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## **Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo**

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# SAME-SEX MARRIAGE, SLIPPERY SLOPE RHETORIC, AND THE POLITICS OF DISGUST: A CRITICAL PERSPECTIVE ON CONTEMPORARY FAMILY DISCOURSE AND THE INCEST TABOO

*Courtney Megan Cahill\**

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“Incest” is symbolic of the special way in which the pattern of social relationships, as they are normatively defined, can be broken . . . . “Incest” means the wrong way to act in a relationship . . . . To act not merely wrong, but to act in a manner *opposite* to that which is proper. It is to “desecrate” relationships. It is to act “ungrammatically.”

—David Schneider, *The Meaning of Incest*<sup>1</sup>

Law is rife with slippery slope rhetoric. When pressed to describe the potential harm that could flow from any given law, courts and lawyers, like politicians on the stump, turn to the rallying cry of the slippery slope. Invoking a downward spiral of inevitable and dire consequences, they inveigh against the immediate threat by emphasizing—and amplifying—the threats sure to follow. Nowhere is this mode of rhetoric more prevalent, or more forceful, than in politically charged issues like same-sex marriage, abortion, and gun control, each of which represents a playing field for debates over foundational social concerns and core constitutional values such as the family, the rights to life and to choose, and the right to defend oneself.

One of the more infamous slippery slope arguments in recent memory appeared in April of 2003, when United States Senator Rick Santorum invoked the metaphor of the slope in order to presage the world of sexual abandon that the decriminalization of sodomy ostensibly would provoke: “If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”<sup>2</sup> While publicly condemned for his glib remark, Santorum was merely giving voice to the chain of implied catastrophe that the Supreme Court majority in *Bowers v. Hardwick*<sup>3</sup> envisaged in 1986, that Justice Scalia, dissenting in *Lawrence v. Texas*,<sup>4</sup> would portend later in 2003, and that the public has been lamenting for quite some time now—namely, that acceptance of same-sex relations will lead to the erosion of sexual taboos like polygamy, bestiality, and incest. Responding to Santorum’s reference to incest specifically, one journalist opined that “Santorum has a point in asserting that such a ruling could put us on a slippery slope

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<sup>1</sup> David Schneider, *The Meaning of Incest*, 85 J. POLYNESIAN SOC’Y 149, 166 (1976).

<sup>2</sup> Interview by the Associated Press with Sen. Rick Santorum (Apr. 7, 2003) [hereinafter Santorum Interview].

<sup>3</sup> 478 U.S. 186, 195–96 (1986) (White, J.) (“[I]f respondent’s submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.”).

<sup>4</sup> 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

toward legalizing some forms of incest, the most repellent of the practices he listed.”<sup>5</sup>

What is it, though, about incest that renders it a key player in slippery slope rhetoric? It would be easy to dismiss analogies between same-sex relations and incest as the fatuous cant of social conservatives and mere rhetorical puffery—and dismissal, it turns out, is often the response. For instance, *The New Republic*'s Andrew Sullivan has attacked the comparison as absurd:

If you want to argue that a lifetime of loving, faithful commitment between two women is equivalent to incest or child abuse, then please argue it. It would make for fascinating reading. But spare us this bizarre point that no new line can be drawn in access to marriage—or else everything is up for grabs . . . .<sup>6</sup>

Similarly, Peter Beinart, also of *The New Republic*, summarily dismissed the analogy by stating simply that “there’s a very good reason for the state to get in and get involved with incest because it produces deformed children.”<sup>7</sup>

To dismiss or overlook the same-sex relations/incest comparison, however, is to underestimate the sheer breadth and depth of the incest taboo in contemporary discourse about sexuality and the family—as well as the simple fact that, for some, same-sex relations *are* like incest. To the extent that incest has been invoked by those who wish to foreground—and magnify—

<sup>5</sup> Stuart Taylor Jr., *Santorum on Sex Where the Slippery Slope Leads*, THE ATLANTIC ONLINE, May 6, 2003 (“Santorum’s remarks are more plausible as legal analysis . . . than most critics have acknowledged. . . . Might Lord Byron’s problem [(consensual sex between an adult brother and sister)] nonetheless be outlawed because it has long been despised as repugnant and immoral? Not if there is an unqualified constitutional right to consensual adult sex. And sodomy, no less than sibling incest, has for centuries been subject to ‘condemnation . . . firmly rooted in Judeo-Christian moral and ethical standards,’ as the late Chief Justice Warren E. Burger stressed in a concurrence in *Bowers v. Hardwick*. Public opinion is moving toward majority support for a right to have gay sex. But it’s not there yet.”), available at <http://www.sodomylaws.org/santorum/sneditorials055.htm>. But see Austin Bramwell, *Mutilated Debate Homosexuality Shouldn’t Be Compared to Incest*, NAT’L REV. ONLINE, Mar. 4, 2004 (“[T]he incest gambit, while tactically shrewd, is strategically unsound. For one thing, it reinforces the impression that conservatives only object to new rights for gays out of disgust for their conduct. Mere feelings, however, no matter how strong, do not provide reasons for government policies. Besides, if disgust for homosexual acts can be overcome (as, among today’s youth, it already has), so, presumably, can disgust for incestuous acts.”), at <http://www.nationalreview.com/comment/bramwell200403040848.asp>; Dahlia Lithwick, *Slippery Slope The Maddening Slippery Slope Argument Against Gay Marriage*, SLATE, May 19, 2004 (“Since few opponents of homosexual unions are brave enough to admit that gay weddings just freak them out, they hide behind the claim that it’s an inexorable slide from legalizing gay marriage to having sex with penguins outside JC Penney’s. The problem is it’s virtually impossible to debate against a slippery slope. Before you know it you fall down, break your crown, and Rick Santorum comes tumbling after.”), at <http://slate.msn.com/id/2100824>.

<sup>6</sup> Andrew Sullivan, *Dialogues Gay Marriage*, SLATE, Mar. 21, 1997, at <http://slate.msn.com/id/3642/entry/23844>.

<sup>7</sup> Jonah Goldberg, *Springfield vs. Shelbyville Gay Marriage, Incest, and The Simpsons*, NAT’L REV. ONLINE, July 1, 2003, at <http://www.nationalreview.com/goldberg/goldberg070103.asp>.

the dangers of same-sex marriage, we must understand both incest and how it figures in the rhetoric of the slippery slope. Unlike the other taboos on the slippery slope of sexual deviance, incest has become a term that signifies any deviation from the norm; consequently, the very term “incest” is a powerful way to provoke an almost visceral disgust toward any relationship to which it is compared. In other words, incest describes not simply sexual relationships between family members, but also, and more comprehensively, any relationship—be it social, sexual, or even reproductive—that is “opposite to that which is proper.”<sup>8</sup> How else can we explain the strange conflation of incest and cloning that has appeared numerous times in the writings and recommendations of Leon Kass, head of President Bush’s Bioethics Council?<sup>9</sup> The degree to which the incest taboo has been used to inspire disgust against a range of consensual relationships—its sheer overinclusiveness—is perhaps the best reason why we should not dismiss the incest/same-sex marriage comparison so lightly. Quite the contrary, the appearance of incest on the slippery slope as a disgust-provoking mechanism demands rigorous critique. As Martha Nussbaum has recently contended, disgust—or what Kass has famously called “the wisdom of repugnance”<sup>10</sup>—is simply an unacceptable ground for legal regulation.<sup>11</sup>

In this Article, I look at the extent to which the incest taboo has shaped law, politics, and public perception in two related legal domains—namely, in the law surrounding sexuality and in family law. Specifically, I examine the way in which incest has been used to define a normative vision of sexuality and the family, and to trigger disgust toward otherwise consensual intimate relationships, most notably same-sex relations. While incest is not the only taboo on the slippery slope of sexual deviance, it is the one taboo that represents in the collective imagination, including the legal imagination, an archetypal form of boundary violation and a potent symbol of disgust. It is for this reason that legal actors, policymakers, and others have turned to incest as an object of comparison to a range of relationships that provoke disgust in ways that recall the mythic horror of the incest taboo. Understanding precisely *why* incest is an object of disgust is indispensable to understanding *how* incest and same-sex relations, or incest and cloning, could possibly be linked in the legal imagination.

After *Lawrence*, a number of legal scholars asked whether the law would turn its attention to incest as the next taboo on the slippery slope.<sup>12</sup> Here, I consider the key predicate questions that the literature overlooks.

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<sup>8</sup> Schneider, *supra* note 1, at 166.

<sup>9</sup> See *infra* note 219 and accompanying text.

<sup>10</sup> Leon R. Kass, *Religious, Philosophical, and Ethical Perspectives on Cloning: The Wisdom of Repugnance—Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998).

<sup>11</sup> See *infra* note 102 and accompanying text.

<sup>12</sup> See, e.g., Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337, 337 (2004); Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48.

What is incest doing at the bottom of the slope in the first place? How might we explain its power to drive slippery slope rhetoric over such varied issues as interracial marriage, same-sex marriage, and alternative reproductive technologies? In the Parts that follow, I take issue with the argument, advanced by some legal commentators, that discussion about the taboo has led to its erosion and that “incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage.”<sup>13</sup> While states have lifted certain incest prohibitions, and while courts have been analyzing the legitimacy of incest laws for quite some time, the incest taboo remains a potent symbol of non-normative sexuality—that is, it continues to represent a “serious” threat to the ideal family unit, one that is comprised of heterosexual parents who have children through a “natural” mode of reproduction. In addition, despite the multiplicity of meanings that attach to incest among the states, it has recently emerged as a single and monolithic force—*incest* or *the* incest taboo—in debates over the constitution of the family and its mode of reproduction.

As a normative matter, I am more interested here in examining and critiquing the way in which the incest taboo has defined the outer limits of kinship than in assessing whether laws against incest either will, or should, be repealed.<sup>14</sup> While I agree with the statement that “the proffered explanations for incest prohibitions should be deeply problematic for any same-sex marriage advocate,”<sup>15</sup> among others, I do not aim in this piece to provide a systematic framework for overturning incest laws—particularly those laws

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<sup>13</sup> Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890–1990*, 28 IND. L. REV. 273, 292 (1995) (quoting WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 352 (1983)); see also Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1526 (1993) (stating that “the continuing vulnerability of family law [including incest prohibitions] to the Enlightenment critique has fueled a movement in recent years that has demanded considerable deregulation of family life in the name of individual rights”); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 98 (1988) (“Rational analysis of taboos is not only likely to miss this point, but even itself to weaken the taboo. Once you begin to think about which kinds of incest-like activities lack particular identifiable harmful consequences for particular identifiable participants, you begin to think about the unthinkable and about why some ‘incest’ is harmless incest. As this process continues, the emotional force of the taboo, its force as a general deterrent, is eroded.”).

<sup>14</sup> For arguments that either propose that certain incest laws be repealed or analyze the possibility of this taking place after *Lawrence*, see Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 298–309 (1984); Martha M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993); McDonnell *supra* note 12, at 337 (examining “how the decision in *Lawrence* affects laws regulating other forms of sexual behavior, choosing in particular consensual adult incest as a way to give the argument focus”); Christine McNiece Metteer, *Some “Incest” Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL’Y 262 (2000).

<sup>15</sup> Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 762 (2002).

that cannot be justified on harm-based grounds alone. Rather, my objectives are to question the privileged position that the incest taboo has maintained in the law governing sexuality and the family more generally, and to propose that the law reappraise the extent to which disgust, rather than reasoned argument, sustains laws directed at sexual and familial choice. In so doing, I hope to contribute to the larger, and more recent, conversation among legal scholars over the proper place of revulsion in the law.<sup>16</sup>

Part I will examine the structural features of the slippery slope, one of the primary means by which taboos in general, and the incest taboo in particular, have been transmitted in an effort to influence public opinion and to shape legal norms. After providing a theoretical analysis of slippery slopes, I turn to the role that incest has played in slippery slope rhetoric and examine a recent case<sup>17</sup> in which *Lawrence* and its so-called companion case, *Goodridge v. Department of Public Health*,<sup>18</sup> figured in the feared movement down the slippery slope to incest.<sup>19</sup>

Part II will draw from Part I's analysis of slippery slopes in order to examine more closely the key position that incest has occupied at, or near, the bottom of the slippery slope of sexual deviance. I shall argue that incest is a bad fit for slippery slope arguments. When we say that we are slipping down the slope to polygamy, or adultery, or bestiality, it is fairly clear what we mean and where we are going because those taboos have a relatively definite meaning. But when we say that we are slipping down the slope to incest, it is much less clear where we are headed because the meaning of incest is much less stable and has shifted over time. Although incest appears in legal and nonlegal slippery slope arguments as a single and monolithic taboo, incest, in fact, is marked by definitional variety (from state to state, including who can commit, and what constitutes, incest) and halting progress toward legalization. In other words, it is unlikely that same-sex marriage will cause us to slide down the slope because in some ways we have already slipped.

Parts III and IV will move from the slippery slope to a closer examination of the typical justifications for the incest taboo in order to show that they fail to provide a full explanation for why incest provokes such disgust. These Parts will provide the theoretical framework that I will use to explain not only why incest has remained a powerful and monolithic taboo on the slippery slope, but also why it has been compared to other sexual (and reproductive) taboos pertaining to the constitution of the family. Part III will contend that the genetic harm and child sexual abuse justifications for the

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<sup>16</sup> See *infra* note 102 and accompanying text.

<sup>17</sup> *Commonwealth v. Rahim*, 805 N.E.2d 13, 23 (Mass. 2004).

<sup>18</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>19</sup> I refer to *Lawrence* and *Goodridge* as "companion cases" in the sense that critics have approached them in similar terms with respect to their perceived roles in activating the "slippery slope to incest."

incest taboo fail both to capture the full range of disgust that incest represents and to explain why incest remains a potent symbol of non-normative sexuality. Specifically, I maintain that incest revulsion is triggered in harmful and nonharmful situations alike; as such, it represents an exception to the classic understanding of harm, advanced by John Stuart Mill, as that alone which justifies legal regulation.<sup>20</sup> Part IV will then provide the critical framework that I will use to situate this theory of the incest taboo as a form of boundary maintenance as well as the more general theory of disgust as boundary violation. This Part will look closely at the analogies that have been made between incest and other taboos, old and new, in order to help bring into focus the theory of boundary violation that I offer.

In Part V, I will draw from the theoretical claims made in the previous Parts in order to explore more fully how, and why, incest has been strategically used to articulate an ideal vision of the family—a vision grounded in a particular understanding of nature and the natural family unit. Here, I shall contend that the incest taboo has continued to shape a normative understanding of the family with respect to who can get married and how they can reproduce, despite the claim that “rational analysis” of the incest taboo has “weaken[ed] the taboo.”<sup>21</sup> In addition, I shall return to the logic of disgust in order to illuminate the symbiotic relationship that exists between the law and the incest taboo.

The incest taboo has figured—and continues to figure—crucially in slippery slope arguments over sexuality and the constitution of the family. And yet, given the definitional variety of incest in American law, and given the fact that one court has already struck down an incest statute on state constitutional grounds,<sup>22</sup> incest is a bad fit for the slippery slope model. Further, harm justifications for the incest taboo are suspect. The question then arises why, despite these weaknesses, the incest taboo and its role in the slippery slope metaphor should figure so heavily in contemporary arguments about acceptable and unacceptable familial arrangements—and, most important for this Article, about same-sex relations. I shall argue that the emotion of disgust is the only way to comprehend the depth and breadth of the incest taboo and its persistent place of “honor” at the bottom of the slippery slope. But should disgust, which is largely socially contingent,

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<sup>20</sup> See J.S. MILL, *ON LIBERTY* (Hackett Publ'g Co. 1978) (1859). As Mill explains in the introductory remarks to his celebrated text:

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

*Id.* at 9.

<sup>21</sup> Schneider, *supra* note 13, at 98.

<sup>22</sup> *Israel v. Allen*, 577 P.2d 762 (Colo. 1978).

carry the freight of such a powerful metaphorical symbol? In other words, should we be so confident in our “tastes” (*disgust*) that we permit them to dictate proscribed and prescribed forms for the expression of the basic human need for intimacy? Or should the law reappraise the breadth of the incest prohibition and the extent to which incest-revulsion substitutes for rational evaluation of same-sex marriage and other “deviant” relationships?

## I. INCEST AND THE SLIPPERY SLOPE

In order to appreciate the persistence of the incest taboo over time, it is necessary first to understand the role that the taboo has played in arguments pertaining to the legal regulation of sexuality. Section A will provide a general overview of the structure and function of slippery slopes. Section B will then look specifically at the position that incest has maintained, both historically and currently, at the bottom of the slippery slope of sexual deviance. This section will also look at a recent state court case that has received a good deal of attention by slippery slope enthusiasts.<sup>23</sup> I shall contend, however, that the slippery slope arguments that have surfaced in response to this case are unpersuasive and, in fact, shed light on inherent weaknesses of the “slippery slope to incest” formulation.

### A. *Structural Features of the Slippery Slope*

What do slippery slopes tell us about sexual taboos like incest? Or, more appropriately, how might we define the precise relationship that exists between sexual taboo and the slippery slope in the legal, social, and political domains? Sexual taboos and slippery slopes often go hand in hand in both legal reasoning and political debate. In fact, we might even say that one of the primary functions of the sexual taboo is to define the parameters of the slippery slope (or at least a certain kind of slippery slope), for the more taboo the prohibition, the steeper, and hence more slippery, the slope. Sexual taboos and slippery slopes, or rather sexual taboos *on* slippery slopes, have been key players in the culture wars over the extent to which the state may control the intimate realms of family and sexuality—to say nothing of the highly contested issue of whether the state has any business interfering in the latter of those two realms at all.

As a constitutive feature of the slippery slope, sexual taboos have been effective in scripting the controversy over same-sex marriage, providing the language that we now use, in nearly unconscious fashion, to frame this legal and political issue.<sup>24</sup> Prior to *Lawrence*,<sup>25</sup> sexual taboos and slippery slopes were routinely deployed in an attempt to influence public opinion with respect to whether consensual sexual behavior should be subject to criminal

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<sup>23</sup> See *infra* notes 62–70 and accompanying text.

<sup>24</sup> See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

<sup>25</sup> 539 U.S. 558 (2003).

penalties. Even after *Lawrence*, one suspects that legal actors and policy-makers will continue to rely on sexual taboos and slippery slopes in order to regulate non-normative families—such as those between same-sex partners—with respect to a wide range of family law issues, including marriage, adoption proceedings, and custody determinations.<sup>26</sup>

The classic formulation of the slippery slope resembles the following: While *A*, the case under consideration or the “instant case,” is innocuous enough, *B*, the danger case, must be avoided at all costs—even if that means forfeiting *A*. As Frederick Schauer explains, “[a] slippery slope argument claims that permitting the instant case—a case that it concedes to be facially innocuous and that it linguistically distinguishes from the danger case—will nevertheless lead to, or increase the likelihood of, the danger case.”<sup>27</sup> While Schauer insists that *A*, the instant case, is unobjectionable and perhaps even desirable,<sup>28</sup> other commentators, including Eugene Volokh and Eric Lode, have qualified Schauer’s structural prototype by observing that the inoffensive nature of *A* is not a necessary predicate for a slippery slope argument: “Sometimes appeals to SSAs [slippery slope arguments] are . . . attempts to help us see what their proponents believe is the objectionable nature of *A*. While SSAs may implicitly concede that *A* is unobjectionable considered alone, such arguments need not make this concession.”<sup>29</sup>

Critics have isolated two species of slippery slope arguments: (1) rational-grounds and (2) empirically-based. Rational-grounds slippery slope arguments assume that a distinction cannot be made between *A*, the object under consideration, and *B*, the object of comparison. This kind of argu-

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<sup>26</sup> Whether or not *Lawrence* enjoins courts from considering sexual orientation as one factor among many in adoption proceedings and custody disputes remains unclear. See, e.g., *Lofton v. Sec’y of Dep’t of Children and Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. Accordingly, we need not resolve the second prong of appellants’ fundamental-rights argument: whether exclusion from the statutory privilege of adoption because of appellants’ sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy.”), *reh’g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

<sup>27</sup> Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 369 (1985).

