freedom of information request, the Crown Prosecution Service confirmed that: "*Our records indicate that charges, brought by way of offences under sections 64 and 65 of the Sexual Offences Act between the years 2004 and 2019, equate to 174 cases*."[686]

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[682] See *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (Admin); [2019] QB 1019
[683] Small 118
[684] Ibid 121-124
[685] Office for National Statistics, 'Sexual offences in England and Wales: year ending March 2017' (2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017> (accessed 29 June 2020)
[686] Information obtained following a freedom of information request, see Appendix 3.

I argue that statutory intervention is required to place the Crown Prosecution Service guidance on the statute book to prevent the prosecution of consensual sexual activity between adult family members.

5.5 Conclusion

In this chapter, I consider whether the alternative approach to autonomy could be reflected in the current law relating to sex with an adult relative.

To determine whether this was the case, I considered the legislative history of the sexual activity between family members provisions to consider the context in which the offence was brought within the scope of the criminal law in the first place and to consider what would be required for it to be removed from scope. I concluded that there is a lack of desire to alter (or repeal) the sex with an adult relative provisions beyond that of maintaining the *status quo* with the continuation of the offence in its current form.

As coercion is a key factor to be considered when dealing with both consent under the 2003 Act and the alternative approach to autonomy, I examined the consent provisions and coercion specifically as a prelude to analysing whether the sex with an adult relative provisions, rather than be removed from the scope of the criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on those provisions. I concluded that rather than remove the sex with an adult relative provisions from the scope of the criminal law, the provisions could be amended to better reflect the above guidance, or be otherwise applied in a more uniform way, but that statutory intervention would be required to prevent the exercise of discretion.

Overall, I conclude that the alternative approach to autonomy is reflected in the current law by way of the guidance published on 8 July 2022.

Chapter 6: Conclusion

6.1 General comments

In this thesis, I argued that consensual sexual activity between adult family members ought to be removed from the scope of the criminal law. Such an argument however cannot be made by reference to law alone and law alone cannot give an answer to the question of incest and how to address consensual sexual activity between adult family members. Roffee argued that the regulation of incest requires a broader, more encompassing approach which required data from multiple disciplines to create a "*legal answer*".[687] I agree with this assessment. Incest cannot be considered as solely a question of law. Any researcher who tries to address incest solely as a question of law will rapidly discover that this is impossible. For example, for the purposes of this thesis my research has, by necessity, been wide encompassing, to list but a few, the disciplines of anthropology, biology, criminology, philosophy, politics, psychology, and sociology. Each discipline has its own views on incest which then contribute to provide a "legal answer".

6.2 The context of the research question

The research questions were why, and how, sexual activity between adult family members should be regulated by the criminal law. I sought to place the research in the context of autonomy and its relationship with intra-familial sexual abuse. As the title to this thesis states, I have advanced "a" case for decriminalisation, not "the" case for decriminalisation.

A tension arises in the criminal law between those that consider that, not only consensual, but all forms of sexual activity between adult family members ought to be retained within the scope of the criminal law based on issues such as the abuse of power and the possibility of long-term grooming and those that seek to remove (or partially remove) such activity from the scope of the criminal law based on issues such

[687] James A. Roffee, 'The Law on Incest: A New Legal Realist Approach to Understanding the English and Welsh Prohibitions' (University of Leicester 2011) 193

as autonomy and privacy. My research falls into the latter category. I argue that the tension created by these approaches can be resolved by way of the application of a relational account of autonomy which can address the substance of both arguments.

A relational account can address some of the difficulties that arise when trying to determine whether consent is present or not. Circumstances which may appear, at face value, to be indicative of consent may, at some deeper level, indicate non-consent. A deeper level examination is a closer examination into the context within which the decision to consent was made and which is not limited in the same it may appear at face value. Such a deeper examination can examine, for example, the overall state of the relationship between the adult family members and not be hindered by the state of the relationship at one specific time. The question of "*did X consent?*" is a time-restricted question with only two possible answers: that of "yes" or "no". A deeper level examination into context does not, however, necessarily lead to a conclusion that the face value assessment on consent was incorrect. A deeper examination into context could identify further evidence of consent as well as evidence of non-consent. Such an approach can ensure that those that do not consent remain protected but that those that do consent have their autonomy respected.