<sup>28</sup> *Id.* at 368.

<sup>29</sup> Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1481 (1999). Lode defines slippery slope arguments generally as “arguments that urge us to resist some practice or policy, either on the grounds that allowing it could lead us to allow some other practice or policy that is clearly objectionable, or on the grounds that we can draw no rationally defensible line between the two.” *Id.* at 1476. Lode thus makes a distinction between rational SSAs and empirical SSAs, observing that “[e]mpirical SSAs maintain that we should not allow *A* on the grounds that allowing it would increase the likelihood of our allowing each successive case on the slope, until we finally reach some objectionable result.” *Id.* at 1504; see also Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 n.12 (2003) (“Slippery slope arguments are sometimes made by people who dislike both *A* and *B*: the arguer may say ‘Even if *A* is good on its own, it might lead to a bad *B*,’ while really thinking that *A* is bad itself. But the argument is framed this way only because the arguer thinks some listeners may like *A* but oppose *B*.”).

ment “rel[ies] on the idea that there is no non-arbitrary stopping place anywhere along the slope. Typically, such arguments maintain that there are no important differences between *A* and *m*, between *m* and *n* . . . and the clearly objectionable *B*.”<sup>30</sup> Take the following argument as an example: Because marijuana and cocaine are in essence the same—each a mind-altering substance—the law cannot, within the bounds of logic, permit the use of one drug and prohibit the other. Insofar as “we can draw no non-arbitrary line along the slope, rational-grounds SSAs maintain that we should not step on it in the first place.”<sup>31</sup>

By contrast, empirical slippery slope arguments assume that while differences between *A* and *B* exist, *A* should nevertheless be prohibited “on the grounds that allowing it would increase the likelihood of our allowing each successive case on the slope, until we finally reach some objectionable result.”<sup>32</sup> Take now the slightly modified version of the first drug argument: While marijuana and cocaine might reflect different orders of magnitude on the mind-altering substance scale, the legalization of marijuana might lead to the legalization of cocaine; for this reason, the law should allow neither. Whereas rational-grounds SSAs thus posit that there is no principled distinction between *A* and *B*—e.g., marijuana and cocaine, or, more relevant here, same-sex marriage and incest—empirical SSAs are slightly more discriminating, recognizing the difference between *A* and *B* but nonetheless wary that one could easily slip from *A* to *B* by making a series of concessions along the way down the slope.

Whether we characterize slippery slopes as rational-grounds or empirically-based, however, the fear is largely the same—namely, that *A* will either collapse or slip into *B*, which sits near, or at, the bottom of the slope and threatens to pull *A* down through sheer gravitational force. While rational-grounds slippery slope arguments might posit that no principled distinction exists between *A* and *B*, they nevertheless still employ the metaphor of the slope—one that reflects a moral hierarchy whereby *B*, or whatever rests at the bottom, is worse than *A*. Because *B* must be avoided at all costs, the slippery slope argument is deployed in order to maintain the status quo, or what Schauer calls the “state of rest.”<sup>33</sup> In other words, the metaphor of the slippery slope assumes that the desired state of affairs exists somewhere on the plateau at the top of the slope—the plateau signifying a state of rest, or the status quo. Any force—our *A* here—that threatens to push us over the edge and into the abyss, where *B* resides, is strictly prohibited. Put less abstractly, for at least some individuals same-sex marriage (or same-sex re-

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<sup>30</sup> Lode, *supra* note 29, at 1484.

<sup>31</sup> Lode, like Schauer before him, describes this as a version of Sorites paradox, according to which “taking a grain of sand away from a heap of sand makes no significant difference: What we are left with will still be a heap of sand.” *Id.* at 1485; *see also* Schauer, *supra* note 27, at 372.

<sup>32</sup> Lode, *supra* note 29, at 1504.

<sup>33</sup> Schauer, *supra* note 27, at 371.

lations) (“*A*”) and incest (“*B*”) might very well be equally contemptible and share common characteristics. Nevertheless, there is still no getting around the fact that incest, our “*B*” here, sits at the bottom of the slope and thus in some sense enjoys the privilege of being the worst of a bad lot. It is for precisely this reason that same-sex marriage (or same-sex relations), insofar as it edges us off the plateau and closer to incest, constitutes an object of grave concern.<sup>34</sup>

While the claim that *A* will cause or result in *B* might be “illogical,”<sup>35</sup> and while slippery slope arguments are not always “logically compelled,”<sup>36</sup> they are nevertheless highly persuasive because they appear to “describe a behavioral reality”—that is, they seem to reflect the way people think. Moreover, slippery slopes can be potent rhetorical tools, and, according to Volokh, “present a real risk—not always, but often enough that we cannot lightly ignore the possibility of such slippage.”<sup>37</sup> As Volokh has recently demonstrated, the “mechanisms” of slippage are wide-ranging, and include the driving role of precedent in American law, the vagaries of the democratic process, linguistic imprecision, and the degree to which the consideration (and eventual legalization) of *A* might cause an attitudinal shift—leading legislators, jurists, and the public alike to find *B* less threatening and perhaps even inevitable.<sup>38</sup> To this list one might add the gravitational force of the landmark case, that is, “cases we use to chart our course to future decisions” and that “alter[] our jurisprudence by introducing some new value into it or by altering the significance we attach to some value already

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<sup>34</sup> Lode, *supra* note 29, at 1528 (“Some SSAs can be viewed, at least in part, as expressions of disapprobation toward allowing *A*. Allowing *A* will often represent the corruption of some value that is important to the proponent of the SSA. This corruption will frequently be accentuated or magnified in the case of *B*. *B* thus can put us in a better position to understand why the proponent of the SSA is troubled by the thought of allowing *A*. This, in turn, may enable us to do more justice to the deeper concerns that lie behind her invocation of the argument.”).

<sup>35</sup> Schauer, *supra* note 27, at 369 (“[The slippery slope claim] seems not to be an appeal to logic. Indeed, it is in some sense illogical.”).

<sup>36</sup> *Id.* at 370.

<sup>37</sup> Volokh, *supra* note 29, at 1038; *see also* Schauer, *supra* note 27, at 382 (“It is true that the phenomenon of the slippery slope is not strictly logical and that a slippery slope effect is always in logical and linguistic theory eliminable. But as long as law and life are inhabited by people with human weaknesses of bias and deficiencies of understanding, who govern with laws of limited complexity, the claims of slippery slope effect will not necessarily be invalid.”).

<sup>38</sup> Volokh, *supra* note 29, at 1036 (“Attitude-altering slippery slopes happen when the expressive power of law changes people’s *political* behavior as well as their other behavior, by leading them to accept proposals that they would have rejected before.”); *see also* Lode, *supra* note 29, at 1515 (“Other closely related factors can also lead to such slides. First, going through some process may change our views of that process. By allowing each successive case on a slope, judges’ views on the law may begin to change in ways that lead them to neglect their possible hesitancy to step on the slope in the first place. Second, allowing some practice could lead to a shift in our norms regarding when uses of that practice are appropriate. Third, certain decisions may become landmarks—cases we use to chart our course to future decisions.”).

existent in our discourse.”<sup>39</sup> Proponents of the slippery slope might argue that “[i]f a decision allowing *A* is likely to be viewed as a landmark, we may have good grounds for fearing that the judiciary will gradually allow practices further down the slope.”<sup>40</sup> Some slippery slope enthusiasts have already conceptualized *Lawrence* and *Goodridge* in precisely this way: that is, as two such landmark cases that could lead us down the slope toward several different *B*’s, including same-sex marriage and the decriminalization of all sexual morality laws, such as laws prohibiting incest.<sup>41</sup>

### B. *Incest and Slippery Slope Arguments*

Both prior to and following *Lawrence* and *Goodridge*, two species of incest slippery slope arguments were current: first, the movement from sodomy to “incestuous” sex (the decriminalization of incest); and second, the movement from same-sex marriage to incestuous marriage (the civil recognition of incestuous relationships).<sup>42</sup> To be sure, these same “parade of horrors” arguments predated *Lawrence*, and were in fact fairly commonplace in the mid-1990s. For instance, testifying before Congress prior to the passage of the Defense of Marriage Act (“DOMA”),<sup>43</sup> Hadley Arkes, Professor of Jurisprudence and American Institutions at Amherst College, posed the following question: If same-sex marriage were allowed, “[on w]hat ground would the law say no” to incest?<sup>44</sup>

It is important to note, however, that slippery slope arguments that raise the specter of incest are neither new nor particular to the debate over the legalization of sodomy and same-sex marriage. Rather, incest has occupied a privileged position on the slippery slope of sexual deviance for quite some time now, as the taboo against incest was once used to support

<sup>39</sup> Lode, *supra* note 29, at 1519.

<sup>40</sup> *Id.*

<sup>41</sup> See *infra* notes 71–72 and accompanying text. For a discussion of the “landmark” status of *Lawrence*, see Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (“[T]he best we can do now is take the measure of *Lawrence* as a landmark in its own right by placing its logic in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution’s elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity.”).

<sup>42</sup> It should be noted that the division that I have made between criminal incest (sexual relations) and the civil prohibition against incestuous marriage is not entirely apt in light of the fact that, in several states, criminal incest is defined as *either* marriage *or* sexual relations. Such is not the case with respect to the criminal/civil distinction between sodomy and same-sex marriage, which are clearly different. If anything, the fact that in some states incestuous sex is no different from incestuous marriage insofar as *either* would constitute the crime of incest, highlights the ambiguity of the very term “incest” as it has been deployed in legal and political debate.

<sup>43</sup> Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2005) and 1 U.S.C. § 7 (2005)).

<sup>44</sup> *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 87 (1996) (statement of Prof. Hadley Arkes), available at <http://judiciary.house.gov/legacy/25728.pdf>.

the taboo against miscegenation in arguments that bear a striking resemblance to the arguments that have more recently surfaced. Incest therefore has a history of surfacing in slippery slope arguments at times when law and culture are confronted with threatening forms of sexuality and non-normative family arrangements.

For instance, in 1872, the Tennessee Supreme Court considered whether the state could prosecute an interracial couple for violating Tennessee's antimiscegenation law. In that case, *State v. Bell*,<sup>45</sup> the plaintiffs, a white man and an African-American woman, were married in Mississippi, which, unlike Tennessee at that time, permitted interracial marriage. Although recognizing that such unions were permitted in the state of Mississippi, the *Bell* court nevertheless upheld the couple's conviction for miscegenation in the state of Tennessee by adverting to three related forms of boundary control: state sovereignty, antimiscegenation laws, and the incest taboo.

The court first noted that because

[e]ach State is a sovereign, a government within, of, and for itself . . . [it] cannot be subjected to the recognition of a fact or act contravening its public policy . . . as lawful, because it was made . . . in a State having no prohibition against it or even permitting it.<sup>46</sup>

The court's use of the public policy rationale implicitly rested on the trope of boundary maintenance; indeed, the phrase "within, of, and for itself" represented the linguistic correlative of the geographical, social, and political boundaries that separated the states and ensured their individual sovereignty.<sup>47</sup> Racial miscegenation here found its counterpart in geographical miscegenation couched in the language of conflict of laws—each an equally dangerous and infective form of boundary violation. Put slightly differently, the physical body (the actual "mixing" of the races) figured as a metaphor for the body politic (protection of state borders), and vice versa.<sup>48</sup>

<sup>45</sup> 66 Tenn. 9 (1872).

<sup>46</sup> *Id.* at 11.

<sup>47</sup> The *Bell* court was not alone in situating the issue of interracial marriage within the larger context of state sovereignty. For instance, in 1878, the Supreme Court of Virginia remarked that laws against interracial marriage would be

futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another state or country, should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void.

*Kinney v. Commonwealth*, 71 Va. 858, 859 (1878). Similarly, in 1890, the Supreme Court of Georgia underscored the need to maintain boundaries "between" borders and "between" the races: "It will thus be seen how clearly recognized and distinctly fixed is the purpose of the state of Georgia to prohibit within its borders, miscegenation, as the result of marriages between the white and black races." *State v. Tutty*, 41 F. 753, 757 (C.C.S.D. Ga. 1890).

<sup>48</sup> In this sense, one might recall the passage of DOMA and its "mini" state equivalents (including the various state amendments banning same-sex marriage) as similar efforts to delineate boundaries and assert state sovereignty over the definition of marriage.

To be sure, it was for precisely this reason that a federal antimiscegenation amendment to the United States Constitution was proposed in 1911—an uncanny forebear to the federal marriage amendment that was proposed (unsuccessfully) in 2004—and which led United States Representative Seaborn Roddenberry, an avid supporter of the antimiscegenation amendment, to fulminate that

[i]ntermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant . . . . It is subversive of social peace. It is destructive of moral supremacy, and ultimately this slavery of white women to black beasts will bring this nation to a fatal conflict.<sup>49</sup>

Moreover, the *Bell* court deployed the proverbial slippery slope argument involving the ineluctable descent to incest:

[By e]xtending the rule to the width asked for by the defendant, . . . we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited.<sup>50</sup>

Thus, in addition to considering the threat of racial mixing and to framing the issue as one of state sovereignty, the court presaged yet a third form of boundary violation, namely, intrafamilial sexuality. While I shall return to this idea of incest as an exemplary form of boundary violation in Part IV—one that helps to bring into focus the routine comparison between incest and miscegenation—suffice it to note here that incest once occupied a position at the bottom of the slippery slope with respect to miscegenation that resembles the position that it currently occupies with respect to same-sex relations.

Similarly, slightly more than ten years after *Bell*, the Supreme Court of Missouri considered whether to sustain a demurrer to an indictment charging a white woman with violating a statute that made interracial marriage a felony. The plaintiff in that case, *State v. Jackson*,<sup>51</sup> contended that Missouri's antimiscegenation statute violated the state and federal constitutions. In rejecting the plaintiff's claim and reversing the lower court's judgment sustaining the demurrer, the court compared laws against miscegenation to laws against incest, stating that "the State has the same right to regulate marriage in this respect that it has to forbid the intermarriage of cousins and other blood relations."<sup>52</sup> As with the *Bell* court, the *Jackson* court deployed a variant of the slippery slope argument in portending the deplorable consequences that would follow should the court find that the federal Constitution guaranteed an unqualified right to marry:

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<sup>49</sup> 49 CONG. REC. 503 (1912) (statement of Rep. Roddenberry).

<sup>50</sup> *Bell*, 66 Tenn. at 9.

<sup>51</sup> *State v. Jackson*, 80 Mo. 175, 176 (1883).

<sup>52</sup> *Id.*

All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instrument confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship all our marriage acts forbidding intermarriage between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother. . . . The condition of a community, moral, mental and physical, which would tolerate indiscriminate intermarriage for several generations, would demonstrate the wisdom of laws which regulate marriage and forbid the intermarriage of those nearly related in blood.<sup>53</sup>

As in *Bell*, incest functioned in *Jackson* as the danger case toward which society might slip should the relationship in question—interracial marriage—receive legal recognition. In both cases from the post-war period, the courts relied on a kind of rhetorical proliferation—“the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother”—as a means of conveying the negative concatenating effect of decriminalizing tabooed sexual behavior.

The parade of horrors that would result should states recognize interracial marriage resonates with the recent declarations sounded by critics of same-sex relations. Specifically, like the *Bell* court, critics of sodomy and same-sex marriage have relied on a similar strategy of rhetorical proliferation: “If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”<sup>54</sup> In addition to the more formal pronouncements of Justice Scalia and Senator Santorum, a number of commentators have taken up the perceived relationship between incest and same-sex relations in light of *Lawrence* and *Goodridge*. As mentioned, one commentator has noted that “Santorum has a point in asserting that such a ruling could put us on a slippery slope toward legalizing some forms of incest, the most repellent of the practices he listed.”<sup>55</sup>

More recently, Stanley Kurtz, a research fellow at Stanford's Hoover Center and critic for *The National Review*, has argued that same-sex marriage will lead not only to the dissolution of marriage as an institution, but also to incest. Kurtz contends that the “[t]he taboo against homosexuality works in a similar fashion” as the taboo against incest; consequently, the erosion of one taboo might lead to the erosion of another, such that “[g]ay marriage would set in motion a series of threats . . . from which the institution of marriage may never recover.”<sup>56</sup> Because the mythic specter of incest

<sup>53</sup> *Id.*

<sup>54</sup> Santorum Interview, *supra* note 2.

<sup>55</sup> See *supra* note 5.

<sup>56</sup> Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, NAT'L REV. ONLINE, Apr. 30, 2003, at <http://www.nationalreview.com/kurtz/kurtz043003.asp>.

exists near the bottom, and helps to define the gradient, of the slippery slope, any slippage that might occur through the legalization of same-sex marriage must be prevented before it begins.<sup>57</sup>

The correlation between incest and same-sex relations is by no means a mere rhetorical flourish, although a perennial favorite of conservative commentators. Rather, some less biased commentators maintain that the slippery slope arguments that have been made with respect to incest and same-sex relations might not be entirely far-fetched. For instance, *Slate* magazine's chief political correspondent, William Saletan, has suggested that Santorum's claim, as interpreted by David Smith, Communications Director for the Human Rights Campaign, that "being gay [is] on the same legal and moral plane as a person who commits incest"<sup>58</sup> is not so wildly implausible:

In its brief to the Supreme Court in the sodomy case, [the Human Rights Campaign] maintains that "criminalizing the conduct that defines the class serves no legitimate state purpose," since gays "are not less productive—or more dangerous—members of the community by mere dint of their sexual orientation." They sustain "committed relationships" and "serve their country in the military and in the government." Fair enough. But couldn't the same be said of sibling couples? Don't laugh. Cousin couples are already making this argument.<sup>59</sup>

While Saletan "[t]hink[s] Santorum is wrong" because a moral difference exists between incest and same-sex relations, he concludes by ceding that "legally, I don't see why a sexual right to privacy, if it exists, shouldn't cover consensual incest."<sup>60</sup> In the same vein, Volokh has suggested that, contrary to the Supreme Judicial Court of Massachusetts's assertion otherwise, it is "eminently plausible" that "the Massachusetts homosexual marriage decision may lead to legalization of adult incestuous marriages."<sup>61</sup>

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<sup>57</sup> See generally Michelle MacAfee, *Catholic Bishops Same-Sex Marriage Could Lead to Incest; "You Open the Door to Things You Can't Foresee,"* BROCKVILLE RECORDER & TIMES, Sept. 11, 2003, at A5 (quoting Jean-Claude Cardinal Turcotte, Archbishop of Montreal, who in the wake of *Lawrence* stated that "[w]hen you change the definition of the institution, you open the door to things you can't foresee. . . . 'If marriage is a union between two persons who love each other—that's the new definition, without the allusion to sex—where does the notion stop? Will you recognize the marriage between a father and his daughter? Between a brother and his sister? Or two brothers or two sisters? . . . It's very dangerous because we don't know the consequences.'"); Louis Sheldon, *Utah Man Uses Sodomy Decision to Push for Polygamy,* TRADITIONAL VALUES COALITION (May 1, 2004) (stating that the "flawed logic" of *Lawrence* "could easily be extended to 'consensual' incest, prostitution, bestiality, and group sex orgies in the 'privacy' of a person's home"), at <http://www.traditionalvalues.org/modules.php?sid=1309>.

<sup>58</sup> William Saletan, *Incest Repellant? If Gay Sex Is Private, Why Isn't Incest?*, SLATE, Apr. 23, 2003, at <http://slate.msn.com/id/2081904>.

<sup>59</sup> *Id.*; see also William Saletan, *Incest Repellant Continued More on Santorum, Sodomy, and Incest*, SLATE, Apr. 25, 2003, at <http://slate.msn.com/id/2082075>.

<sup>60</sup> Saletan, *supra* note 58.