In arguing that consensual sexual activity between adult family members ought to be removed from the scope of the criminal law I was able to examine issues such as consent, the troubling nature of consent, whether consensual activity ought to be within the scope of the criminal law, the relationship between consent and autonomy, and whether autonomy could provide an answer to my research question.

For the argument to be considered valid, however, the essential autonomy argument required three key matters to be addressed. First, I argued that autonomy was a key principle within the criminal law and that respect for autonomy ought to allow all adult family members to engage in consensual sexual activity with each other. Second, that if the State were to take such a step, it could more accurately determine which activity was consensual (and autonomous) and which was non-consensual (and not autonomous). Third, that as autonomy encompasses several different theoretical positions, that a relational autonomy account would appropriately address the issue of consent. These key matters required examination in the context of familial

relationships and familial power dynamics to which a traditional liberal account of autonomy is unfit to deal with.

Before being able to examine these key matters, other matters required examination. First, the origins of the offence of incest. Second, the grounds of justification for bringing sexual activity between family members within the scope of the criminal law. Third, that the harm principle was the correct basis upon which to remove sexual activity between family members from the scope of the criminal law. I addressed these matters in the substantive chapters of the thesis.

A relational account of autonomy does have broader implications for the criminal law, and it can be applied to areas of the criminal law in which there is a relationship between two or more people, or where consent is (or ought to be) an issue. The criminal law, when addressing consent, ought to apply a deeper level examination, a face-value examination can, at times, be insufficient and can result in injustice by making, otherwise consensual activity, criminal activity. I have argued in this thesis that this does not have to be the case, especially regarding consensual sexual activity between adult family members.

6.3 Chapter conclusions

In chapter 2, entitled “Is Sexual Activity Between Family Members Correctly Criminalised?”, I sought to determine whether sexual activity between family members is correctly criminalised.

I considered the identified grounds of justification upon which the criminalisation of sexual activity between family members, rather than specifically between adult family members, were based. These grounds of justification were grouped into groups A to D. I concluded that the grounds of justification do not offer any form of coherent doctrine, either collectively or individually and that the grounds of justification contained within Groups A, B and C are piecemeal. The only grounds of justification which come close to forming coherent doctrine are in Group D.

Having identified the grounds of justification for the criminalisation of sexual activity between family members, I discussed the theoretical framework of criminalisation before analysing the contemporary criminalisation principles of the offence principle, legal moralism, and the harm principle. I concluded that the harm principle is the correct basis upon which to bring an activity within the scope of the criminal law however, regarding consensual sexual activity between adult family members, that criminalisation is not justified.

I argued that whether an activity is brought within the scope of the criminal law is to be determined by reference to the harm principle. However, by itself, this is insufficient when making the final determination of whether to bring an activity within the scope of the criminal law. Something *more* is required. I argued that the something *more* is autonomy. For criminalisation to be justified, it must cause harm *and* does not impact upon a person's autonomy.

In chapter 3, entitled "The Foundations of Autonomy", I have considered the foundations of autonomy by analysing how autonomy is inbuilt into the harm principle, how autonomy is linked to consent and autonomy as a human rights principle.

I argued that for an activity to be brought or retained within the scope of the criminal law to be justified, it must cause harm *and* does not impact upon a person's autonomy. I argued that autonomy is inbuilt into the harm principle. I further argued that though the harm principle is the correct contemporary criminalisation principle, autonomy can override, mediate, and limit the role of the criminal law.

I considered how the role of consent is viewed by the criminal law and made the distinction between sexual and violent offences. I concluded that autonomy is an important factor within the criminal law that plays the role of an override (or mediating principle) to otherwise harmful activity which would otherwise be within the scope of the criminal law. I considered how human rights and autonomy arguments combine when considering issues of sexual orientation. I considered the right of sexual orientation and analysed the jurisprudence of the European Court of Human Rights. I concluded that the Court's view appears to be that the protections afforded by Article 8 resulted from the applicants *being* homosexual, regardless of any outward

expression of homosexual activity. But, in cases where additional sexual orientations or sexual minorities are concerned (consensual sexual activity between adult family members), the Court has been unwilling to extend the same protections to them.

In chapter 4, entitled “Relational Autonomy: An Alternative Approach to Autonomy”, I considered an alternative approach to the traditional liberal account of autonomy: that of relational autonomy. I set out the theoretical framework of relational autonomy, including the advanced accounts (procedural and substantive). I concluded that a procedural account, with a focus upon critical reflection, is to be preferred and I advanced an argument that consent, if arrived at following a process of critical reflection, ought to be respected by the criminal law.

I also reconsidered the traditional liberal formula of consent *equals* autonomy following the conclusions regarding relational autonomy. I concluded that relational autonomy does not alter the formula rather it modifies the meaning of “consent” and “autonomy” within the formula whereby consent would only *be* consent if it were identified following a process of critical reflection.

In Chapter 5, entitled “Could the Alternative Approach be Reflected in the Current Law?”, I considered whether the alternative approach to autonomy could be reflected in the current law relating to sex with an adult relative.

I considered the legislative history of the sexual activity between family members provisions to consider the context in which the offence was brought within the scope of the criminal law in the first place and to consider what would be required for it to be removed from scope. I concluded that there is a lack of desire to alter (or repeal) the sex with an adult relative provisions beyond that of maintaining the *status quo* with the continuation of the offence in its current form.

As coercion is a key factor to be considered when dealing with both consent under the 2003 Act and the alternative approach to autonomy, I examined the consent provisions and coercion specifically as a prelude to analysing whether the sex with an adult relative provisions, rather than be removed from the scope of the criminal law, could be amended, or applied to more reflect the Crown Prosecution Service guidelines on

those provisions. I concluded that rather than remove the sex with an adult relative provisions from the scope of the criminal law, the provisions could be amended to better reflect the above guidance, or be otherwise applied in a more uniform way, but that statutory intervention would be required to prevent the exercise of discretion.

I concluded that the alternative approach to autonomy is reflected in the current law by way of the guidance published on 8 July 2022.

6.4 Future research

In this final section of my thesis, I make suggestions as to the future research that could be undertaken in this area.

Further research regarding consensual sexual activity between adult family members and its specific application to the contemporary criminalisation principle of the offence principle would be of benefit. As would a United Kingdom-based study into moral dumbfounding.

Further research regarding a relational autonomy approach to, not only consensual sexual activity between adult family members, but to the criminal law as a whole or other specific offences would be of benefit. There is no reason why such an approach need be limited in scope to sexual offences but could include any offence where there is a relationship between two individuals.

Further research could also be conducted regarding the discretion of the Crown Prosecution Service to charge and prosecute in the sex with an adult relative provisions cases. The records as to specific relationships and consensual (or not) nature of the relationship are not available under a freedom of information request therefore it would be interesting if these records could be viewed and organised in a statistical way to be able to breakdown specific relationships, the circumstances, the context and whether a decision was made to charge to assist in determining whether there was a particular relationship-bias.

Research could also be undertaken regarding the charging decisions cases to determine the personal views of Crown Prosecutors and whether these have an impact upon the decisions themselves as compared with other offences.

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Appendix 1: Full text of relevant legislation

A. Punishment of Incest Act 1908

- Royal Assent: 21 December 1908
- Commencement: 1 January 1909
- Repealed: 1 January 1957
- Active: 1 January 1909-31 December 1956 *(never amended)*

1 – Incest by males

(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labor: Provided that if, on an indictment for any such offence, it is alleged in the indictment and proved that the female person is under the age of thirteen years, the same punishment may be imposed as may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).

(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

(3) If any male person attempts to commit any such offence as aforesaid, he shall be guilty of a misdemeanor, and upon conviction thereof shall be liable at the discretion of the court to be imprisoned for any time not exceeding two years with or without hard labour.

(4) On the conviction before any court of any male person of an offence under this section, or of an attempt to commit the same, against any female under twenty-one years of age, it shall be in the power of the court to divest the offender of all authority over such female, and, if the offender is the guardian of such female, to remove the offender from such guardianship, and in any such case to appoint any person or persons to be the guardian or guardians of such female during her minority or any less period: Provided that the High Court may at any

time vary or rescind the order by the appointment of any other person as such guardian, or in any other respect.

2 - Incest by females of or over sixteen

Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or; son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labor for any term not exceeding two years.

B. Sexual Offences Act 1956

- Royal Assent: 2 August 1956
- Commencement: 1 January 1957
- Repealed: 1 May 2004
- Active: 1 January 1957-30 April 2004 *(never amended)*

10 – Incest by a man

(1) It is an offence for a man to have sexual intercourse with a woman whom he knows to be his grand-daughter, daughter, sister or mother.

(2) In the foregoing subsection " sister " includes half-sister, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

11 – Incest by a woman

(1) It is an offence for a woman of the age of sixteen or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent.