<sup>61</sup> Eugene Volokh, *Polygamous and Incestuous Marriages*, THE VOLOKH CONSPIRACY (Nov. 18,

Some individuals would agree with Professor Volokh. For example, consider the reaction of some critics after the Supreme Judicial Court of Massachusetts decided *Commonwealth v. Rahim* just four months after it decided *Goodridge*.<sup>62</sup> In *Rahim*, the court considered whether a Massachusetts incest statute applied to purely affinal<sup>63</sup> relationships. The defendant was charged with rape, abuse of a minor, and incest in connection with the sexual abuse of his sixteen-year-old stepdaughter.<sup>64</sup> Because the defendant was not related to his stepdaughter by either blood or adoption, he moved to dismiss the incest charge, arguing that “the necessary element of consanguinity under the incest statute was absent.”<sup>65</sup> The *Rahim* court agreed with the defendant on the ground that the plain language of the statute did not include affinal relationships within its definition of incest, and that there was no evidence to suggest that the legislature intended to include such relationships.<sup>66</sup>

Following a lengthy interpretation of the statute and of the etymology of “consanguineous,” the court held that the incest statute applied only to blood relations.<sup>67</sup> While recognizing the abusive character of the relationship in question, the court nevertheless expressed concern that criminalizing affinity-based relationships would unduly infringe on consensual adult sexual conduct: “The interpretation that the Commonwealth urges on us sweeps up and criminalizes not only the repugnant conduct alleged in this case, but a wide assortment of relationships between consenting adults.”<sup>68</sup> In addition, the court emphasized the fact that the state had already successfully charged the defendant under a number of other criminal statutes—in other words, regardless of how the court ruled on the incest charge, the defendant still would have faced additional criminal penalties.<sup>69</sup> The court fi-

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2003), at [http://volokh.com/2003\\_11\\_16\\_volokh\\_archive.html](http://volokh.com/2003_11_16_volokh_archive.html). According to Volokh,

[t]he [*Goodridge*] court reasons that ‘the right to marry means little if it does not include the right to marry the person of one’s choice,’ but while it qualifies this as ‘subject to appropriate government restrictions in the interests of public health, safety, and welfare,’ it’s far from clear that a court would find that ‘health, safety, and welfare’ would be hurt by adult polygamous marriages (assuming all existing partners in the marriage consent to the addition of another). Likewise for adult brother-sister marriages; as I mentioned several months ago, I think the genetic harm argument doesn’t really work here—after all, we don’t generally ban marriages between people who have serious genetic diseases, even if the odds of a defect in their children are much higher than for brother-sister marriages.

*Id.* (quoting *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

<sup>62</sup> 805 N.E.2d 13 (Mass. 2004).

<sup>63</sup> By “purely affinal,” I mean, here and throughout, a relationship based exclusively on marriage (e.g., step-relatives related by neither the whole nor the half blood).

<sup>64</sup> *Rahim*, 805 N.E.2d at 14.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 23.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

nally concluded by remarking that “[w]e leave it to the Legislature to expand the incest prohibition if it so chooses.”<sup>70</sup>

Some have speculated that the *Rahim* decision and its focus on consent were motivated, in part, by the same court’s decision in *Goodridge* four months earlier and by the Supreme Court’s decision in *Lawrence*. For instance, after *Rahim* was decided, a student writing on Harvard Law School’s Federalist Society’s weblog, *Ex Parte*, opined that “[e]very week, it becomes clearer—*Lawrence* and *Goodridge* do undermine the criminalization of incest.”<sup>71</sup> Similarly, in an article that was circulated widely over the Internet, entitled *Massachusetts Burning: “Gay Marriage” Leads to Incest*, the writer declared that

making no sense and running roughshod over the voters and families of Massachusetts is what this same 4-3 majority has begun to get really good at.

I said earlier this year—when this same majority ordered by executive fiat that the acceptance of sexual unions of the same-sex (homosexual) “marriage” be mandated and recognized by law—that rulings like [*Rahim*] were on their way. I just never believed that they would come so quickly.<sup>72</sup>

The problem with this statement—as with so much information on the woefully unedited Internet—is that it got the facts wrong: With the exception of one justice, the four to three majority in *Rahim* was not the same four to three majority in *Goodridge*. In fact, the justice who authored a dissenting opinion in *Goodridge*, Justice Cordy, was the same justice who authored the majority opinion in *Rahim*, thus casting doubt on the slippery slope contention that the majority in *Rahim* was somehow compelled to recognize “consensual adult relations” between stepfathers and stepdaughters because that same majority had extended the civil right of marriage to same-sex couples in *Goodridge*.

More important, though, is the fact that the *Rahim* court was simply following an approach that it had followed in prior cases when dealing with similar matters of statutory interpretation. For instance, in an earlier case, *Commonwealth v. Smith*,<sup>73</sup> the same court considered whether digital penetration and oral sex fell within the scope of the state incest statute, which defined the act of incest as marriage, sexual intercourse, or both. There, the court held that “in light of . . . legislative activity, we are compelled to limit the meaning of ‘sexual intercourse’ in G.L. c. 272, § 17, to penile-vaginal penetration, with or without emission, and to conclude that the incest in-

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<sup>70</sup> *Id.*

<sup>71</sup> Posting of Eric Soskin to *Ex Parte*, at [http://fedsoc.blogspot.com/2004\\_03\\_01\\_fedsoc\\_archive.html](http://fedsoc.blogspot.com/2004_03_01_fedsoc_archive.html) (Mar. 23, 2004, 13:36 EST).

<sup>72</sup> Kevin McCullough, *Massachusetts Burning “Gay Marriage” Leads to Incest*, WORLDNETDAILY (Mar. 23, 2004), at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=37764](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37764).

<sup>73</sup> *Commonwealth v. Smith*, 728 N.E.2d 272 (Mass. 2000).

dictments against the defendant were properly dismissed.”<sup>74</sup> As a result of the court’s holding in *Smith*, the Massachusetts legislature amended the incest statute to include “unnatural sexual intercourse” in the list of prohibited activities.<sup>75</sup> In light of *Smith*, it would appear that, rather than sliding down a slippery slope that *Goodridge* and *Lawrence* put into motion, the *Rahim* court simply felt that its hands were tied—as it surely believed, and openly conveyed, in *Smith*—because the legislature had chosen to define incest in a rather narrow way.

Whether *Rahim* in fact reflects a movement down the slippery slope is, therefore, largely speculative. That said, *Rahim* is useful because it suggests at least two reasons why the privileged position that the incest taboo has enjoyed on the slippery slope warrants closer attention.

First, *Rahim* reveals the extent to which a uniform definition of incest does not exist. The legal heuristic of the slippery slope as something on which we slip from *A* to *B* assumes that there is something definite (or definable) into which we might slip. However, *Rahim* shows that what might be incestuous conduct in one state—e.g., sexual relations between a stepfather and stepdaughter—might be permissible, nonincestuous conduct in another.

Second, *Rahim*, which relies on a wealth of prior case law dealing with the legitimacy and interpretation of state incest statutes, reveals that a legal conversation about incest had been taking place for quite some time before *Goodridge* and *Lawrence*. That is, the slippery slope argument assumes that *B* (incest) is necessarily posterior to *A* (same-sex marriage) and that *B* needs *A* in order to occur—or, less drastic, that *A* is a vehicle through which *B* might appear as an object of consideration on the public’s radar screen. To be sure, the metaphor of the slope is rhetorically effective precisely because it evokes a visual hierarchy between and among terms on it (*B* is made possible only through *A*) and because it conveys a sense of imminent slippage to a place at the bottom—a nadir—that we have never deigned to imagine. However, *Rahim* shows that talk about incest has a long history and did not suddenly materialize after the recent decisions dealing with same-sex relations.

The following Part will look more closely at these problems that plague the “slippery slope to incest” formulation in order to set the stage for exploring more fully why the incest taboo has retained its power over time. In Parts III and IV, I shall argue that incest has maintained its privileged position at the bottom of the slippery slope not because the “slippery slope to incest” argument is logically persuasive, but rather because of the enormous power of incest to elicit disgust.

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<sup>74</sup> *Id.* at 275–76.

<sup>75</sup> See Act of July 3, 1974, 1974 Mass. Acts 474 (current version at MASS. GEN. LAWS ch. 265, § 23 (2005)).

## II. PROBLEMS WITH THE “SLIPPERY SLOPE TO INCEST” FORMULATION

A. *No Single Definition of Incest Exists*

Statutory definitions vary significantly among the states over what constitutes incest. It is, of course, a basic principle of federalism that the regulation of certain social relations—including what constitutes incest and who may (and may not) marry—lies within the province of state control; for this reason, definitional variety is not intrinsically remarkable. However, the variation in the legal definition of incest among the states reveals a lack of clarity over where it is that we are slipping to when we “slip” down the proverbial slope to incest. In this sense, incest, unlike polygamy or bestiality, is neither a stable nor a fixed taboo in slippery slope rhetoric.

For instance, whereas several states criminalize sexual relations between parents and children related by affinity, Massachusetts, *Rahim* tells us, does not.<sup>76</sup> In fact, the criminal codes of twenty other states, following the Model Penal Code,<sup>77</sup> do not define as “incest” sexual relations between family members related by affinity; some of those same states, however, do prohibit marriage between affinally-related adults.<sup>78</sup> Dissenting in *Rahim*, Justice Greaney highlighted this paradox when he observed that “the court leaves us with a situation where this defendant will avoid prosecution for incest, and (unless the statute is changed) a stepfather can have consensual sexual intercourse with his sixteen year old stepdaughter without fear of criminal sanction. (But, he will not be able to marry her).”<sup>79</sup> Other states punish affinal incest only if the victim is a child (variously defined) or if the

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<sup>76</sup> See MASS. GEN. LAWS ch. 272, § 17 (2005).

<sup>77</sup> For this discussion, see *Commonwealth v. Rahim*, 805 N.E.2d 13, 25–26 (Mass. 2004). The Model Penal Code has rejected affinity-based incest as a basis for criminal sanctions. See MODEL PENAL CODE AND COMMENTARIES § 230.2 cmts. 2(c)–(e), at 405–07 (1980).

<sup>78</sup> For instance, while in Massachusetts there is no criminal prohibition for sexual relations between individuals related by affinity, those same individuals are prohibited from getting married under the state’s domestic relations statute. See MASS. ANN. LAWS ch. 272, § 17. For those states that do not criminalize sexual relations between parents and children related only by affinity, see ALASKA STAT. § 11.41.450 (Michie 2002); ARIZ. REV. STAT. ANN. § 13-3608 (West 2001); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); CAL. PENAL CODE § 285 (West 1999); CAL. FAM. CODE § 2200 (West 2004); FLA. STAT. ANN. § 826.04 (West 2003); HAW. REV. STAT. ANN. § 572-1 (Michie 2003); HAW. REV. STAT. ANN. § 707-741 (Michie 2003); IDAHO CODE § 18-6602 (Michie 2004); IDAHO CODE § 32-205 (Michie 1996); IND. CODE ANN. § 35-46-1-3 (West 2004); KAN. STAT. ANN. §§ 21-3602 to 21-3603 (1995); LA. REV. STAT. ANN. § 14:78 (West 2004); ME. REV. STAT. ANN. tit. 17-A, § 556 (West 1983); MINN. STAT. ANN. § 609.365 (West 2003); NEV. REV. STAT. ANN. 122.020 (Michie 2004); NEV. REV. STAT. ANN. 201.180 (Michie 2001); N.M. STAT. ANN. § 30-10-3 (Michie 2003); N.Y. PENAL LAW § 255.25 (McKinney 2000); N.D. CENT. CODE § 12.1-20-11 (1997); N.D. CENT. CODE § 14-03-03 (2004); 18 PA. CONS. STAT. ANN. § 4302 (West 1983); R.I. GEN. LAWS § 11-6-4 (1956), *repealed by* 1989 R.I. Pub. Laws 214, § 1; VT. STAT. ANN. tit. 13, § 205 (1998); VT. STAT. ANN. tit. 15, §§ 1–3 (2002); VA. CODE ANN. § 18.2-366 (Michie 2004); VA. CODE ANN. § 20-38.1 (Michie 2004); WIS. STAT. ANN. § 765.03 (West 2001); WIS. STAT. ANN. § 944.06 (West 2004).

<sup>79</sup> *Rahim*, 805 N.E.2d at 26.

sexual contact was nonconsensual. For example, Montana's incest law provides that "[c]onsent is a defense . . . to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old."<sup>80</sup>

The states also vary in their application of incest statutes to first cousins, adopted children, in-laws, and even uncles and nieces. For instance, eighteen states and the District of Columbia permit first-cousin marriage, whereas twenty-five do not.<sup>81</sup> The remaining seven states permit such marriages only if certain criteria are met. In Arizona, Illinois, Indiana, Utah, and Wisconsin, first-cousin marriage is permitted on the condition that the couple will not bear children either because the woman is postmenopausal or because the couple is infertile.<sup>82</sup> In Maine, first-cousin marriage is permitted on the condition that the couple receives genetic counseling prior to marriage.<sup>83</sup> And in North Carolina, first-cousin marriage is permitted on the condition that the marriage is not between double first cousins (i.e., those that share all lineal and collateral relatives).<sup>84</sup> With respect to criminal prohibitions, only eight states continue to criminalize sexual relations between first cousins. As Brett McDonnell has observed, "[a]t the time the Model Penal Code was drafted, eighteen states prohibited sex between first cousins, and that number has now dropped to eight. Thus, incest between first cousins today is forbidden by fewer states than forbade sodomy before *Lawrence*."<sup>85</sup>

<sup>80</sup> MONT. CODE ANN. § 45-5-507 (2003).

<sup>81</sup> For jurisdictions that prohibit first-cousin marriage, see, for example, ARK. CODE ANN. § 9-11-106(a) (Michie 2002) (marriages between first cousins are incestuous and absolutely void); IDAHO CODE § 32-206 (Michie 1996) (marriages between first cousins prohibited); IOWA CODE ANN. § 595.19 (West 2001) (marriage between first cousins void); KAN. STAT. ANN. § 23-102 (1995) (marriage between first cousins incestuous and absolutely void); KY. REV. STAT. ANN. § 402.010 (Michie 1999) (marriages between first cousins are incestuous and void); MONT. CODE ANN. § 40-1-401(b) (2003) (marriage between first cousins void); N.D. CENT. CODE § 14-03-03(5) (2004) (marriage between first cousins void); OR. REV. STAT. § 106.020 (2003) (marriage between first cousins void); S.D. CODIFIED LAWS § 25-1-6 (Michie 1999) (marriage between first cousins null and void). For jurisdictions that permit first-cousin marriage, see, for example, CAL. FAM. CODE § 2200 (West 2004) (not listed in prohibited degrees); GA. CODE ANN. § 19-3-3(a) (2003) (first cousins not listed in prohibited degrees); HAW. REV. STAT. ANN. § 572-1 (Michie 1999) (first cousins not listed in prohibited relations).

<sup>82</sup> See ARIZ. REV. STAT. ANN. § 13-3608 (West 2001); 720 ILL. COMP. STAT. 5/11-11(2) (West 2002); IND. CODE ANN. § 35-46-1-3 (West 2004); WIS. STAT. ANN. § 765.03 (West 2001); UTAH CODE ANN. § 30-1-1 (2001).

<sup>83</sup> ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (West 1998).

<sup>84</sup> N.C. GEN. STAT. § 51-3 (2003). A rarity, double first cousins are the children of two brothers who reproduce with two sisters. Suppose *A* and *B*, brothers from one family, marry *C* and *D*, respectively, sisters from a separate family. *A* and *C* have children, and *B* and *D* have children. Those children are double first cousins because they share both sets of grandparents (i.e., the children of *A* and *C* have the same grandparents as the children of *B* and *D*).

<sup>85</sup> McDonnell, *supra* note 12, at 350; see also MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE (1996) (noting the definitional variety in first cousin incest prohibitions in the United States and arguing that the U.S. prohibition against such unions originated largely out of the belief that it would promote more rapid assimilation of immigrants).

In addition, whereas twenty states include adoptive relatives (adoptive parent and adopted child; adoptive siblings and adoptive child) within their criminal incest prohibitions, thirty states and the District of Columbia do not. Similarly, whereas forty-four states and the District of Columbia criminalize incest between uncles or aunts and nephews or nieces, six do not.<sup>86</sup> That said, with the exception of Rhode Island, no state permits uncles to marry nieces and aunts to marry nephews. Rhode Island, which repealed its criminal incest law in 1989, has retained a civil incest law that exempts *any* individuals who are related either by blood or through marriage from the marriage prohibition, provided that they are Jewish and are governed by religious precept.<sup>87</sup>

Finally, some states, like Rhode Island, do not even criminally define sexual relations between close blood-related individuals as incestuous. For instance, South Dakota's criminal code defines incest as

[a]ny person, fourteen years of age or older, who knowingly engages in sexual contact with another person, other than that person's spouse, if the other person is under the age of twenty-one and is within the degree of consanguinity or affinity within which marriages are by the laws of this state declared void.<sup>88</sup>

Similarly, Michigan and New Jersey's laws prohibit incest involving persons under eighteen, but not if both individuals are above that age.<sup>89</sup> The irony here, however, is that South Dakota also has a civil prohibition against marriage between any individuals within a certain degree of blood relatedness, regardless of age.<sup>90</sup> In other words, while certain blood relatives cannot get married in South Dakota, they *may* engage in sexual relations—as long as they are over the age of twenty-one. Indeed, these are just a few examples of the vast diversity of the law surrounding this taboo that is routinely grouped under the collective, umbrella term “incest.”

In addition to a lack of uniformity over the class of individuals to which state incest statutes apply, a lack of consensus also characterizes the precise behavior that constitutes incest. For instance, whereas some criminal statutes define the prohibited activity more broadly as “sexual contact” or “sexual conduct,” others have rather narrow definitions of the crime that

<sup>86</sup> The six states that do not are Illinois, Kentucky, Montana, Ohio, Washington, and Wyoming. *See* 720 ILL. COMP. STAT. ANN. 5/11-11 (West 2002); KY. REV. STAT. ANN. § 530.020 (Michie 1999); MONT. CODE ANN. § 45-5-507 (2003); OHIO REV. CODE ANN. § 2907.03 (West 1997); WASH. REV. CODE ANN. § 9A.64.020 (West 2000); and WYO. STAT. ANN. § 6-4-402 (Michie 2003).

<sup>87</sup> *See* R.I. GEN. LAWS § 15-1-4 (2003) (“Marriages of kindred allowed by Jewish religion.—The provisions of §§ 15-1-1 to 15-1-3 shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jewish people, within the degrees of affinity or consanguinity allowed by their religion.”). Similarly, the Uniform Marriage and Divorce Act, which has not been adopted by every state, would permit uncle-niece and aunt-nephew marriage if the couple is from an “aboriginal” culture. UNIF. MARRIAGE & DIVORCE ACT § 207(a)(3) cmt. (1973).

<sup>88</sup> S.D. CODIFIED LAWS § 22-22-19.1 (Michie 1998).

<sup>89</sup> *See* McDonnell, *supra* note 12, at 361 tbl.1.

<sup>90</sup> *See* S.D. CODIFIED LAWS § 25-1-6 (Michie 1999).

limit it to sexual (penile-vaginal) intercourse, marriage (Wisconsin, Utah), or both.<sup>91</sup> Still others grade the crime of incest into degrees based on the kind of behavior in question, with sexual intercourse constituting first degree incest and sexual conduct constituting second degree incest (Washington).<sup>92</sup>

Whereas the other taboos that occupy a place on the slippery slope are subject to a more standardized definition among the states, the law of incest does not enjoy such uniformity. One might object that a standard definition of incest does exist insofar as all states criminalize sexual relations between, say, father and daughter or brother and sister related by the whole or half blood. However, as discussed above, even this definition does not obtain in some states, like South Dakota, New Jersey, and Rhode Island, which do not define sexual relations between any blood-related individuals of a certain age as incestuous. I contend that such definitional variety renders the argument that we might slip down the slope to incest—whether it be incestuous sex or incestuous marriage—less persuasive.