(2) In the foregoing subsection " brother" includes half-brother, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

C. Sexual Offences Act 2003

- Royal Assent: 20 November 2003
- Commencement: 1 May 2004
- Repealed: n/a
- Active: 1 May 2004-7 July 2008 (version 1) & 8 July 2008-present (version 2)

Version 1

64 – Sex with an adult relative: penetration

(1) A person aged 16 or over (A) commits an offence if –

(a) he intentionally penetrates another person's vagina or anus with a part of his body or anything else, or penetrates another person's mouth with his penis,

(b) the penetration is sexual,

(c) the other person (B) is aged 18 or over,

(d) A is related to B in a way mentioned in subsection (2), and

(e) A knows or could reasonably be expected to know that he is related to B in that way.

(2) The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3) In subsection (2) –

(a) "uncle" means the brother of a person's parent, and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister, and "niece" has a corresponding meaning.

(4) Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(5) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

65 – Sex with an adult relative: consenting to penetration

(1) A person aged 16 or over (A) commits an offence if –

(a) Another person (B) penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis,

(b) A consents to the penetration,

(c) the penetration is sexual,

(d) B is aged 18 or over,

(e) A is related to B in a way mentioned in subsection (2), and

(f) A knows or could reasonably be expected to know that he is related to B in that way.

(2) The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3) In subsection (2) –

(a) "uncle" means the brother of a person's parent, and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister, and "niece" has a corresponding meaning.

(4) Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(5) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

Version 2

(changes from version 1 are underlined)

64 – Sex with an adult relative: penetration

(1) A person aged 16 or over (A) (subject to subsection (3A)) commits an offence if –

(a) he intentionally penetrates another person's vagina or anus with a part of his body or anything else, or penetrates another person's mouth with his penis,

(b) the penetration is sexual,

(c) the other person (B) is aged 18 or over,

(d) A is related to B in a way mentioned in subsection (2), and

(e) A knows or could reasonably be expected to know that he is related to B in that way.

(2) The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3) In subsection (2) –

(za) "parent" includes an adoptive parent;

(zb) "child includes an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002;

(a) "uncle" means the brother of a person's parent, and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister, and "niece" has a corresponding meaning.

(3A) Where subsection (1) applies in a case where A is related to B as B's child by virtue of subsection (3)(zb), A does not commit an offence under this section unless A is 18 or over.

(4) Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an

issue as to whether he knew or could reasonably have been expected to know that he was.

(5) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

(6) Nothing in –

(a) section 47 of the Adoption Act 1976 (which disapplies the status provisions in section 39 of that Act for the purposes of this section in relation to adoptions before 30 December 2005), or

(b) section 74 of the Adoption and Children Act 2002 (which disapplies the status provisions in section 67 of that Act for those purposes in relation to adoptions on or after that date),

is to be read as preventing the application of section 39 of the Adoption Act 1976 or section 67 of the Adoption and Children Act 2002 for the purposes of subsection (3)(za) and (zb) above.

65 – Sex with an adult relative: consenting to penetration

(1) A person aged 16 or over (A) (subject to subsection (3A)) commits an offence if –

(a) Another person (B) penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis,

(b) A consents to the penetration,

(c) the penetration is sexual,

(d) B is aged 18 or over,

(e) A is related to B in a way mentioned in subsection (2), and

(f) A knows or could reasonably be expected to know that he is related to B in that way.

(2) The ways that A may be related to B are as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(3) In subsection (2) –

(za) "parent" includes an adoptive parent;

(zb) “child includes an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002;

(a) “uncle” means the brother of a person’s parent, and “aunt” has a corresponding meaning;

(b) “nephew” means the child of a person’s brother or sister, and “niece” has a corresponding meaning.

(3A) Where subsection (1) applies in a case where A is related to B as B's child by virtue of subsection (3)(zb), A does not commit an offence under this section unless A is 18 or over.

(4) Where in proceedings for an offence under this section it is proved that the defendant was related to the other person in any of those ways, it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was.

(5) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

(6) Nothing in –

(a) section 47 of the Adoption Act 1976 (which disapplies the status provisions in section 39 of that Act for the purposes of this section in relation to adoptions before 30 December 2005), or

(b) section 74 of the Adoption and Children Act 2002 (which disapplies the status provisions in section 67 of that Act for those purposes in relation to adoptions on or after that date),

is to be read as preventing the application of section 39 of the Adoption Act 1976 or section 67 of the Adoption and Children Act 2002 for the purposes of subsection (3)(za) and (zb) above.