If, for instance, the “slippery slope to incest” argument has been used to presage the sexualization of the family that will follow from cases like *Lawrence* and *Goodridge*, that argument becomes less convincing in light of the fact that many states do not characterize sexual relations between stepparents and stepchildren, adoptive parents and their adopted children, and even certain blood-related parents and their children as incest. In other words, some states had already determined that it was acceptable for sexual relations to occur between certain family members before these two landmark cases were decided. In addition, if, as many believe, legalized incest would be tantamount to legalizing intrafamilial sexual abuse, then the narrow criminal definition of incest that currently obtains in many states (e.g., penile-vaginal sexual intercourse) suggests that such abuse is already legal—or at least not treated by the law as incestuous per se. Finally, if slippery slope believers have adverted to incest in order to warn others of the Darwinian nightmare that would result should incest bans be lifted, their argument becomes less convincing in light of the fact that many states do not prohibit either sexual relations or marriage between first cousins—where a genetic risk, while not great, is nonetheless present—as well as that in some states (South Dakota, Rhode Island, and New Jersey) close relatives may reproduce without facing criminal penalties.<sup>93</sup> I will return to the weak-

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<sup>91</sup> UTAH CODE ANN. § 76-7-102 (2003); WIS. STAT. ANN. § 944.06 (West 2004).

<sup>92</sup> WASH. REV. CODE ANN. § 9A.64.020 (West 2000).

<sup>93</sup> And, to recall, Rhode Island does not prohibit any individuals related by blood, marriage, or adoption from getting married if they are Jewish. For the debate surrounding whether first cousins run the risk (or perhaps the benefit) of having children with certain recessive traits should they decide to reproduce, see Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring* *Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97, 106 (2002) (estimating that the additional risk of deleterious genetic conditions falls in the range from 4.7 to 6.8% for first cousin unions, as opposed to 3 to 4% for the general population);

nesses of the genetic (or biological) argument in greater detail in Part III. For now, however, it is sufficient to note that the genetic argument alone fails to capture the particular threat that incest represents.

*B. The Metaphor of the “Slope” Does Not Hold up*

Slippery slope arguments presume that the boundary separating the “extant state of affairs” or “the state of rest” from the “danger case” (i.e., the boundary separating the flat ground at the top of the slope from the danger that lurks at the bottom) is firmer than “the one between the instant case and the danger case” (i.e., the boundary separating that which has moved, or might move, us off the flat ground and closer to the dangerous nadir).<sup>94</sup> For this reason, anything that brings us closer to the danger case, including the instant case, is, or at least should be, strictly prohibited. Applying this formulation to the same-sex-marriage-to-incest slippery slope, or to the same-sex-consensual-sex-to-incest slippery slope, the likelihood of legalizing incest based on the existing state of affairs—where we are now—is much less than the likelihood of legalizing incest should bans against same-sex marriage be lifted.

Incest laws, however, were subject to constitutional attack well before *Lawrence* and *Goodridge*. Indeed, even a brief survey of the state reporters reveals that legal arguments and constitutional claims pertaining to the danger case at the bottom of the slope—incest—have a lineage that pre-dates the recent cases dealing with same-sex relations.<sup>95</sup> In other words, the

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Bratt, *supra* note 14, at 267–76; McDonnell, *supra* note 12, at 352–53.

<sup>94</sup> Schauer, *supra* note 27, at 378.

<sup>95</sup> For instance, in *State v. Benson*, the defendant, a father charged with incest and sexual abuse of his biological child, claimed that the incest statute violated his “fundamental right to private consensual acts of sexual intercourse, regardless of the degree of affinity between the parties.” 612 N.E.2d 337, 339 (Ohio Ct. App. 1992). The court disagreed. Finding that the right to engage in an incestuous relationship was not “deeply-rooted” in the nation’s history, the court subjected the incest statute to rational basis review, concluding that “[w]e need hardly cite authority for the obvious conclusion that this statute bears a real and substantial relation to the public morals.” *Id.* Similarly, in *State v. Allen M. (In re Tiffany Nicole M.)*, the Wisconsin Court of Appeals considered the constitutionality of a parental termination statute against both a due process and an equal protection challenge. 571 N.W.2d 872, 876–78 (Wisc. Ct. App. 1997). The defendants in that case, biological siblings involved in a seemingly consensual relationship, had parented three children; the state was attempting to terminate their parental rights as to one of the children on the ground that their incestuous relationship rendered them per se unfit. Recognizing that “a parental rights proceeding interferes with a fundamental right,” the court nevertheless found that the state had “compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society.” *Id.* at 876. The court further reasoned that “[g]enetic mutation . . . is but one consequence of incest, and only one of many reasons why Wisconsin and other states have long prohibited incestuous marriage and criminalized incest.” *Id.* at 878. Although the court cited authority for the proposition that “[w]hether consanguineous mating causes genetic defects may be more questionable than generally assumed,” it nevertheless did not find the biological argument to be dispositive. *Id.* at 875 n.8. For other unsuccessful constitutional challenges to state incest statutes, see *Benton v. State*, 461 S.E.2d 202 (Ga. 1995) (holding that the prohibition against incest was rationally related to the legitimate state interest of protecting children and the family unit); *In the Interest of L.*, 888 S.W.2d 337, 341 (Mo. Ct. App. 1994) (holding that a father’s undisputed acts of incest with his minor sisters

boundary separating the “extant state of affairs” from the danger case is much less definite than the slippery slope enthusiasts would have us believe. Whereas no court in the United States has recognized a legal challenge to laws prohibiting polygamy or bestiality, at least one court—the Colorado Supreme Court in *Israel v. Allen*<sup>96</sup>—has already recognized an equal protection challenge, on state constitutional grounds, to an incest statute.

The plaintiffs in that case challenged a provision of a Colorado incest statute that prohibited marriage between a brother and a sister related solely by adoption on the ground that it violated their fundamental right to marry.<sup>97</sup> While the district court agreed with the plaintiffs that the statute was not supported by a compelling state interest, the Supreme Court of Colorado went further, stating that, regardless of whether marriage was a fundamental right, the statute failed to satisfy even rational basis review.<sup>98</sup> The court relied heavily on the biological argument, reasoning that it was illogical to prohibit an adopted brother and sister from marrying because there was no genetic threat:

[O]bjections that exist against consanguineous marriages are not present where the relationship is merely by affinity. The physical detriment to the offspring of persons related by blood is totally absent. The natural repugnance of people toward marriages of blood relatives, that has resulted in well-nigh universal moral condemnation of such marriages, is generally lacking in applications to the union of those only related by affinity.<sup>99</sup>

I shall return to the *Israel* court’s striking analysis of the relationship between nature and adoption through its deployment of the nature trope in Part IV. More important for present purposes, however, is the fact that, as early as 1978, a court found that there was no rational basis on which to support the incest prohibition as applied to individuals related by adoption, presumably opening the door to any number of subsequent legal challenges.

The metaphor of the slippery slope derives much of its power by what it visually depicts and by what that depiction assumes—namely, the existence of something at the bottom to which we should give heed and the fact that we are not *there* yet. In the case of incest, however, neither of these assumptions is entirely accurate. Because the meaning of incest varies from state to state, it is uncertain just what is lurking at the bottom of the slope—

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involved children “in the family” within the meaning of statutory ground for termination of father’s parental rights to his biological daughter); *State v. Buck*, 757 P.2d 861, 864 (Or. Ct. App. 1988) (holding that incest statute did not violate federal constitutional right to privacy); *State v. Kaiser*, 663 P.2d 839, 843 (Wash. Ct. App. 1983) (holding that statute criminalizing incest did not violate equal protection).

<sup>96</sup> *Israel v. Allen*, 577 P.2d 762, 764–65 (Colo. 1978).

<sup>97</sup> *See id.* at 763.

<sup>98</sup> The court maintained that whether marriage was a fundamental right in the state of Colorado was in dispute. *See id.* at 764.

<sup>99</sup> *Id.* at 764 (quoting 1 VERNIER, AMERICAN FAMILY LAWS 183 (1931)).

if father-daughter incest, then that is already permitted in many states, provided that the father and daughter are not related by blood (and, in a few states, certain forms of incest are permitted even despite the existence of a blood relationship).<sup>100</sup> Further, the fact that incest statutes have been challenged, sometimes successfully, on constitutional grounds, suggests that *A* (e.g., same-sex marriage) is not necessarily higher on the incline than *B* (e.g., incest)—thus casting doubt on the topography of the slippery slope itself.

Despite the multiplicity of meanings surrounding incest and the fact that the “state of rest”—or the flat ground before case *A*—is not as staid as the slippery slope model presumes, the incest taboo remains a potent monolithic force at the bottom of the slope. In one sense, Carl Schneider’s observation that “[r]ational analysis of taboos is not only likely to miss the point, but even itself to weaken the taboo,”<sup>101</sup> represents a plausible theory of the way in which prohibition relies on silence to sustain itself. But in another sense, it is arguable whether “rational analysis” of the incest prohibition—including a successful constitutional challenge to an incest statute in *Israel*—has *in fact* led to its decline. Quite the contrary, incest continues to anchor the slippery slope, one that has been instrumental in shaping public opinion as well as the law itself.

How might we then account for the persistence and persuasive force of incest as the yawning abyss at the bottom of the slippery slope in legal and political debate over the regulation of intimate relationships? I would argue that the only way that we can begin to understand the position that incest occupies on the slippery slope is to comprehend the logic of disgust that underlies the incest taboo. Specifically, the slippery slope at least theoretically assumes that a line can be drawn somewhere on the slope—a toehold, so to speak—at the point where behavior causes harm. As Parts III and IV will show in greater detail, however, disgust is an emotion that is triggered in response to even harmless situations. An examination of disgust suggests that even if we could draw a line between harmful and harmless incest on the slippery slope, it is largely irrelevant because individuals would find even harmless incest to be a source of disgust.

Recognizing precisely why many forms of incest provoke disgust is critical to understanding the power of the taboo as well as why it has been routinely deployed against a range of relationships, from interracial to same-sex relations. In the next Part, I pose the following questions in order to clarify the precise threat that incest represents: Is incest disgusting because it is harmful? Or does incest trigger revulsion even in the absence of harm? Clarifying whether, why, and the extent to which laws prohibiting incest are motivated by disgust will help to provide the necessary frame-

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<sup>100</sup> See *supra* notes 88–89 and accompanying text.

<sup>101</sup> Schneider, *supra* note 13, at 96.

work for approaching the broader question of precisely why, and how, the incest taboo has been used to articulate a normative vision of the family.

### III. INCEST AND HARM

In her recent work on disgust, Martha Nussbaum has suggested that, while harm might provide a “*prima facie* case for legal regulation,” revulsion, or disgust, alone is never enough.<sup>102</sup> If that is correct, then it is important to determine whether laws against incest derive from a proper understanding of harm and whether a “*prima facie* case for legal regulation” of incest can be made. If so, then at the very least we might be able to justify those laws and mark a line beyond which certain kinds of incest are harmful and thus warrant regulation. If, however, laws against incest, even otherwise *harmless* incest, derive mainly from revulsion, then it is difficult to determine exactly where that “line” should be drawn. More important, if the taboo has come to symbolize the revulsion surrounding even harmless sexual behavior, then this would provide a firm basis for criticizing the extent to which the taboo has been used in slippery slope arguments against otherwise consensual (and harmless) sexual relationships.

#### A. Harm-Based Rationales for Laws Against Incest

The two most common arguments that incest is harmful, and thus demands regulation, are that consanguineous reproduction increases the chance for genetic abnormalities and that intrafamilial sexual relations are abusive.<sup>103</sup> Indeed, the mere mention of incest summons images of “backwoods” children and the specter of child sexual abuse. While it is for partly these reasons that incest provokes disgust, neither of these rationales provides a complete or comprehensive account of the taboo’s persistence as a symbol of sexual deviance.

Courts have sometimes referred to one, or both, of these harm-based rationales for sustaining laws against incest. For instance, in *Israel v. Allen*, discussed in Part II, the Colorado Supreme Court turned to biology (or genetic harm) when stating that “objections that exist against consanguineous marriages are not present where the relationship is merely by affinity. The physical detriment to the offspring of persons related by blood is totally absent.”<sup>104</sup> Similarly, in upholding a constitutional challenge to a state incest

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<sup>102</sup> Martha Nussbaum, “*Secret Sewers of Vice*” *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 45 (Susan A. Bandes ed., 1999) (“[W]here disgust is concerned . . . I would argue that we never have even a *prima facie* case for legal regulation.”); see also MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 14 (2004) [hereinafter NUSSBAUM, *HIDING FROM HUMANITY*] (“I shall ultimately take a very strong line against disgust, arguing that it should never be the primary basis for rendering an act criminal, and should not play either an aggravating or a mitigating role in the criminal law where it currently does.”).

<sup>103</sup> See *infra* notes 104–110 and accompanying text.

<sup>104</sup> 577 P.2d at 764 (quoting 1 VERNIER, *supra* note 99, at 183).

statute by a biologically-related brother and sister in *In re Tiffany Nicole M.*, the Wisconsin Court of Appeals adverted to biology when recognizing that “genetic mutation” is one of the many consequences of incest.<sup>105</sup> In addition, courts have also justified laws against incest on the ground that incest is tantamount to child abuse. For instance, in *Kaiser v. State*, the Washington Court of Appeals stated that “[p]revention of mutated birth is only one reason for these statutes. The crime is also punished to promote and protect family harmony, [and] to protect children from the abuse of parental authority . . . .”<sup>106</sup>

Each of these rationales fails to provide a complete explanation for why incest elicits such disgust. Considering first the genetic rationale, it would be difficult to argue that the mere fact that a child is born with recessive genetic traits is in itself offensive; any number of children from non-incestuous unions are born with such traits and we would not say that they necessarily elicit disgust. Rather, what could very well be deemed offensive, and thus legally prohibited, is the fact that parents might put their future progeny in harm’s way by increasing the risk that they will be born with such traits. But even this harm does not entirely explain the revulsion triggered by incest specifically or why certain kinds of incest are illegal. For instance, even when there is a strong likelihood that each parent carries a recessive trait, as in the case of Tay-Sachs disease in the Ashkenazi Jewish community, the law does not require parents to undergo genetic testing prior to having children to determine whether the child or children will be born with a genetic abnormality. In addition, even if nonrelated parents knew that they each carried a recessive trait and nevertheless decided to have children, it is unlikely that we would label that decision as disgusting *per se*—while certainly risky and arguably even irresponsible, probably not disgusting. Perhaps the Supreme Court of Georgia had these inconsistencies in mind when it altogether discounted biology as a valid justification for the incest taboo. In that case, *Benton v. State*,<sup>107</sup> the Georgia court found that the state’s criminal incest law applied to stepfamilies and biological families alike, reasoning that

the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties. This is evidenced by the fact that the taboo is often violated—people generally are incapable of violating their instincts—and because society condemned incest long before people knew of its genetic effects.<sup>108</sup>

Considering now the child sexual abuse rationale, it is unclear whether the idea of child abuse elicits disgust in the same way as does incest. As with related parents who place their progeny in harm’s way by increasing

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<sup>105</sup> *State v. Allen M. (In re Tiffany Nicole M.)*, 571 N.W.2d 872, 878 (Wisc. Ct. App. 1997).

<sup>106</sup> *State v. Kaiser*, 663 P.2d 839, 843 (Wash. Ct. App. 1983).

<sup>107</sup> 461 S.E.2d 202 (Ga. 1995).

<sup>108</sup> *Id.* at 205 (Sears, J., concurring).

the risk of recessive chromosomal traits, it is plausible that we would find sexually abusive parents and parent-figures disgusting because they severely harm their biological, adoptive, or stepchildren physically as well as psychologically. At the same time, however, child abuse and incest represent different orders of magnitude on the revulsion scale, largely because incest represents much more than child abuse. Indeed, even in the absence of abuse, it is likely that we would label the incestuous relationship disgusting. In addition, and on a more practical level, if the harm that incest statutes are targeting is abuse, then such harm is already adequately captured by statutes dealing with child abuse. For instance, the National Center on Child Abuse and Neglect defines the former as “[c]ontacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another person.”<sup>109</sup> By contrast, incest is simply defined as “sexual relations between persons so closely related that marriage is legally forbidden.”<sup>110</sup>

These harm-based rationales are an incomplete way of accounting for the disgust that incest provokes and for why certain incestuous relationships must be legally prohibited. To be sure, the *Israel* court did draw a line between harmful and nonharmful incest on the basis of genetics and biology—at the point where offspring might suffer “physical detriment.”<sup>111</sup> At the same time, however, the court suggested that our disgust responses are invariably triggered by *any* sexual relationship between blood-related relatives, remarking that “[t]he natural repugnance of people toward marriages of blood relatives, that has resulted in well-nigh universal moral condemnation of such marriages, is generally lacking in applications to the union of those only related by affinity.”<sup>112</sup> In other words, the *Israel* court assumed that all blood relatives—presumably including cousins—have an innate aversion for incestuous relationships, even biologically harmless incestuous relationships that might not necessarily involve sexual reproduction. Through this one sweeping statement, the court neglected to consider the fact that many blood relatives *have* entered into incestuous relationships *in spite of* this “natural” repugnance. Similarly, although the petitioners’ three children in *In re Tiffany Nicole M.* were healthy and seemingly free from chromosomal defects, and although the court there noted that “[w]hether consanguineous mating causes genetic defects may be more questionable than generally assumed,” it nevertheless evinced disgust over the mere possibility of incest when it observed that “the incestuous parent by his actions has demonstrated that the natural, moral constraint of blood relationship has

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<sup>109</sup> Joelle Anne Moreno, Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1302 n.150 (1989) (quoting R. KEMPE & C. KEMPE, THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 10 (1984)).

<sup>110</sup> *Id.*

<sup>111</sup> *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978).

<sup>112</sup> *Id.* (quoting 1 VERNIER, *supra* note 99, at 183).

failed to prevent deviant conduct and thus cannot be relied upon to constrain similar conduct in the future.”<sup>113</sup> In other words, like the *Israel* court, the *In re Tiffany Nicole M.* court suggested that something—a disgust mechanism, perhaps—exists in the “blood relationship” to prevent even presumably harmless incest encounters. The courts’ rhetoric in these two opinions speaks to a much larger belief, shared by many, that incest is a source of disgust or repugnance even when it does not result in harm, genetic or otherwise.

### B. *Incest and the Insignificance of Harm*

Aside from the Georgia Supreme Court’s pronouncement in *Benton v. State* suggesting that harm-based rationales do not fully capture the threat that incest represents,<sup>114</sup> does more empirically-based evidence exist that suggests that harm is irrelevant in the context of sexual taboos in general and the incest taboo in particular? Research conducted over the last decade in the fields of cognitive science and moral psychology suggests that this is likely the case—that is, that notions of harm matter less in these particular contexts than we might have otherwise assumed.<sup>115</sup> Scientists in these fields have increasingly contended that “for affectively charged events such as incest and other taboo violations, a [social] intuitionist model may be more plausible than a rationalist model.”<sup>116</sup> In so doing, they have challenged the

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<sup>113</sup> *State v. Allen M. (In re Tiffany Nicole M.)*, 571 N.W.2d 872, 878 (Wisc. Ct. App. 1997) (quoting *In re L.*, 888 S.W.2d 337, 341 (Mo. Ct. App. 1994)).

<sup>114</sup> See *supra* note 107 and accompanying text.

<sup>115</sup> See, e.g., Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 J. PERSONALITY AND SOC. PSYCHOL. 613, 625 (1993) (stating that “[h]arm may be an important factor in the moral judgment of all cultures, but harm references may sometimes be red herrings”).