Appendix 2: List of criminal Bills reviewed to identify grounds for justification

The following criminal Bills (and debates thereon) were reviewed to identify grounds of justification, in chronological order:

- Criminal Law Amendment Act 1885 (Amendment) Bill (No 1) 1896 (HC Bill 61)
- Criminal Law Amendment Act 1885 (Amendment) Bill (No 2) 1896 (HC Bill 156)
- Incest (Punishment) Bill 1899 (HC Bill 127)
- Incest Bill 1900 (HC Bill 136)
- Incest Bill 1903 (HC Bill 51)
- Incest Bill 1907 (HC Bill 173)
- Incest Bill 1908 (HC Bill 127; HL Bill 124)
- Criminal Law Amendment Bill 1910 (HC Bill 54)
- Morality Bill 1910 (HC Bill 179)
- Prevention of Immorality Bill 1911 (HC Bill 40)
- Prevention of Immorality Bill 1912 (HC Bill 28)
- Criminal Law Amendment Bill 1913 (HC Bill 132)
- Criminal Law Amendment Bill 1914 (HC Bill 32)
- Criminal Law Amendment Bill 1917 (HC Bill 7)
- Protection of Young Persons Bill 1920 (HC Bill 172)
- Protection of Women and Young Persons Bill 1921 (HC Bill 114)
- Criminal Law Amendment Bill 1921 (HC Bill 141)
- Criminal Law Amendment Bill 1922 (HC Bill 2)
- Offences against the Person Bill 1924 (HC Bill 39)
- Criminal Procedure (Scotland) Bill 1937-38 (HC Bill 172)
- Sexual Offences Bill 1956 (HC Bill 221; HL Bill 89)
- Criminal Law Bill 1976-77 (HC Bill 168)
- Incest and Related Offences (Scotland) Bill 1985-86 (HC Bill 150)
- Sexual Offences Bill 2003 (HC Bill 128)

Appendix 3: Freedom of Information Act requests and response

A Freedom of Information Act request was made in identical terms to the following Crown Prosecution Service areas: (1) East Midlands; (2) East of England; (3) London North; (4) London South; (5) Mersey-Cheshire; (6) North East; (7) North West; (8) South East; (9) South West; (10) Thames & Chiltern; (11) Wales; (12) Wessex; (13) West Midlands; and (14) Yorkshire & Humberside.

Each request was forwarded by email to IAT@cps.gov.uk. The requests were made on 28 May 2020 as follows:

"In regard to the **[name]** area (comprising of **[named counties]**):

1. How many:
    a. Charges were brought for an offence under s. 64 or s. 65 of the Sexual Offences Act 2003 every year since 2004 (or, in the event that the information is not available for the period 2004-present, please can you provide it for the following years: 2019, 2018, 2017, 2016 and 2015)?
    b. Of those, how many cases were you asked to make a charging decision?
    c. Of the cases where a charging decision was made, how many cases were not in the public interest to charge?

2. How many:
    a. Convictions were there for an offence under s.64 or s.65 of the Sexual Offences Act 2003 every year since 2004 (or, in the event that the information is not available for the period 2004-present, please can you provide it for the following years: 2019, 2018, 2017, 2016 and 2015)?
    b. Of the convictions under s. 64, what were the familial relationships?
    c. Of the convictions under s. 65, what were the familial relationships?
    d. Of the convictions under both s. 64 and s. 65:
        i. How many convictions involved a consensual familial relationship?
        ii. What where these consensual familial relationships (e.g. parent-child, siblings etc.)?

3. Please provide the guidance (and its publication date) issued to prosecutors in relation to s. 64 and s. 65 of the Sexual Offences Act 2003."

The response from the Crown Prosecution Service (headed original available) received, under references 9163 to 9176, was as follows:

19 June 2020

Ref: 9163 to 9176

Dear Mr Beetham,

Freedom of Information Act 2000 Request

Thank you for your Freedom of Information (FOI) request which we received on 28 May 2020.

The FOI Act gives you the right to know whether we hold the information you want and to have it communicated to you, subject to any exemptions which may apply. It is a public disclosure regime, not a private regime. This means that any information disclosed under the FOI Act by definition becomes available to the wider public.