<sup>116</sup> Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) [hereinafter Haidt, *The Emotional Dog*]; see also Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517 (2002). While alternative theories of morality—including the social interactionist and the social intuitionist perspectives—have gained acceptance, “[r]ationalism still rules, and there appears to be a consensus that morality lives within the individual mind as a traitlike cognitive attainment, a set of knowledge structures about moral standards that children create for themselves in the course of their everyday reasoning.” Haidt, *The Emotional Dog, supra*, at 816. For additional work on the subject, see S. BLACKBURN, *RULING PASSIONS: A THEORY OF PRACTICAL REASON* (1998); SHAUN NICHOLS, *SENTIMENTAL RULES: ON THE NATURAL FOUNDATIONS OF MORAL JUDGMENT* (2004); Richard A. Schweder & Jonathan Haidt, *The Future of Moral Psychology: Truth, Intuition, and the Pluralist Way*, 4 PSYCHOL. SCI. 360 (1993). It appears that the treatment of the social intuitionist model, as well as the affective basis for moral judgment, have begun to percolate into legal scholarship as well. See, e.g., Jeremy Blumenthal, *Who Decides? Privileging Public Sentiment About Justice and the Substantive Law*, 72 UMKC L. REV. 1 (2003); Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2004); Cass Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1563 (2004) (“A great deal of recent attention has been paid to the fact that people often have a rapid, largely affective response to objects and situations, including job applicants, consumer products, animals, cars, and causes of action.”).

widely-held assumption that moral judgment is shaped by one's perceptions of harm.

The social intuitionist model claims that "moral judgment is caused by intuitive moral impulses and is followed (when needed) by slow, ex post facto moral reasoning."<sup>117</sup> According to this model, moral judgments, like aesthetic judgments, are made quickly and intuitively—particularly in response to scenarios, such as incest, that elicit disgust or extreme emotion.<sup>118</sup> The "intuitionist" aspect of the model presumes that morality is driven by intuitions, which are defined as "the sudden appearance in consciousness of a moral judgment, including an affective valence (good-bad, like-dislike), without any conscious awareness of having gone through steps of searching, weighing evidence, or inferring a conclusion."<sup>119</sup> The "social" aspect of the model presumes that moral reasoning "is usually an ex post facto process used to influence the intuitions (and hence judgments) of other people. In the social intuitionist model, one feels a quick flash of revulsion at the thought of incest and one knows intuitively that something is wrong."<sup>120</sup> When asked to justify one's belief that something—like consensual, harmless incest—is wrong, "[o]ne puts forth argument after argument," and believes that he is right "even after [his] last argument has been shot down."<sup>121</sup> In the social intuitionist model it becomes plausible to say, "I don't know, I can't explain it, I just know it's wrong."<sup>122</sup>

Jonathan Haidt, a key exponent of this model, has used it to examine the source of moral angst over sexual taboos as well as to account for the various disagreements that have driven a wedge between political conservatives and liberals over issues of sexual morality.<sup>123</sup> For example, in one study, Haidt interviewed self-identified conservatives and liberals in order to measure their reactions to three harmless, yet "offensive," sexual taboo violations—same-sex relations, masturbation (with a bestiality component), and consensual sibling incest—that were then further subdivided into six scenarios intended to elicit varying degrees of disgust.<sup>124</sup> The results of the

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<sup>117</sup> Haidt, *The Emotional Dog*, supra note 116, at 817; see also *id.* at 829 ("[T]he social intuitionist model . . . is not an antirationalist model. It is a model about the complex and dynamic ways that intuition, reasoning, and social influences interact to produce moral judgment.").

<sup>118</sup> See *id.*; see also A. Angyal, *Disgust and Related Aversions*, 36 J. ABNORMAL & SOC. PSYCHOL. 393 (1941) (analyzing the role that disgust plays in the formation of moral judgment).

<sup>119</sup> Haidt, *The Emotional Dog*, supra note 116, at 812.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 814.

<sup>122</sup> *Id.*

<sup>123</sup> See Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED PSYCHOL. 191 (2001).

<sup>124</sup> The six scenarios included: a 27-year-old man having intercourse with a 25-year-old man who is his partner; a 30-year-old woman having oral sex with a 29-year-old woman who is her partner; a 34-year-old woman who enjoys masturbating while cuddling with her favorite teddy bear; a 25-year-old man who prefers to masturbate while his dog willingly licks his (the man's) genitals and seems to enjoy it; a 29-year-old man and his 26-year-old girlfriend who one day discover that they are half brother and

interviews supported Haidt's thesis that moral judgment was driven more by the nonconsequentialist and emotional reactions of disgust/offensiveness than by perceptions of harm.<sup>125</sup> His researchers found that conservatives and liberals both responded to the six scenarios in quick and immediate fashion, only later coming up with rationalizations such as "it is wrong because it is harmful" or "it is wrong because, well, it just is"—even when the interviewers called attention to the nonharmful aspects of each scenario.

Haidt's study shows that political conservatives and liberals differed most over their affective responses to the same-sex scenarios and least over their affective responses to the incest scenarios.<sup>126</sup> Most striking, however, was the researchers' conclusion that negative affect was the most significant predictor of moral judgment for both groups. Whereas most liberals espoused a harm-based morality (i.e., only those actions that cause harm are immoral) and most conservatives espoused a broader morality (e.g., based on community norms and religious belief), for both groups, negative affect (or disgust) determined moral judgment more than *any* of the other predictors in all of the scenarios—and *particularly* in the incest scenarios. While conservatives and liberals disagreed most over their views toward same-sex relations, "[t]he liberal insistence that people have a right to do whatever they choose, so long as they don't hurt anyone, did not extend to the powerful taboo against incest."<sup>127</sup> Haidt explains:

[M]oral judgment was better predicted by participants' emotional reactions than by their perceptions of harmfulness. Harm was often cited, especially on the incest scenarios, but even there it was not a significant predictor of judgment, once negative affect was included in the analysis. This finding fits with the qualitative finding that participants often condemned the scenarios instantly, and then seemed to search and stumble through sentences laced with pauses, "ums," and "I don't know," before producing a statement about harm.

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sister (raised in separate families) but decide to continue their sexual relationship anyway, using a condom; and a 25-year-old man and his 23-year-old adopted sister who decide to have sexual intercourse. *See id.* at 193.

<sup>125</sup> Haidt defines "affective condemnation" in terms synonymous with disgust: "The following two quotes illustrate the [affective condemnation] code: 'It's more along the gross lines, sort of repelling. I just don't think it's normal'; and 'That's foul, that's nasty. I mean that's not right. That's not right.'" *Id.* at 201. To avoid a situation where one's perception of harm (what Haidt calls a moral content code) was indistinguishable from one's affective condemnation (harmful because disgusting and disgusting because harmful), the reliability of all codes for each participant was computed. The interviewers also ran regression analyses in order to determine whether harm or negative affect was a greater predictor of moral judgment regarding sexual choices.

<sup>126</sup> For instance, whereas 0% of the liberals and 40% of conservatives interviewed exhibited a negative affective response to gay male sex, 8% of both liberals and conservatives interviewed exhibited a negative affective response to a sexual relationship between an adopted brother and sister. Similarly, whereas 7% of the liberals and 60% of the conservatives interviewed exhibited "dumbfounding," or a confused inability to explain one's position, with respect to gay male sex, 42% of the liberals and 50% of the conservatives interviewed exhibited a dumbfounding response with respect to the sexual relationship between the siblings related by adoption. *See id.* at 209.

<sup>127</sup> *Id.* at 213.

This general pattern of quick affective judgment and slow, awkward justification fits well with an intuitionist model of moral judgment, while it does not fit well with models in which moral reasoning drives moral judgment.<sup>128</sup>

Haidt concludes his study by suggesting that “the best way to change moral judgments may be to trigger competing moral intuitions” rather than by relying on a process of argumentation that “does not cause people to change their minds,” but instead “forces them to work harder to find replacement arguments.”<sup>129</sup>

Like Haidt, Joshua Greene, a researcher at Princeton’s Center for the Study of Brain, Mind, and Behavior, has conducted a series of magnetic resonance imaging (“MRI”) experiments that are designed to test the brain’s moral decisionmaking process.<sup>130</sup> What Greene has found strongly supports Haidt’s theory behind the intuitionist model of moral decisionmaking. Specifically, Greene has begun to uncover the distinctly neuronal foundation of moral judgments. When posed a series of questions that implicated a wide spectrum of moral issues, volunteers participating in the experiments relied on those parts of the brain that produce emotions and feelings of disgust and anger significantly more than on those parts of the brain typically associated with the reasoning process. Based on a variety of such experiments, Greene has concluded that emotions and intuitions play a critical—albeit undervalued—role in the formation of moral judgment. He suggests that Hume, who believed that moral judgment derived partly from an “immediate feeling and finer internal sense,” better captured the etiology of moral judgment than did the primary modern exponents of moral reasoning, Kant and Mill.

An understanding of the intuitionist model of moral judgment, and of the pivotal role that emotions play in the decisionmaking process, is indispensable to any inquiry into the relationship among disgust, incest, and per-

<sup>128</sup> *Id.* at 214–15 (citations omitted).

<sup>129</sup> *Id.* at 218. He continues:

Just as a reversible figure in a perceptual psychology experiment can seem to flip back and forth between two stable interpretations, the conservative participants in the present study sometimes flipped back and forth between their intuitions that homosexuality was a private choice (ethics of autonomy) and their intuitions that it was a deviant or antisocial activity (ethics of community and divinity). The question then becomes: How does one get a person to ‘see’ a moral question in a new way?

*Id.* Haidt offers two suggestions for how to accomplish this: (1) individuals on both sides of the debate (over, say, rights for same-sex couples) “should acknowledge the moral motivations of the other side [as] [c]oncessions generally lead to reciprocal concessions”; and (2)

speakers, politicians, and opinion leaders should emphasize the common moral ground that can be found. The ethics of autonomy are clearly shared by all Americans, but liberals will have to reach beyond this in some way to defuse the fear that conservatives have of a purely harm-based or rights-based morality.

*Id.*

<sup>130</sup> Carl Zimmer, *Whose Life Would You Save?*, DISCOVER, April 2004, at 60 (interview with Joshua Greene), available at [http://www.carlzimmer.com/articles/2004/articles\\_2004\\_Morality.html](http://www.carlzimmer.com/articles/2004/articles_2004_Morality.html); see also Joshua Greene & Jonathan Cohen, *For The Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1775 (2004).

ceptions of harmfulness for at least two reasons. First, the model challenges the classic liberal or libertarian claim, enunciated by, and commonly associated with, John Stuart Mill, that the government's only role in the community is the prevention of harm.<sup>131</sup> The Millean position presupposes that, as long as an individual's choices do not result in harm to others, the state must refrain from intruding upon or constricting them—including, presumably, choices pertaining to one's sexuality or sexual behavior. This classic harm-based, or consequentialist, position has been widely embraced in American law. Indeed, one might even say that it has shaped the Supreme Court's substantive due process jurisprudence and was an integral feature of the majority's opinion in *Lawrence*.<sup>132</sup> The intuitionist model, however, not only questions the importance of harm in the formation of moral judgment, but also suggests that the classic liberal paradigm is prescriptive of the way people *should* think rather than descriptive of the way they *do* think.

For instance, one might argue that it is possible to draw a line on the slippery slope (from sodomy to incest or from same-sex marriage to incestuous marriage) at the point where one's sexual preferences or sexual choices inflict harm on others. At first glance, this position would appear to defuse the slippery slope argument by providing a firm toehold on the slope itself: of course we are not going to slip down the slope to incest because, given our Millean leanings, we know that a line can be drawn at harm, whether that harm is the coercive nature of any incestuous act or the increased biological risk that consanguineous reproduction poses. The intuitionist model, however, suggests that whether a line theoretically *can* be drawn on the slippery slope is of little to no consequence, for individuals will inevitably find that certain sexual taboos—same-sex relations, but incest more so—are worthy of our moral condemnation regardless of whether they cause harm to others. The consensual incest encounters in Haidt's study offer representative examples of precisely this phenomenon. While harm was one predictor of moral judgment, it paled in comparison to the more decisive role of negative affect. These empirically-based conclusions, which suggest that morality is driven largely by disgust, are more in line with Lord Patrick Devlin's assertion that disgust is among the primary "forces behind the moral law"<sup>133</sup> than with Mill's harm principle.

Second, and more relevant here, the intuitionist model provides an explanation for why the incest taboo has continued to remain a key player in the culture wars over sexuality, despite the fact that not all incest causes

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<sup>131</sup> See MILL, *supra* note 20, *passim*.

<sup>132</sup> That said, McDonnell points out that "the Court [n]ever explicitly state[s] that the government can only criminalize behavior that causes harm to others." McDonnell, *supra* note 12, at 355.

<sup>133</sup> PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 17 (1965). Interpreting this passage, Nussbaum remarks that Devlin's "entire argument is directed against Mill's contention that only . . . harm justifies legal regulation". NUSSBAUM, HIDING FROM HUMANITY, *supra* note 102, at 78.

harm.<sup>134</sup> As Haidt points out, incest was the only sexual taboo in his study that elicited extreme affective condemnation or disgust from political conservatives and liberals alike. That moral disapprobation for incest supercedes political affiliation offers one possible explanation for why incest has maintained its position at the bottom of the slippery slope—namely, because everybody is repulsed by it. The conservative juxtaposition of same-sex relations and incest is thus an opportune way of winning the debate over same-sex marriage by alerting opponents that incest is disgusting and must therefore be avoided at all costs—even if that means that some advocates of same-sex marriage might end up sacrificing a cause which they tend to support.<sup>135</sup> In this sense, incest performs the powerful role of contaminating anything that becomes associated with it. As I will suggest in the next Part, placing incest alongside other taboos (same-sex relations, miscegenation, cloning) makes those taboos start to look more and more like incest.<sup>136</sup>

Because harm is an incomplete way of explaining the potency of the incest taboo, we must turn to other theories in order to account for the extreme disgust that incest provokes. In the next Part, I shall set forth one possible theory of disgust that more fully captures the reasons why the incest taboo has come to symbolize any non-normative family arrangement and why it has surfaced during moments of perceived crisis (on the slippery slope) when the law demands a clear-cut definition of the family.

#### IV. INCEST AND THE LOGIC OF DISGUST

Among the many possible reasons why individuals find incest—and the other taboos to which it is (or was) compared—to be a source of disgust, is the extent to which it represents an archetypal form of boundary violation. Section A will provide the critical background in support of this theory. Section B will then apply this theory to incest specifically. Section C will again rely on this theory to explain how, and why, incest has functioned as a point of comparison to other non-normative family arrangements. This more comprehensive theory of incest as a prototypical symbol of boundary violation will help to explain why incest has continued to remain a monolithic taboo on the slippery slope—the incest taboo—in spite of the problems of the “slippery slope to incest” formulation highlighted in Part II.

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<sup>134</sup> Consider, for instance, the consensual—and thus otherwise harmless—sexual relationship between adoptive siblings in *Israel v. Allen*, or the consensual sexual relationship between the biologically-related brother and sister in *In re Tiffany Nicole M.*, a relationship that produced three children free from genetic abnormalities.

<sup>135</sup> This is primarily an issue that affects those individuals who are “on the fence,” so to speak.

<sup>136</sup> See LAKOFF & JOHNSON, *supra* note 24 (examining this process of “contamination” and its political consequences).

*A. Disgust and Boundary Violation*

Paul Rozin, among the first scholars to lend intellectual respectability to the study of disgust, once remarked to an interviewer that “[d]isgust evolves culturally, and develops from a system to protect the body from harm to a system to protect the soul from harm.”<sup>137</sup> Rozin’s inquiry into the nature of disgust starts with what he refers to as the core “elicitors” of disgust, including food, body products, and certain animals and their wastes.<sup>138</sup> Moving centrifugally out from these core elicitors, Rozin identifies additional corporeally-related, disgust-eliciting phenomena, including “sexual behaviors, contact with death or corpses, violations of the exterior envelope of the body (including gore and deformity) [and] poor hygiene.”<sup>139</sup> Rozin and his colleagues have concluded that these disgust elicitors share a common theoretical substrate, namely, they all constitute “reminders of our animal vulnerability” and serve to “humanize our animal bodies.”<sup>140</sup>

According to Rozin, our revulsion reflexes are not limited to these largely physical and bodily phenomena, but extend to social phenomena as well, including “interpersonal contamination (contact with unsavory human beings) and certain moral offenses.”<sup>141</sup> While the “presumed origin of disgust [is] a rejection response to bad tastes, in the service of protecting the body,” it branches out to encompass a range of cultural and moral activity, such that disgust might be conceived of as serving the purpose of “protecting the soul.”<sup>142</sup> In fact, Rozin explains that “[w]hen we elicited lists of disgusting things from North American and Japanese informants, we found that the *majority* of instances referred to moral offenses.”<sup>143</sup> For instance, a high number of informants alternatively characterized racists, Republicans, and liberals as “disgusting.”<sup>144</sup> Furthermore, Rozin notes that “the broad expansion of the word ‘disgusting’ into the sociomoral domain” is not simply a metaphorical extension of the “core” feeling of disgust; nor is it unique to the English language, but rather it characterizes a number of languages and cultures.<sup>145</sup> As with the core disgust elicitors, sociomoral disgust arises from a fear of boundary violation (and ensuing contamination)

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<sup>137</sup> John Wilson, *You Stink, Therefore I Am: Philosophers Ponder the Meaning of Disgust*, BOSTON GLOBE, May 2, 2004, at D1; see also NUSSBAUM, HIDING FROM HUMANITY, *supra* note 102, at 89 (observing that the “motivating idea” behind Rozin’s theory of disgust “has to do with our interest in policing the boundary between ourselves and nonhuman animals, or our own animality”).

<sup>138</sup> Paul Rozin, Jonathan Haidt, & Clark P. McCajuley, *Disgust*, in HANDBOOK OF EMOTIONS 637, 640 (M. Lewis & M. Haviland-Jones eds., 2d ed. 2000).

<sup>139</sup> *Id.* at 637; see also *id.* at 638 (locating the origin of disgust in reactions to taste and noting the etymology of “disgust,” de-gustare or that which is offensive to the taste).

<sup>140</sup> *Id.* at 642 (internal quotations omitted).

<sup>141</sup> *Id.* at 637.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 643.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

and necessitates the imposition of boundaries in the human body-politic. Although Rozin and his colleagues thus locate the origin of disgust in a “particular motivational system (hunger) and . . . a particular part of the body (mouth),” they also underscore the distinctly social and cultural functions of a more fully developed sense of disgust—noting that “along with fear, [disgust] is a primary means for socialization.”<sup>146</sup> A more common example might be the way in which the word “dirty,” which denotes the actual substance of dirt, has expanded to connote that which is metaphorically unclean and that which sullies in a moral sense (e.g., dirty magazines, dirty talk, dirty sex).

Anthropologists and researchers in other fields have also called attention to the relationship among disgust, socialization, contamination, and boundary maintenance. Most notably, in her seminal work, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo*,<sup>147</sup> Mary Douglas elucidates the greater social function of ritualistic pollution behaviors. Like Rozin, Douglas highlights the relationship between disgust and the socialization process, maintaining that “pollutions are used as analogies for expressing a general view of the social order.”<sup>148</sup> Specifically, “our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications.”<sup>149</sup> More than Rozin, Douglas conceptualizes the sociomoral domain of disgust within the larger context of boundary maintenance.<sup>150</sup> As creatures of order and “tidiness” with an obsessive need to classify and categorize, humans are compelled to draw boundaries and to banish the anomaly; that is, anything that does not quite conform to the bounded space that we have fashioned:

In a chaos of shifting impressions, each of us constructs a stable world in which objects have recognizable shapes, are located in depth, and have permanence. In perceiving we are building, taking some cues and rejecting others. The most acceptable cues are those which fit most easily into the pattern that is being built up. Ambiguous cues tend to be treated as if they harmonized with the rest of the pattern. Discordant cues tend to be rejected. If they are accepted, the structure of assumptions has to be modified. As learning proceeds

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<sup>146</sup> *Id.* at 638.