Request

In regard to the:
East of England area (comprising of Cambridgeshire, Essex, Norfolk and Suffolk)
East Midlands area (comprising of Derbyshire, Leicestershire, Lincolnshire, Northamptonshire and Nottinghamshire)
London North area
London South area
Mersey-Cheshire area (comprising of Cheshire and Merseyside)
North East area (comprising of Cleveland, Durham and Northumbria)
North West area (comprising of Cumbria, Greater Manchester and Lancashire)
South East area (comprising of Kent, Surrey and Sussex)
South West area (comprising Avon & Somerset, Devon & Cornwall and Gloucestershire)
Thames & Chiltern area (comprising of Bedfordshire, Berkshire, Buckinghamshire, Hertfordshire and Oxfordshire)
Wales area (comprising of Dyfed Powys, Gwent, North Wales and South Wales
Wessex area (comprising of Dorset, Hampshire, Isle of Wight and Wiltshire)
West Midlands (comprising of Staffordshire, Warwickshire, West Mercia, and West Midlands)
Yorkshire & Humberside area (comprising of Humberside, North Yorkshire, South Yorkshire and West Yorkshire)

1. How many:

a. Charges were brought for an offence under s. 64 or s. 65 of the Sexual Offences Act 2003 every year since 2004 (or, in the event that the information is not available for the period 2004-present, please can you provide it for the following years: 2019, 2018, 2017, 2016 and 2015)?

b. Of those, how many cases were you asked to make a charging decision?

c. Of the cases where a charging decision was made, how many cases were not in the public interest to charge?

2. How many:

a. Convictions were there for an offence under s.64 or s.65 of the Sexual Offences Act 2003 every year since 2004 (or, in the event that the information is not available for the period 2004-present, please can you provide it for the following years: 2019, 2018, 2017, 2016 and 2015)?

b. Of the convictions under s. 64, what were the familial relationships?

c. Of the convictions under s. 65, what were the familial relationships?

d. Of the convictions under both s. 64 and s. 65:

i. How many convictions involved a consensual familial relationship?

ii. What where these consensual familial relationships (e.g. parent-child, siblings etc.)?

3. Please provide the guidance (and its publication date) issued to prosecutors in relation to s.64 and s. 65 of the Sexual Offences Act 2003.

Response

The nature of the information requested in your fourteen requests has an overarching theme and common thread concerning data regarding sections 64 and 65 of the Sexual Offences Act. For this reason we have aggregated the requests as they relate to the same information as set out in section five of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Please refer to the link below:

http://www.legislation.gov.uk/uksi/2004/3244/regulation/5/made

Our records indicate that charges, brought by way of offences under sections 64 and 65 of the Sexual Offences Act between the years 2004 and 2019, equate to 174 cases. In order to determine the number of cases where charges were not brought, on the grounds that the Public Interest test was not met as described in part one c), a manual search of all pre-charge decisions during the timeframe would be required, as no central records are held in relation to the specific offence in which a pre-charge decision is made.

A manual review of pre-charge cases and cases in which offences were charged would therefore have to be undertaken to answer your questions in part one b) and c) pertaining to the charging decision and to all of part two pertaining to the familial relationships in those cases in which convictions were reached.

Section 12(1) of the FOI Act provides that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit is specified in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and for central government is set at £600. This represents the estimated cost of one person spending 3.5 working days in determining whether the Department holds the information, and locating, retrieving and extracting the information.

Consequently, the CPS is not obliged to comply with any of your requests in accordance with section 12(1) of the Freedom of Information Act 2000. Please be

advised that this cost limit will apply to any new requests that can be considered under the same theme as the current fourteen. The cost limit will apply to similar requests received in 60 consecutive working days.

The cost limit will apply to similar requests received in 60 consecutive working days from 17 June 2020. The cost limit will therefore apply until 09 September 2020. Requests received that are considered not to fall under the same theme as the current fourteen requests will be dealt with as normal.

In response to part three of your request, the CPS has published guidance pertaining to Rape and Sexual Offences wherein reference is made to sections 64 and 65 of the Sexual Offences Act. This guidance is withheld under section 21 of the FoIA – information accessible by other means. Please see the attached section 17 notice which provides an explanation of this exemption.

The current guidance can be accessed at the CPS website via the following link:

https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and

Historically, there was no specific guidance for the two sections of the Act up until 10 November 2011, when specific guidance was published as part of the Rape and Sexual Offences Manual on the CPS' intranet. Please find attached this previously published guidance.