<sup>147</sup> MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966).

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *Id.* at 36.

<sup>150</sup> Nussbaum maintains that Rozin’s empirically-based theory of disgust is

clearly preferable to its most famous theoretical alternative, Mary Douglas’s theory of purity and danger. For Douglas, disgust and impurity are socially contextual notions, and the guiding idea is that of an anomaly. An object may be pure in one context, impure in another: what makes it impure-disgusting is its violation of socially-imposed boundaries. Douglas’s theory does important work in making us aware of social factors surrounding disgust . . . . Nonetheless, the theory has a number of defects that make it problematic as an account of *disgust*, however insightful it may be about the operation of taboos and prohibitions.

NUSSBAUM, HIDING FROM HUMANITY, *supra* note 102, at 91.

objects are named. Their names then affect the way they are perceived the next time: once labeled they are more quickly slotted into the pigeon holes in the future. As time goes on and experiences pile up, we make a greater and greater investment in our system of labels. So a conservative bias is built in. It gives us confidence.<sup>151</sup>

Among her more specific case examples of the practical function of boundary control, Douglas points to the North African Nuers, whose taboos against incest and adultery ensure the stability and structure of marriage as an exogamic necessity.<sup>152</sup> Douglas's analysis of taboos underscores a key feature of taboos and pollution rituals, namely, the importance of border control and policing the line separating this from that, us from them. Her description of the boundary maintenance function of taboos and pollution rituals predates what Pierre Schlag has later referred to as one of the law's foundational aesthetics, the aesthetic of the grid. More precisely, Schlag invokes the metaphor of the grid to conceptualize a mode of legal organization, just as Douglas earlier invoked the same metaphor to conceptualize a mode of social organization. Specifically, Schlag notes that the "principal role of the judge in the grid aesthetic is to police the grid." He further remarks that this prototypical "grid thinker is preoccupied with the proper location and maintenance of boundaries: 'Where do we draw the line?' 'Will the line hold?' 'How do we avoid the slippery slope?'"<sup>153</sup> In fact, Schlag's description of the grid aesthetic and its penchant for "tidiness" not only reveals the role that the slippery slope performs in the politics of disgust, but also recalls Douglas's description of the boundary control function of taboo and its protective guard against contamination. He continues:

Understandably, the recurrent contact with societal untidiness elicits in legal professionals a desire for an antiseptic law. The grid can be seen as an attempt to shield the lawyer, the judge, and the law itself from contamination. In this light, the grid can be seen as an attempt to ward off contamination. The most prestigious precincts of the law are the most antiseptic, the most clearly marked off from the mess. . . . Both the appellate judge and the academic can become entranced with maintaining or perfecting the grid at the expense of attending to its worldly implications. This is the allure of law cast as geometry.

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<sup>151</sup> DOUGLAS, *supra* note 147, at 36. Douglas's "conservative bias" that "gives us confidence" performs a role not unlike that of *stare decisis* in American law. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1059 (2002) (discussing the legal "aesthetic" of *stare decisis*).

<sup>152</sup> "The integrity of the [Nuer] social structure is very much at issue when breaches of the adultery and incest rules are made, for the local structure consists entirely of categories of persons defined by incest regulations, marriage payments and marital status." DOUGLAS, *supra* note 147, at 131.

<sup>153</sup> Schlag, *supra* note 151, at 1059. Douglas identifies four kinds of social pollution that are conceived in grid-like terms:

The first is danger pressing on external boundaries; the second, danger from transgressing the internal lines of the system; the third, danger in the margins of the lines. The fourth is danger from internal contradiction, when some of the basic postulates are denied by other basic postulates, so that at certain points the system seems to be at war with itself.

DOUGLAS, *supra* note 147, at 122–24.

This is the formalist orientation par excellence: the dominance of concern with maintaining the proper form and order of law in terms of its own criteria.<sup>154</sup>

The similarities between Douglas's analysis of taboo and Schlag's articulation of one of the law's foundational aesthetics highlight the extent to which taboo and disgust are constitutive of the law as well as the metaphors—slippery slopes, line drawing—in which it speaks.<sup>155</sup> This peculiar relationship between sexual taboo and border control (or policing the line) is perhaps nowhere more clearly dramatized in the law governing sexuality than in the recent expansion of state “mini-DOMAs” and state constitutional amendments as a means of ensuring that state recognition of one sexual taboo—in that case, same-sex marriage—does not “seep over” the borders and contaminate less tolerant states.

More recent inquiries into the etiology of disgust have expanded on Douglas's original formulation of taboo as a kind of boundary control as well as on Rozin's understanding of the relationship between disgust and the socialization process. William Ian Miller, for instance, posits that disgust “is especially useful and necessary as a builder of moral and social community. It performs this function obviously by helping define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”<sup>156</sup> Summarizing the pioneering work of Rozin and others, Miller points out that disgust performs the function of conveying a negative emotion toward the incorporation or assimilation of a contaminant. More important, though, Miller, like Rozin before him, demonstrates the extent to which disgust performs the related, but more overtly political and social functions of maintaining rank and hierarchy. He elaborates as follows:

Our very core, our soul, is hemmed in by barriers of disgust, and one does not give them up unless one is in love or is held at the point of a gun. In fact, the claim seems to be that the core or the essence of one's identity can only be known as a consequence of which passions are triggered in its defense. Dis-

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<sup>154</sup> Schlag, *supra* note 151, at 1060–61.

<sup>155</sup> Schlag's description of the law's obsession with classification also resonates with Douglas's understanding of the role that classification plays in taboo rituals. Schlag notes,

One of the ironic byproducts of the effort to police and maintain the grid is that this activity ends up producing a plurality of grids—a multitude of different classification schemes. The proliferation of sundry classification schemes in the early twentieth century was intense. In fact, ‘classification’ itself became a subject of inquiry, controversy, and of course, ultimately classification itself.

*Id.* at 1062–63.

<sup>156</sup> WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 194–95 (1997); *see also* Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *LAW & SOC. INQUIRY* 529, 532 (2002) (arguing that sex offender lawmaking “is seeped in a constellation of emotional expressions of disgust, fear of contagion, and pollution avoidance, manifested in a legislative concern about boundary vulnerabilities between social spheres of the pure and the dangerous”).

gust's durability, its relative lack of responsiveness to the will, suits it well to its role as the maintainer of the continuity of our core character across social and moral domains. Our durable self is defined as much by disgust as by any other passion. Disgust defines many of our tastes, our sexual proclivities, and our choices of intimates. It installs large chunks of the moral world right at the core of our identity, seamlessly uniting body and soul and thereby giving an irreducible continuity to our characters.<sup>157</sup>

To be sure, certain aspects of Miller's evaluation and taxonomy of disgust warrant criticism. For instance, his largely unsupported claim that semen is not only repulsive, but also perhaps one possible source for misogyny—as he remarks, “[m]ale disgust with semen . . . bears no small connection with misogyny . . . . Men can never quite believe that women aren't as revolted by semen as men feel they should be”—is, to say the least, somewhat questionable and open to debate.<sup>158</sup> Nevertheless, his analysis overall is descriptively useful insofar as it highlights the dual function of disgust: its ability at once to separate (to draw boundaries between and among individuals and groups) and to unite (“hemming in” and “seamlessly uniting body and soul” as well as individuals within the community at large). As one scholar has explained the unlikely conflation of sexual offenses in Deuteronomy and Leviticus, including incest, same-sex relations, bestiality, and adultery, “all these offenses have this in common: not separating that which should be separated, mixing that which should be kept apart, and confusing genera, sexes, kinship, and alliance.”<sup>159</sup> Or, as Julia Kristeva has remarked with respect to these same biblical abominations, “[t]he pure will be that which conforms to an established taxonomy; the impure, that which unsettles it, establishes intermixture and disorder.”<sup>160</sup>

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<sup>157</sup> MILLER, *supra* note 156, at 250–51.

<sup>158</sup> *Id.* at 104; *see also id.* at 105 (“Semen . . . disgusts because it is sexual, fertilizing, and reproductive. Its way of feminization is rather different from castration's way, but it need be no less sadistic for all that.”). Whereas chapter 15 of Leviticus explicitly states that “[w]hen any man has a discharge issuing from his member, he is unclean,” *see* TANAKH—THE HOLY SCRIPTURES 179 (Jewish Pub'n Soc'y, 1985), it places the “discharge” from men and women on an equal footing and nowhere suggests that the former renders the person who comes into contact with it any more feminine for doing so. Indeed, the biblical text makes clear that the man and woman who have carnal relations (and thereby come into contact with the “unclean” discharge) are *equally* unclean: “When a man has an emission of semen, he shall bathe his whole body in water and remain unclean until evening . . . . And if a man has carnal relations with a woman, *they* shall bathe in water and remain unclean until evening.” *Id.* at 179 (emphasis added). In other words, nothing in the text suggests that women (and, by extension, any recipient of ejaculate) are rendered that much *more* unclean than men with respect to the “contaminating” effect of semen. Both man and woman remain “unclean” until the process of purification takes place. *See also* JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION 71 (Leon S. Roudiez trans., 1982) (“[P]olluting objects fall, schematically, into two types: excremental and menstrual. Neither tears nor sperm, for instance, although they belong to the borders of the body, have any polluting value.”).

<sup>159</sup> FRANÇOISE HÉRITIER, TWO SISTERS AND THEIR MOTHER: THE ANTHROPOLOGY OF INCEST 288 (Jeanine Herman trans., 2002).

<sup>160</sup> KRISTEVA, *supra* note 158, at 98.

This boundary control theory is a particularly useful way of critiquing not only the position that incest occupies on the slippery slope, but also the association made between incest and other forms of sexual (and reproductive) deviance. We might even say that the slippery slope, which itself lacks fixed boundaries (it is, after all, a slope) and which suggests an imminent slip into the vast unknown, is the ideal rhetorical device or vehicle for conveying disgust. The slippery slope often assumes a world lacking in difference and distinction—because *A* is too much like *B*, we cannot allow *A*—features which, I have shown, characterize disgust. It is not surprising, then, that slippery slope arguments often appear in debates surrounding tabooed forms of sexuality and the revulsion they elicit and that incest has figured so prominently in slippery slope rhetoric.

### B. Incest and Boundary Violation

One way to approach the question of how incest represents a prototypical form of boundary violation is to return to Douglas's conceptualization of disgust (or pollution behavior) as a reaction against that which defies or confuses our "cherished classifications." Specifically, in the same quotation excerpted above, Douglas calls attention to the causal relationship that exists between taboo and naming. She notes,

[As] learning proceeds objects are named. Their names then affect the way they are perceived next time: once labeled they are more speedily slotted into the pigeon holes in the future. As time goes on and experiences pile up, we make a greater and greater investment in our system of labels.<sup>161</sup>

Douglas's examination of the naming process is a useful heuristic by which to approach the peculiar relationship that exists between names—or naming—and incest as well as the theoretical claim that naming and the incest taboo often go hand in hand. Indeed, scholars from a number of different disciplines have taken up Claude Lévi-Strauss's suggestion, made in 1949, that only by "pursuing the comparison" between language and the incest taboo can we "hope to get to the meaning of the institution" of exogamic marriage and of the role that the taboo plays in ensuring that institution.<sup>162</sup>

For instance, psychologists have remarked that familial names—mother, father, sister, brother—perform a prescriptive as well as a descriptive function. One scholar comments that "[t]he incest taboo exerts its effect on the use of names," specifically, that

[w]ith the use of the terms "mother" and "father" instead of proper names such as Sally and John, one is describing a part of the individual, a function (one who mothers or fathers), and not the total person including his feelings, sexual-

<sup>161</sup> DOUGLAS, *supra* note 147, at 36.

<sup>162</sup> CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 495 (James Harle Bell et al. trans., 1949).

ity, desires, etc. Using the mother's proper name would make her too much like a "real" person or a peer, with whom all is possible, and the incestuous conflict together with wishes and anxieties would be reawakened . . . . This verbal institution serves to maintain and support the incest taboo.<sup>163</sup>

Similarly, anthropologists have noted that "[t]he naming function of language by which we assert the father/mother/sister/brother/uncle/aunt/cousin placement may well be one of the strongest announcers and enforcers of the taboo."<sup>164</sup> This idea that intrafamilial naming represents a "semiotics of incest"<sup>165</sup> resonates with Douglas's observation that language constructs categories which, in turn, reinforce social behavior. In other words, "[t]he process of naming is the process of categorizing, which is the unconscious establishment of limits, in [the case of the incest taboo] sexual limits."<sup>166</sup> Indeed, it is this very relationship between naming and taboo that prompted anthropologist David Schneider to remark that incest represents a way of acting "ungrammatically."<sup>167</sup>

The disgust triggered by incest derives from precisely this sense of name or boundary violation: One should not be in a sexual relationship with someone whom they call brother or sister (or mother, or father, etc.). Even brothers and sisters who are not biologically related but fully naturalized into the family unit—say, through adoption, the aim of which is to incorporate the child into the "natural" family<sup>168</sup>—become part of these nominal categories that comprise the "semiotics of incest."<sup>169</sup> In families where adopted children and siblings are fully naturalized into the family, one would suspect that this naming function would work in the same way to enforce the taboo against sexual relations. Such a claim is supported by empirical evidence, for in Haidt's study, the adopted brother and sister sexual scenario elicited nearly the same degree of disgust as did the scenario involving siblings who were related by blood through one parent.<sup>170</sup> However, in families where adopted children are not considered to be fully naturalized into the family, one would suspect that the naming function does not

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<sup>163</sup> M.J. Weich, *The Terms "Mother" and "Father" as a Defense Against Incest*, 16 J. AM. PSYCHOANALYTIC ASS'N 783, 787 (1968).

<sup>164</sup> JAMES TWITCHELL, FORBIDDEN PARTNERS: THE INCEST TABOO IN MODERN CULTURE 9 (1987); see also KAREN MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS 19 (1978) (stating that "[c]reation of the incest taboo was made possible by, and probably coincided with, the development of language"). For a more in-depth treatment of the relationship between language and sexual prohibition, see Courtney Cahill, "That Which is Our Bane, That Alone We Have in Common," *Incest, Intimacy, and the Crisis of Naming*, J.L., POL., AND SOC. 3, 8–23 (2000).

<sup>165</sup> TWITCHELL, *supra* note 164, at 9.

<sup>166</sup> *Id.*

<sup>167</sup> Schneider, *supra* note 1, at 166.

<sup>168</sup> See Naomi Cahn, *Perfect Substitutes for the Real Thing?*, 52 DUKE L.J. 1077, 1144 (2003).

<sup>169</sup> TWITCHELL, *supra* note 164, at 9.

<sup>170</sup> See Haidt, *The Emotional Dog*, *supra* note 116.

operate in the same way. As legal commentators have argued, one of the reasons why some states do not apply their incest prohibitions to adopted brothers and sisters, to stepsiblings (related only by marriage), or to both is because the law in these states still does not consider those individuals to be naturalized into the family unit—and, by extension, a “real” family in the normative sense.<sup>171</sup>

The *Israel* decision represents a good example of this phenomenon. There, the Colorado Supreme Court employed a botanical metaphor to suggest that adopted children do not become fully naturalized into the family tree, stating that “adopted children are not *engrafted upon* their adoptive families for all purposes.”<sup>172</sup> The *Israel* court’s repetition of the phrase “adopted brother and sister” and “brother and sister related *only* by adoption” suggests that the semiotics of incest did not apply there because the court was dealing with an “adopted brother” and an “adopted sister,” rather than a real “brother” and “sister.”<sup>173</sup> The fact that the court found otherwise reveals the pivotal role that the law plays in creating these names, categories, and the legal relationships that they signify.

In addition to the rich anthropological literature on the subject, judges, policymakers, and even poets have elucidated the relationship that exists between naming and the incest taboo. Their observations reveal the extent to which the disgust that incest provokes derives from the fact that boundaries have been violated and those “cherished classifications” that we live by have been called into question.<sup>174</sup>

For instance, in upholding laws criminalizing incest against constitutional challenge, courts have underscored the extent to which incest leads to a confusion of names and roles within the family. As one court noted:

Prevention of mutated birth is only one reason for these statutes. The crime is also punished to promote and protect family harmony, to protect children from the abuse of parental authority, *and because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.*<sup>175</sup>

Other courts have similarly observed that, rather than representing an instinctual aversion or a guard against genetic abnormalities, the primary function of the incest taboo is to maintain the nominal and symbolic hierar-

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<sup>171</sup> See, e.g., Cahn, *supra* note 168, at 1139 (“Because courts and legislatures have focused on the differences between biological and adoptive families, rather than on the similarities of the parent-child relationships, they have not treated incest within adoptive families as punitively as incest within biological families. Indeed, differential definitions of incestuous relationships continue today in both the civil and criminal law. The incest cases ultimately show that the legal recognition of adoption should not translate into identical regulation of adoptive families.”).

<sup>172</sup> *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978) (emphasis added).

<sup>173</sup> *Id.*

<sup>174</sup> DOUGLAS, *supra* note 147, at 37.

<sup>175</sup> *State v. Kaiser*, 663 P.2d 839, 843 (Wash. Ct. App. 1983) (emphasis added).

chy of the family unit.<sup>176</sup> For instance, in *Benton v. State*, the Georgia Supreme Court remarked that the incest taboo does not reflect an innate repugnance to incestuous relationships, but rather polices boundaries by forcing “family members to go outside their families to find sexual partners. Requiring people to pursue relationships outside family boundaries helps to form important economic and political alliances, and makes a larger society possible.”<sup>177</sup> In addition, the taboo helps to maintain “the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members.”<sup>178</sup>

The relationship between the incest taboo and the maintenance of names and the familial hierarchy has been conveyed in more poetic fashion by one of the more infamous figures in Ovid’s *Metamorphoses*, Myrrha, who repeatedly tricks her father into having sex with her—and who eventually turns into a tree as a form of punishment for her deceit.<sup>179</sup> While contemplating the possibility of father-daughter incest early in Ovid’s narrative of forbidden desire, Myrrha conjures up an absurd world where incest dissolves linguistic boundaries and the relationships that they signify. As she soliloquizes: “But can you hope for aught else, unnatural girl? Think how many ties, how many names you are confusing! Will you be the rival of your mother, the mistress of your father? Will you be called the sister of your son, the mother of your brother?”<sup>180</sup> For Myrrha, incest is unnatural not because of the desire itself—as she proclaims earlier in her soliloquy, the natural love that exists between father and daughter is merely increased or “twinned” by a sexual bond—but rather because of the unnatural crisis of naming and the dissolution of the familial hierarchy that it produces. Ovid’s legendary narrative of father-daughter incest is not the only story in the *Metamorphoses* to explore the subject of forbidden desire in terms that suggest boundary violation and name confusion. To the contrary, Ovid similarly conceptualizes a number of sexual relationships in the *Metamorphoses* that are either in fact incestuous or described in language evocative of incest, including twin brother-sister incest, self-love, and artistic creation. In all of these narratives, Ovid makes clear that the nominal transgression—e.g., what to “call” your brother should he become your lover—is an indispensable part of the sexual transgression.<sup>181</sup>

<sup>176</sup> See, e.g., *Smith v. State*, 6 S.W.3d 512, 520 (Tenn. Crim. App. 1999).

<sup>177</sup> *Benton v. State*, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring).

<sup>178</sup> *Id.*

<sup>179</sup> 1 & 2 OVID, *THE METAMORPHOSES* (Frank Justus Miller trans., 3rd ed. Loeb Classical Library 1977).

<sup>180</sup> *Id.* at 10.345–348.

<sup>181</sup> See generally Cahill, *supra* note 164. Interestingly, the same name/role confusion that causes or leads to disgust may also constitute a source of attraction. As mentioned, Myrrha proclaims that love for a family member merely increases—or “doubles”—the natural love that already exists: “And yet they say that there are tribes among whom mother with son, daughter with father mates, so that natural love is

The theory of incest and disgust that I have proposed here reveals the extent to which disgust is a socially-contingent category, dependent on how we choose to categorize and name objects and people. In other words, that which is an object of disgust in one social context might be entirely acceptable—even encouraged—in another.<sup>182</sup> But what does this theory of disgust tell us about the incest taboo specifically? On the most basic level, it suggests that, even as the incest taboo appears on the slippery slope as something monolithic (*the* incest taboo) and is thought to derive from an instinctive sense of repugnance, the horror surrounding incest is in many ways socially determined. For instance, while the thought of brother-sister incest might provoke horror for some, for others it is an entirely natural manifestation of desire. As Nussbaum has characterized Siegmund's love for his twin sister, Sieglinde, in Wagner's *Die Walkure*, the "lovers are drawn to one another not in spite of the tie, but precisely because of it: they seem to see their own faces in one another, and to hear their own voices."<sup>183</sup> Indeed, one would be misguided to argue that certain individuals lack the "instinct" to refrain from committing incest. As the *Benton* court remarked, "people generally are incapable of violating their instincts."<sup>184</sup> Or, as Françoise Héritier has argued in her cross-cultural examination of the incest taboo:

One might . . . consider Sir James Frazer's counterargument: Why would a deep human instinct need to be reinforced by law? What nature forbids and punishes does not require a law as well. There is no law obliging people to eat or drink, preventing them from placing their hands in fire, and so on. The very existence of a legal ban would, on the contrary, lead one to infer the existence of a natural instinct *toward* incest. We know the use Sigmund Freud made of this argument in *Totem and Taboo*.<sup>185</sup>

The claim that the incest taboo is more nurture than nature supports the observations made in Parts I and II of this Article with respect to the position that the incest taboo maintains at the bottom of the slippery slope.

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increased by the double bond." OVID, *supra* note 179, at 10.324–333. In a previous article, and to a lesser extent here, I argued that incest has been portrayed in literature generally, and in Ovid's *Metamorphoses* specifically, as a crime of desiring that which approximates and resembles oneself—a trope that finds its most literal expression in the Ovidian characters of Caunus and Byblis, a *twin* brother-sister pair, the sister of whom desires her brother precisely because he is so similar to her. While the law more often than not treats this source of attraction as a failure of boundary maintenance—and, therefore, an elicitor of disgust—it has at least one time recognized that incestuous desire can constitute a natural extension of the affection that already exists. Specifically, in considering whether to recognize a marriage between an aunt and a nephew that was contracted in Italy, the New York Court of Domestic Relations in *Incuria v. Incuria* suggested that the incestuous relationship was the natural outgrowth of the familial one: "There was probably affection between the parties; *that would naturally flow from the relationship existing between them.*" 280 N.Y.S. 716, 718 (N.Y. Fam. Ct. 1935) (emphasis added).

<sup>182</sup> See *infra* note 186.

<sup>183</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 102, at 81.

<sup>184</sup> *Benton v. State*, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring).

<sup>185</sup> HÉRITIER, *supra* note 159, at 17 (emphasis added).

Specifically, I suggested there that while the taboo might function in slippery slope arguments as something staid and untouchable (again, *the* incest taboo), the law of incest suggests that it is less definite, more wide-ranging, and society specific. What may be deemed incestuous (and thus prohibited) in one state or country may be permitted—indeed, encouraged—in another.<sup>186</sup> Despite this definitional variety, however, the incest taboo continues to appear in slippery slope rhetoric as a single and monolithic taboo. In looking more closely at the way in which the incest taboo has been used to articulate an ideal vision of the family in Part V, I shall return to this notion that the definition of incest is a prescriptive, ideological choice rather than a factual description of the way in which families naturally operate.

In addition, this theory of disgust as a form of boundary violation helps to explain why incest has been compared to other non-normative behaviors—including, at one time, miscegenation, and, more recently, same-sex relations and cloning. I have already examined the incest-same-sex relations parallel to some extent throughout this Article, and will return to this comparison in Part V. Here, I turn to comparisons between incest and the two other non-normative kinship arrangements. I contend that the incest-miscegenation and incest-cloning analogies help to bring into focus the peculiar boundary violation that incest represents and the disgust that it provokes. Furthermore, an examination of these analogies provides a context in which to discuss, and ultimately to criticize, the way in which the incest taboo has been used to define acceptable forms of sexuality and kinship.

### C. *The Incest-Miscegenation/Cloning Analogies*

1. *Incest-Miscegenation Analogy.*—As discussed in Part I, incest once played a key role on—or at the bottom of—the slippery slope from miscegenation to incest. Prior to *Loving v. Virginia*, incest was not only a feared result of the decriminalization of miscegenation, but was, in fact, used synonymously with that term. Most remarkably, in his *Treatise on Sociology: Theoretical and Practical*, written in 1852, white supremacist and pro-slavery apologist, Henry Hughes, proclaimed that interracial and intrafamilial sexual relations and marriage were alike incestuous:

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<sup>186</sup> In some countries, certain forms of consanguineous marriage and mating are not only permitted but desirable. See, e.g., A. Bittles, *Consanguinity and Its Relevance to Clinical Genetics*, 60 CLINICAL GENETICS 89, 91 (2001) (“Dravidian South Indians regard consanguineous marriage as preferential, whereas in North India consanguinity is prohibited under the Aryan Hindu tradition . . . . Like Hinduism, there are conflicting attitudes and opinions in Christianity, with specific dispensation required by the Roman Catholic Church for first cousin marriages, and even more rigorous proscription in the Orthodox Church. By comparison, the Protestant denominations basically follow the Judaic guidelines laid down in Leviticus 18:7–18, with consanguineous unions up to and including first cousins permissible.”); see also *id.* at 91 (“[S]ome land-owning families also favour consanguineous unions as a means of preserving the integrity of their estates.”).

Races must not be wronged. Hygienic progress is a right. It is a right, because a duty. But hygienic progress forbids ethnical regress. Morality therefore, which commands generally progress, prohibits this special regress. The preservation and progress of a race, is a moral duty of the races. Degeneration is evil. It is a sin. That sin is extreme.

Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.<sup>187</sup>

Hughes's rhetoric reveals the extent to which miscegenation and incest were seen to be not just similar to each other—objects of frequent comparison and juxtaposition—as so-called biological hazards, but, in fact, indistinguishable from each other.<sup>188</sup>

Incest and miscegenation were together considered to be dangerous solvents of the well-policed boundaries that guaranteed one's biological, social, and even proprietary inheritance; in fact, the taboo against one was often used to sustain the taboo against the other. These complementary prohibitions against intrafamilial and interracial marriage—both of which, curiously, were referred to as “intermarriage”—were often juxtaposed as “crimes of blood” in state statutory schemes and judicial decisions.

For instance, a Mississippi statute from 1880 suggested that interracial marriage was a kind of incest, providing that a “marriage [that] is prohibited by law by reason of race or blood” is “declared to be incestuous and void.”<sup>189</sup> Similarly, a 1911 Nebraska statute defined as “illegitimate” children produced through either incestuous or interracial marriage: “Upon the dissolution by decree or sentence of nullity of any marriage that is prohibited on account of consanguinity between the parties, or of any marriage between a white person and a negro, the issue of the marriage shall be deemed to be illegitimate.”<sup>190</sup> The frequency with which criminal and civil prohibi-

<sup>187</sup> HENRY HUGHES, TREATISE ON SOCIOLOGY: THEORETICAL AND PRACTICAL (1852), reprinted in THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860, at 259–60 (Drew Gilpin Faust ed., 1981).

<sup>188</sup> While the incest-miscegenation parallels surfaced during particular historical periods in the United States, anthropologists have noted the juxtaposition of these two mutually constitutive sexual taboos in other contexts as well. See, for example, Lévi-Strauss, who notes in *The Elementary Structures of Kinship* that

incest proper, and its metaphorical form as the violation of a minor (by someone ‘old enough to be her father,’ as the expression goes), even combines in some countries with its direct opposite, inter-racial sexual relations, an extreme form of exogamy, as the two most powerful inducements to horror and collective vengeance.

LÉVI-STRAUSS, *supra* note 162, at 10 (emphasis added).

<sup>189</sup> Courts later in the twentieth century noted this paradox and resolved it by finding that an incestuous marriage could not possibly be a miscegenetic one.

<sup>190</sup> NEB. REV. STAT. § 42-328 (1929), repealed by 1972 Neb. Laws 820. *But see* NEB. REV. STAT. § 28-702 (2004) (declaring any incestuous marriage “absolutely void”).

tions against miscegenation and incest appeared in either the same code section or consecutive sections, suggests the extent to which the two crimes of blood reflected and reinforced each other.<sup>191</sup>

Likely influenced by the frequent juxtaposition of incest and miscegenation in state statutes, courts during this period also conceptualized incest and miscegenation as analogous crimes. For instance, in considering the validity of an interracial marriage contracted outside Oklahoma, where such marriages were prohibited, the Oklahoma Supreme Court proclaimed in 1924 that

[i]n the case at bar the marriage was impossible under the statute, going out of the state to escape the statute, and going through the form of marriage in a state where the inhibition did not exist, and soon thereafter returning to this state, and all in an effort to accomplish indirectly what cannot be done directly, would be a fraud upon the laws of this state by a citizen of this state, and such a marriage cannot be recognized by the courts, neither can it be ratified or in any manner become legal by time or change or age or conduct of the parties. *The inhibition, like the incestuous marriage, is in the blood*, and the reason for it is stronger still.<sup>192</sup>

The Oklahoma court's understanding of the instinctive character of the taboos against miscegenation and incest—the legal prohibition *against* blood-mixing naturally existing *in* the blood—anticipates more contemporary pronouncements with respect to humans' so-called instinctual aversion to incest. As noted above, in *Israel v. Allen*, the Colorado Supreme Court observed that individuals have a “natural repugnance” toward marriages between blood relatives.<sup>193</sup> Similarly, in *In re Tiffany Nicole M.*, the Wisconsin Court of Appeals stated that “the incestuous parent by his actions has demonstrated that the natural, moral constraint of blood relationship has failed to prevent deviant conduct and thus cannot be relied upon to constrain similar conduct in the future.”<sup>194</sup>

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<sup>191</sup> See PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX & THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); see also Hrishu Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 ASIAN L.J. 1, 24 n.130 (2002) (providing a list of these state statutes).

<sup>192</sup> *Eggers v. Olson*, 231 P. 483, 486 (Okla. 1924) (emphasis added).

<sup>193</sup> *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978).

<sup>194</sup> *State v. Allen M. (In re Tiffany Nicole M.)*, 571 N.W.2d 872, 879 (Wisc. Ct. App. 1997) (quoting *In re L.*, 888 S.W.2d 337, 341 (Mo. Ct. App. 1994)). Similarly, in *Scott v. State*, the Georgia Supreme Court infamously declared that “[t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.” 39 Ga. 321, 323 (1869). Likening the prohibition against miscegenous marriage to that against incestuous marriage and marriage between idiots, the court continued that

[t]he Legislature certainly had as much right to regulate the marriage relation by prohibiting it between persons of different races as they had to prohibit it between persons within the Levitical degrees, or between idiots. Both are necessary and proper regulations. And the regulation now

That the two taboos were cast in terms of each other is striking in light of the fact that, whereas incest signified the unnatural mixing of the same, miscegenation signified the unnatural mixing of the dissimilar. In commenting on Henry Hughes's strange conflation of blood crimes in his infamous denunciation, one scholar has noted that "Hughes transforms the hybrid or mulatto from someone who is considered 'impure' because he combines qualities that are too different to mix successfully . . . to someone whose 'impurity' and transgressions lie in the blending of traits that are, by contrast, too much *alike*."<sup>195</sup> In fact, it would appear that the incest prohibition, which functions in a positive way to ensure or compel marriage outside the family, would *itself* create the conditions that make miscegenation possible. More precisely, the more restrictive the intrafamilial prohibition, the more likely that one would go outside her family to find a marital partner, sexual partner, or both. At the same time, the potent taboo against miscegenation—particularly in the rural South—made the threat of incest that much more real.<sup>196</sup> In this sense, then, the taboo against miscegenation and the taboo against incest together ensured that sexual and marriage partners could be neither too similar to the self (incest) nor too different from the self (miscegenation).<sup>197</sup>

While the routine juxtaposition of these seemingly noncomplementary taboos might be accounted for in a number of additional ways, including fears about miscegenation increasing the actual potential for incest,<sup>198</sup> I will

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under consideration is equally so.

*Id.* at 324. It should also be noted that while the majority of legal decisions invoked the incest taboo to shore up the miscegenation taboo, the incest-miscegenation analogy was not exclusively unidirectional; rather, the taboo against miscegenation was also used at times to support the taboo against incest. *See, e.g., Osoinach v. Watkins*, 180 So. 577 (Ala. 1938).

<sup>195</sup> WERNER SOLLORS, NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE 298 (1997) (quoting David Lawrence Rodgers, *The Irony of Idealism: William Faulkner and the South's Construction of the Mulatto*, in *THE DISCOURSE OF SLAVERY: APHRA BEHN TO TONI MORRISON* 166 (Carl Plasa & Betty J. Ring eds., 1994)).

<sup>196</sup> Commenting on Hughes's incest-miscegenation comparison, Werner Sollors states that "the [antimiscegenation] hysteria that enveloped the discourse of slavery immediately before the Civil War" led to the "illogical and eventually ironic position" of making incest the inescapable alternative to interracial marriage. *Id.* Sollors describes how the "fantasy of purity" at the heart of antimiscegenation laws and rhetoric involved "both the need for the violent purging of impurity and the regression to the incestuously toned realm of origins alone." *Id.* at 310.

<sup>197</sup> *See, e.g., S. J. Tambiah, Animals Are Good to Think and Good to Prohibit*, 8 *ETHNOLOGY* 423 (1969) (pointing out that in some Thai villages animals cannot be eaten if they are too close to humans or too distant from humans, and that sexual partners cannot be too much like the self (same sex, same nuclear family) or too distant (animals, people of other races)).

<sup>198</sup> The secrecy surrounding miscegenation and the frequent denial of one's paternity (or maternity) to a "mulatto" child led to situations that supposedly raised the specter of incest and, particularly, sibling incest. In his comprehensive review of the strategic placement of the two taboos in mid-nineteenth and early-twentieth century literature, Werner Sollors remarks that the "possibility of sibling incest in a younger generation," as frequent a theme in early-Modern American literature as it was in eighteenth-century British texts, often resulted "from the secrecy of miscegenation of [that generation's] elders." SOLLORS, *supra* note 195, at 303. Sollors provides a number of illuminating examples from the litera-

focus here on concerns relating to the theory of disgust as boundary violation. First, linked to concerns over one's genetic inheritance, the incest-miscegenation analogy reflected an acute anxiety with respect to what was termed as one's "social inheritance." For instance, dissenting in *Perez v. Lippold*, in which the California Supreme Court struck down a state anti-miscegenation statute on due process grounds, Justice Schenk, while recognizing the potential benefits of "unrestricted racial intercrossing," nevertheless noted that "[r]ace crossings disturb social inheritance. That is one of its worst features."<sup>199</sup> Similarly, in *Berea College v. Commonwealth*, the Kentucky Court of Appeals presaged the dangers of "social amalgamation" when considering whether a law prohibiting the mixing of African Americans and whites in a single school violated the state and federal constitutions. The court there declared that "[t]he natural separation of the races is . . . an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."<sup>200</sup> In this sense, blood or biology functioned as a metaphor for social relations, as "social practices" were cast as "biological essences" and vice versa.<sup>201</sup> Eva Saks has provided a persuasive and comprehensive account of the constellation of issues surrounding the miscegenation hysteria, one that created and heavily relied on the metaphor of "blood" as a means of "consolidating social and economic boundaries."<sup>202</sup> Eugenic or hereditary concerns thus reflected a much greater anxiety over the symbolic maintenance of social (marital, sexual) and economic (inheritance, property-related) boundaries between blacks and whites.

Second, the biological mixing of blood found its legal counterpart in the numerous conflict of laws cases in which questions concerning the validity of interracial marriage, incestuous marriage, or both often arose. The fear of interstate contamination was most viciously expressed in a dissenting opinion in *State v. Ross*.<sup>203</sup> In that case, the Supreme Court of North Carolina considered whether to recognize a marriage between an African-American man and a white woman that was validly contracted in South Carolina, but prohibited and subject to criminal penalties under North Carolina's antimiscegenation statute. While recognizing that "a marriage between persons of different races [might be] as unnatural and as revolting as an incestuous one, and is declared void by the law of North Carolina," a majority of the court nevertheless quashed the indictment, reasoning that "it

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ture of the antebellum and postbellum periods in which "themes of interracial unions and of incestuous relationships are intertwined, ranging from projections and fantasies of the two taboos to representations of the transgressive acts, and from passing allusions to plot-constitutive centrality." *Id.* at 313.

<sup>199</sup> *Perez v. Lippold*, 198 P.2d 17, 45 (Cal. 1948) (en banc) (Schenk, J., dissenting).

<sup>200</sup> *Berea Coll. v. Commonwealth*, 94 S.W. 623, 628 (Ky. Ct. App. 1906).

<sup>201</sup> Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 40 (1988).

<sup>202</sup> *Id.* at 50.

<sup>203</sup> 76 N.C. 242 (1877).

is desirable . . . that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.”<sup>204</sup>

Dissenting in *Ross*, Justice Reade employed the language of border control to assert that “[n]o nation is bound to admit the laws and customs of another nation within its borders” and that “[i]f such a marriage solemnized here between our people is declared void, why should comity require the evil to be imported from another State? Why is not the relation severed the instant they set foot upon our soil?”<sup>205</sup> In addition, and more contemptuous still, the dissenting justice invoked a series of animal and disease metaphors to convey the disgust elicited by this failure of boundary maintenance:

[The] provision in the Constitution of the United States, “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States,” does not mean that a citizen of South Carolina removing here may bring with him his South Carolina privileges and immunities; but that when he comes here he may have the same privileges and immunities which our citizens have. Nothing more and nothing less. It is courteous for neighbors to visit and it is handsome to allow the visitor family privileges and even to give him the favorite seat; but if he bring his pet rattlesnake or his bear or spitz dog famous for hydrophobia, he must leave them outside the door. And if he bring small pox the door may be shut against him.<sup>206</sup>

Justice Reade’s vivid characterization of boundary control in the *Ross* dissent resonates with Miller’s cultural and sociological account of disgust, which he suggests builds moral and social community “by helping to define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”<sup>207</sup> Indeed, it is likely no coincidence that metaphors signifying a failure of boundary maintenance, and the disgust that it elicits, appear in an opinion that takes up the question of miscegenation—a paradigmatic form of blood mixing and biological contamination.<sup>208</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (Reade, J., dissenting).

<sup>206</sup> *Id.*

<sup>207</sup> MILLER, *supra* note 156, at 194–95.