Under section 16 of the FoIA we have an obligation to advise what, if any, information may assist you with your request. The Ministry of Justice (MoJ) publish data regarding offence outcomes. The MoJ has recently published data pertaining to year end 2019 and you may find this data useful. It can be accessed via the following link:

https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019

If you are not satisfied with this response you have the right to request an internal review by responding in writing to the address below within two months of the date of this response. The internal review will be handled by a member of CPS staff who has not been involved with your original request.

IAT@cps.gov.uk

Information Access Team
Floor 8
102 Petty France
London
SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Ms J.Fasulo
Information Access Team
020 3357 0788
IAT@cps.gov.uk

Attachment to CPS Freedom of Information request reference 9163 to 9176 released 19 June 2020

Flag A

Sex with an adult relative (sections 64 and 65 Sexual Offences Act 2003) See Archbold 20-11

Key points

- These provisions make it an offence to have sex with an adult relative either by committing, or consenting to, an act of sexual penetration.
- The ways in which the parties may be related are set out in section 64(2) and include, for the first time, uncles and aunts (but not their spouses or partners).
- Adoptive parents are also included since the amendment of section 64 by section 73 and Schedule 15, paragraph 5(3) of the Criminal Justice and Immigration Act 2008.
- The maximum penalty on indictment is two years' imprisonment, a relatively low penalty, reflecting that the offences involve sexual activity between consenting adults.

Charging practice

The SOA 2003 is aimed particularly at protecting the vulnerable, especially children, and these offences should primarily be reserved for situations where a history of abuse against a child family member continues into adulthood or where a suspect sexually exploits an adult relative who is vulnerable. To this end it will be useful to consider the circumstances in which the relationship first arose and how long it has existed.

Where a history of exploitation and grooming can be shown, at least in the early stages of the relationship, a prosecution for historic offences of rape, sexual assault or similar may be appropriate in addition to any offence committed under sections 64 and 65.

The introduction of blood uncles and aunts into the list of proscribed relationships raises the possibility of a lawful relationship pre-dating the Act subsequently becoming unlawful. In the absence of any history of exploitation a prosecution in these circumstances is unlikely to be in the public interest.

When considering a case involving sex with an adult relative, prosecutors should bear in mind that all adult parties will commit an offence providing they either commit or consent to the act, regardless of whether or not they are the 'victim'. Prosecutors should always consider the position of the parties individually and identify any issues of exploitation and victimisation. Although both may have committed an offence, different factors may apply to each, especially in relation to the public interest.

A number of cases referred to CPS involve young women who, having grown up apart from their absent father, have felt the need to seek him out in adulthood. It is not uncommon in cases of this nature for suspects who are fathers to claim that the sexual relationship was instigated by their daughter and to suggest that it is they who have been seduced. Prosecutors should always question the credibility of such assertions

and acknowledge, in reaching any decision, that the exploitation of a daughter for sexual purposes always involves a gross breach of trust.

Code for Crown Prosecutors considerations

Paragraph 4.16 of the Code for Crown Prosecutors lists a number of relevant common public interest factors that make a prosecution of one individual rather than the other more likely.

They are:

j) the victim of the offence was in a vulnerable situation and the suspect took advantage of this;
k) there was an element of corruption of the victim in the way the offence was committed;
l) there was a marked difference in the ages of the suspect and the victim and the suspect took advantage of this;
m) there was a marked difference in the levels of understanding of the suspect and the victim and the suspect took advantage of this;
n) the suspect was in a position of authority or trust and he or she took advantage of this.

In the absence of public interest factors tending in favour of prosecution and where the relationship can be shown to have arisen between adults without coercion or exploitation, a prosecution is unlikely to be required.

Where the relationship has resulted in the birth of a child or children, very careful consideration should be given to whether the public interest requires a prosecution, bearing in mind any potential adverse impact that a prosecution might have on the child/ children. Similarly, where the family is subject to social services intervention, prosecutors should carefully consider whether a prosecution, over and above any civil proceedings and supervision, is required in the public interest.

Where the parties make it clear that the relationship has ended and will not resume in future, this is an additional factor which may suggest that the public interest does not require a prosecution. Conversely, cases in which the relationship continues beyond a decision to advise that no action be taken on public interest grounds will need very careful consideration. In the event of such circumstances being further investigated and referred for a charging decision, the fact that a previous decision has been made not to prosecute on public interest grounds will mean that a prosecution is more likely to be in the public interest on any subsequent occasion.