<sup>208</sup> It should be noted that the infective potential of incest was equally feared. The very mention of incest was, in fact, so contaminating that in 1888 the New York Supreme Court refrained from even reciting the facts of an incest case that was before it: “The prisoner was convicted of incest. To linger over the facts, or repeat the details of the proof, would peril the calmness and cleanness which belong to a judicial record, and we should therefore touch the disgraceful history only at points where necessity compels.” *People v. Lake*, 17 N.E. 146, 146 (N.Y. 1888). These same sentiments reappeared in an Alabama case more than one hundred years later—dealing not with incest, but with homosexuality. Describing the history behind the revulsion surrounding that taboo, the Supreme Court of Alabama just two years ago reminded its citizens that “[e]arlier courts refused even to describe the activity inherent in homosexuality, stating that ‘[the crime against nature] is characterized as abominable, detestable, unmentionable, and too disgusting and well known to require other definition or further details or description.’” *Ex parte H.H.*, 830 So.2d 21, 29 (Ala. 2002) (Moore, C.J., concurring) (quoting *Horn v. State*, 273 So.2d

Third, the confusion of boundaries arising from blood mixing—be it incest or miscegenation—found a counterpart in the law of inheritance and property allocation. As Leigh Bienen has noted, “traditional incest statutes [were] designed to uphold a property-based kinship system based upon marriage.”<sup>209</sup> Specifically, Bienen maintains that the traditional laws against incest cannot be fully understood apart from the property system in which they arose.<sup>210</sup> Explaining the ideological difference between traditional and modern incest statutes, she remarks that

[c]onsidered as a set of rules maintaining a social structure based upon marriage, rather than as laws regarding the sexual abuse of children, including descent and distribution and the ownership of land within the family, the incest prohibition makes sense. In the eighteenth century, divorce was rare or non-existent. People who owned property stayed in one place for their entire lives. Maintaining clarity in the ownership of land and family relationships was the primary goal. In traditional statutes, the prohibited relationships focus upon close ties of affinity, marriage, or consanguinity.<sup>211</sup>

In other words, traditional incest statutes represented a form of boundary maintenance with respect to the classification and ordering of proprietary relations. In a world where “[w]ealth and stature in the community was based upon ownership of land,” any marriage that “would confuse the lines of inheritance and ownership of land . . . had to be prohibited.”<sup>212</sup>

In one such case involving inheritance that went before the Supreme Court of the United States, *Brewer’s Lessee v. Blougher*,<sup>213</sup> the plaintiff’s attorney envisioned a parade of horrors in which incest and miscegenation together figured as powerful solvents that could disrupt all lines and categories of inheritance.<sup>214</sup> In that case, the Court considered the meaning of an 1852 Maryland statute that provided that

the illegitimate child or children of any female, and the issue of any such child or children, are declared to be capable in law to take and inherit both real and personal estate from their mother or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock.<sup>215</sup>

In other words, under the statute, even “illegitimate” children—including children produced through incestuous unions—could inherit property from their mother.

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249, 250 (Ala. Crim. App. 1973)).

<sup>209</sup> Leigh Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1533 (1998).

<sup>210</sup> *Id.* at 1529.

<sup>211</sup> *Id.* at 1531.

<sup>212</sup> *Id.*

<sup>213</sup> 39 U.S. (14 Pet.) 178 (1840).

<sup>214</sup> *Id.* at 184.

<sup>215</sup> *Id.* at 197 (internal quotations omitted).

Although the Court upheld the statute on the ground that “[t]he expediency and moral tendency of this new law of inheritance, is a question for the legislature of Maryland, and not for this Court,”<sup>216</sup> the plaintiff’s lawyer attempted to convince it otherwise. Specifically, the attorney argued that the act in question threatened to undermine the integrity and continuity of the family tree:

From the careless manner of its enactment, the legislature has rendered itself liable to be misunderstood, and its true intention frustrated. It has, indeed, if the letter be adhered to, made a general act to direct descents for the benefit of all illegitimate children of any female who is the *propositus* in the law, and who is to be the *stirps* whence these relations are to branch out, from fathers and mothers without marriage; and this too, embracing bastards issuing from adultery, and from incest of father and daughter [sic], and even son and mother; if the depravity of the human heart shall ever let loose such unbridled passions: and also embracing in its confusion, bastards lineal and collateral, running into the same incest and adultery, and bastards of colour mingled with whites, and all too in like manner as if born in lawful wedlock. But in such a state of illegitimacy, how could persons and families proceeding from such female, as the root, establish their right to inherit any estate from each other?<sup>217</sup>

This notion of a world in chaos because of incest and miscegenation, as well as adultery, reveals a world lacking cognizable boundaries, categories, and lines of descent. The metaphor of the family tree nicely captures the extent to which incest and miscegenation posed a threat to the coherence of domestic relations—in this case, a coherence conferred by the law of inheritance. Indeed, it is no coincidence that in Ovid’s story of father-daughter incest, Myrrha is redeemed in a sense through her transformation or metamorphosis into a tree—a symbol of the familial integrity that she not only compromised, but threatened to undermine through her incestuous relationship with her father.

This look at the analogy between the incest taboo and the taboo against interracial relations in legal and nonlegal sources helps to bring to light how, and why, incest has functioned as a potent symbol of boundary violation—and, by extension, of disgust. During periods of enormous social and political change, particularly in the post-war South, intrafamilial and interracial sexual relations and marriage—collectively referred to as “intermarriage”—represented not simply a biological threat, unions that ostensibly produced degraded offspring or “deplorable results.” In addition, the unnatural mixing that these relations entailed signified other, more symbolic or abstract forms of mixing and boundary confusion, including challenges to state sovereignty (and related fears of interstate contamination) as well as challenges to stable lines of inheritance. The constellation of boundary issues (and images of boundary violation) surrounding both miscegenation

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<sup>216</sup> *Id.* at 198.

<sup>217</sup> *Id.*

and incest helps to clarify not only the extent to which incest came to symbolize boundary violation, but also the extent to which incest was used to shore up a normative vision of the family—one that assumed that marriage (and sexuality) was marked by just enough (racial) similarity and just enough (familial) difference.

2. *Incest-Cloning Analogy.*—The incest taboo has surfaced more recently as a point of comparison to yet another boundary violation involving the family—namely, cloning. Like incest and miscegenation, cloning is said to represent a threat because it upsets the laws of evolutionary biology, for, like incest, cloning involves a mode of reproduction that does not contribute to the diversification of the overall gene pool. While cloning might ensure the replication of the strongest genes, it might also entail the duplication of so-called weaker traits.<sup>218</sup>

As with miscegenation and incest, however, the social and symbolic implications of cloning outweigh the biological threat it represents. Simply put, cloning, like incest, would lead to a confusion of names, boundaries, and roles within the family. In 1852, Henry Hughes fulminated that “[a]malgamation is incest,” thereby collapsing the distinction between these two crimes of blood. More recently, Leon Kass, Chairman of President George W. Bush’s Bioethics Council, has cast the repugnance of cloning in analogous terms, suggesting that cloning precipitates not only name confusion, but the drama of incest as well:

[C]loning, if successful, would create serious issues of identity and individuality. The clone may experience concerns about his distinctive identity not only because he will be in genotype and appearance identical to another human being, but, in this case, he may also be twin to the person who is his “father” or “mother”—if one can still call them that. Unaccountably, people treat as innocent the homey case of intrafamilial cloning—cloning of husband or wife (or single mother); they forget about the unique dangers of mixing the twin relation with the parent-child relation . . . . Virtually no parent is going to be able to treat a clone of himself or herself as one does a child generated by the lottery of sex. What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with? In case of divorce, will Mommy still love the clone of Daddy, even though she can no longer stand the sight of Daddy himself?<sup>219</sup>

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<sup>218</sup> See, e.g., Eric A. Posner & Richard A. Posner, *The Demand for Human Cloning*, in CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING 236 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998) [hereinafter CLONES AND CLONES] (“The likely reason that [cloning] did not evolve is that the reshuffling of the genes with every generation, which we get with sexual reproduction, provides protection against co-evolving parasites.”).

<sup>219</sup> *Human Cloning Prohibition Act of 2001 Before the Subcomm. on Sci., Tech., and Space of the Senate Comm. on Commerce, Sci., and Transp.*, 107th Cong. 48 (May 2, 2001) (statement of Leon R. Kass), available at <http://commerce.senate.gov/hearings/0502kas.PDF>; see also *The Science and Ethics of Human Cloning Before the Subcomm. on Sci., Tech., and Space of the Senate Comm. on Commerce, Sci., and Transp.*, 108th Cong. (Jan. 29, 2003), available at <http://commerce.senate.gov/hearings/>

It is precisely because cloning could blur the boundary separating parents from children that Kass has opined that cloning belongs in the same category as incest: “Can anyone really give an argument fully adequate to the horror which is father-daughter incest (even with consent) . . . ? The repugnance at human cloning belongs in that category.”<sup>220</sup> Indeed, for at least one legal commentator, cloning represents orders of magnitude *beyond* incest in its dangerous ability to violate boundaries: “[I]f incest crosses the boundaries defined by the human way of coming into being, cloning twists and breaks them.”<sup>221</sup>

The above quotation by Kass conveys the idea that this unnatural mode of reproduction raises the specter, and perhaps even makes possible, this “horror which is father-daughter incest”: “What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with?” Just as the secrecy surrounding interracial sexual relations and the children they produced increased the potential for incest, so, too, does cloning make incest that much more possible. In this sense, cloning is not only *like* incest because it precipitates identity confusion, but in fact *leads to* incest.

The identity confusion and boundary violation that will ostensibly result from cloning is not limited to the more conventional Oedipal situations involving parents and children. Rather, the destructive potential of cloning branches out into the larger family tree. Kass has elsewhere presaged a range of uncanny<sup>222</sup> incest scenarios, remarking,

In the case of self-cloning, the “offspring” is, in addition, one’s twin; and so the dreaded result of incest—to be parent to one’s sibling—is here brought about deliberately, albeit without any act of coitus. Moreover, all other relationships will be confounded. What will *father*, *grandfather*, *aunt*, *cousin*, and *sister* mean? Who will bear what ties and burdens? . . . It is no answer to say that our society, with its high incidence of [broken families and nonmarital childbearing], already confuses kinship and responsibility for chil-

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testimony.cfm?id=700&wit\_id=1868.

<sup>220</sup> LEON KASS & JAMES Q. WILSON, *THE ETHICS OF HUMAN CLONING* 18 (1998); see also Lori Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643 (1998) (pursuing incest-cloning analogy).

<sup>221</sup> E.V. Kontorovich, *A Sexual Revolution: Hubris and Disastrous Attempts to Change Human Nature Are Not New. Cloning Is.*, NAT’L REV. ONLINE, Mar. 9, 1998, at <http://www.nationalreview.com/09mar98/kontorovich030998.html>.

<sup>222</sup> I use this word deliberately, as the “uncanny” is a constitutive feature of disgust. See William Ian Miller, *Sheep, Joking, Cloning and the Uncanny*, in *CLONES AND CLONES*, *supra* note 218, at 78. While never explicit, Kass has alluded to the uncanny nature of cloning when stating that “[e]ven in the absence of unusual parental expectations for the clone—say, to live the same life, only without its errors—the child is likely to be ever a curiosity, ever a potential source of déjà vu.” KASS & WILSON, *supra* note 220, at 84 (emphasis added).

dren . . . unless one also wants to argue that this is, for children, a preferable state of affairs.<sup>223</sup>

Similarly, in suggesting that “we may see in cloning the resurgence of our fascination with an archaic form of incest with the original twin, and the grave psychotic consequences of such a primitive fantasy (Cronenberg’s film *Dead Ringers* is a dramatic illustration of this),”<sup>224</sup> Jean Baudrillard has called attention to the possible—albeit otherwise fantastical—causal relationship between cloning and sibling incest, a scenario that recalls Byblis’s fantasy of incest with her twin brother, Caunus, in Ovid’s *Metamorphoses*.

In one sense, the cloning-incest analogy reflects the hysteria that often surrounds any “new” technology, a panic that is particularly acute in the face of alternative reproductive technologies. For instance, similar kinds of arguments have been made with respect to the incestuous potential of in vitro fertilization. In 2001, a sixty-two-year-old French woman became one of the world’s oldest mothers after giving birth to a baby following fertility treatment. While the woman carried the baby to term and was therefore the gestational parent, she was not the biological or genetic parent. Rather, the baby was conceived by her brother’s sperm and a donor egg. Although technically not a case of incest, a French prosecutor who was investigating the case commented that it represented an instance “not of biological incest, but [of] social [incest].”<sup>225</sup>

In another sense, however, the incest-cloning analogy speaks to much more deep-seated fears about the reconstitution of the family in an age where boundaries and lines of demarcation are neither fixed nor stable. Just as the incest-miscegenation analogy—one that appeared with greater frequency after the Civil War—reflected an anxiety over the shifting social landscape of the postbellum South, so, too, does the incest-cloning analogy reflect an anxiety over the so-called de-naturalization of the modern family.

I would like to conclude this section on cloning, and on the threat of incest that it tends to provoke in both the legal and literary imaginations, by turning to a work of fiction—a seemingly safe place where our “primitive fantasy” of cloning and incest, in the words of Baudrillard, may take root. Perhaps quite appropriately, Nussbaum’s anthology on cloning, *Clones and Clones: Facts and Fantasies About Human Cloning*, closes with a short piece of fantasy (or fiction) by Nussbaum herself, entitled “Little C.”<sup>226</sup>

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<sup>223</sup> *Id.* at 37–38. Kass’s cataloguing of terms here—father, grandfather, aunt, cousin, etc.—recalls the proliferation of language that often appears in slippery slope rhetoric, as discussed *supra* Part II. In addition, Kass’s parade of horribles scenario once again points to the nominal basis of familial relationships—as part of the problem with cloning is what the natural familial terms (father, grandfather, etc.) will “mean” in a post-cloning world.

<sup>224</sup> JEAN BAUDRILLARD, *THE VITAL ILLUSION* 12–13 (2000).

<sup>225</sup> *Storm over French IVF Babies*, BBC NEWS, June 21, 2001, at <http://news.bbc.co.uk/1/hi/world/europe/1401070.stm>. The brother-sister pair supposedly “tricked” doctors in California, where the woman underwent the procedure, into thinking that they were married (and, of course, nonrelated).

<sup>226</sup> Martha Nussbaum, *Little C*, in *CLONES AND CLONES*, *supra* note 218, at 338.

Nussbaum's "Little C" is, in short, a story that explores the intersections among fiction, cloning, and incest through the first-person, elegiac voice of a narrator whose lover, presumably deceased or at the very least vanished—"You weren't there any more. I don't know why, but I know you were gone, just not there anymore, and I was frozen with grief,"<sup>227</sup>—reappears one day at her doorstep in the form of Little C, the "baby clone . . . with the defiant smile of baby Hercules getting ready to throttle the serpents."<sup>228</sup> Taking Little C into her arms, the narrator, now mother, proceeds to explore the resemblances between Little C and the original on which he is presumably based; indeed, the very name of this mystery waif begs the presence of an absent Big C, who, in turn, functions as the object of the narrator's elegy: "How I loved Little C. I would hold him so hopefully in my arms, thinking that he would soon become you. When his eyes turned from baby blue to a deeper gray-blue with flecks of yellow, a wonderful joy began to seep into my heart."<sup>229</sup>

The narrator's fantasy of reconnection—sexual and otherwise—with the lost original through the person of Little C is made explicit throughout the narrative. At the beginning of the story, the narrator remarks, "I felt the baby lips around my nipple, and I imagined, as the milk flowed out, how the new sensation would please you."<sup>230</sup> Indeed, insofar as "Little C's" narrator captures the fantastical interplay between incest and cloning through the duplication of a former lover, Nussbaum's piece nicely encapsulates—and concludes—this anthology that deals in large part, and explicitly so, with the relationship between cloning and nontraditional sexuality.<sup>231</sup>

But Nussbaum defies even these unconventional expectations with her piece. Later in the story, the narrator tells us that Little C is, to her initial dismay, not like his original prototype in a number of significant ways. Little C, unlike his predecessor, likes the color green: "One day when Little C was ten, he said to me, 'Mother, green is such a beautiful color. Why do you never wear green dresses?' Astonished, I replied, 'What a ridiculous question. Because you hate green.' But I was wrong, for Little C did not hate green."<sup>232</sup> Similarly, Little C, unlike Big C, has a penchant for cleanliness: "Papers in neat piles on the desk, books on the shelf, socks in the laundry[,] . . . cups and plates neatly stacked in the dishwasher."<sup>233</sup> The narrator recounts that she witnessed this "with approval and gentle encour-

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<sup>227</sup> *Id.* at 338.

<sup>228</sup> *Id.* at 338–39.

<sup>229</sup> *Id.* at 339.

<sup>230</sup> *Id.*

<sup>231</sup> See, e.g., Wendy Doniger, *Sex and the Mythological Clone*, in *CLONES AND CLONES*, *supra* note 218, at 114; William N. Eskridge, Jr. & Edward Stein, *Queer Clones*, in *CLONES AND CLONES*, *supra* note 218, at 95.

<sup>232</sup> Nussbaum, *supra* note 226, at 342.

<sup>233</sup> *Id.*

agement. And the ice of grief began to grow again in [her] heart.”<sup>234</sup> In other words, upon realizing that Little C is not, in fact, a simulacrum of her departed lover, the narrator, who felt that her “heart was a heavy cold block” following Big C’s departure, once again feels the “ice of grief . . . in [her] heart”—the grief that accompanies her realization that an absolute correspondence between the clone and the original from which he seemed to issue is impossible. She laments, “Could it be that the secrets of making love to you were so well known to me, while the secrets of producing you were unknown completely?”<sup>235</sup> The incest-cloning motif is here once again made explicit—notwithstanding the profound sense of loss that follows from the narrator’s knowledge that her clone-child is not the replica of her departed lover. In the story’s closing moments, during the performance of *Don Carlo* to which mother and son jointly attend, the narrator finally realizes that, like Elisabetta and Carlo, who are “fated to be mother and son rather than lovers,” she and Little C are “[d]oomed to be mother and son, forever.”<sup>236</sup>

Nussbaum’s story—fantastical though it might be—challenges Kass and Wilson’s criticism of cloning as not only creating “serious issues of identity and individuality,” but also making possible any number of primal, incestuous scenarios: “What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with?” While Nussbaum’s story undeniably flirts with the possibility of incest, it also suggests that the fantasy of merged identities between lover and child is just that—a fantasy—and that any attempt to recreate what is particular and absolutely singular about an individual is likely futile—even in a fictive world where human cloning is not only possible but desirable. As the narrator tells Little C toward the end of the story, “each story has its own ending, and no person is exactly like any other.”<sup>237</sup> If anything, Little C, who leaves home at the age of seventeen to attend Julliard, ends up looking far more like his mother—as someone with a penchant for music (opera), literature, and perfection—than he does his “paternal” prototype. In fact, one might say that Nussbaum’s story ultimately discloses the irony that lies at the heart of the Kass-Nelson critique: cloning merely throws into relief the issues surrounding identity and individuality that are *already* present in many parent-child relationships. Put another way, cloning is neither new nor *sui generis*, but instead simply represents an absurd extension—or representation—of the conventional families that we already know.

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 343.

<sup>236</sup> *Id.* at 345.

<sup>237</sup> *Id.*

## V. INCEST AS SYMBOL AND ITS LEGAL IMPLICATIONS

What, then, does this analysis of the incest taboo tell us about the kind of family that the taboo envisions, and, moreover, about what is at stake in having this particular model through which to define the family? In addition, how does this analysis help to explain the dogged persistence of the incest taboo as a point of comparison on the slippery slope to any non-normative kinship arrangement? Finally, and from a more prescriptive standpoint, what investment does the law itself have in continuing to rely on the taboo in slippery slope arguments pertaining to the family? Section A will draw from the previous analysis in order to summarize how and why the incest taboo has been used to construct an ideal vision of the family. Section B will then look more closely at the symbiotic relationship between the incest taboo and the law and will suggest that the law adopt alternative, or at least more expansive, discourses in which to talk about kinship relations.

A. *Incest, Non-Normative Kinship Relations, and Naturalist Assumptions*

What has this analysis shown us about the manner in which the incest taboo has been used to articulate a normative vision of the family? First, and most basically, this analysis has brought into focus the particular threat that incest signifies (or symbolizes)—namely, a boundary violation that is tied to the way in which sexual desire is expressed in the family as well as the way in which a family reproduces itself. As I have suggested, the incest taboo is a guard against the confusion of names and roles within the family, one that results from a failure to recognize that certain family members should not be sexual partners. I have argued that it is for this reason that incest has been linked to other forms of boundary violation—miscegenation, cloning, and same-sex relations—that similarly represent perversions of an ideal form of familial desire and reproduction.<sup>238</sup> The taboo thus reinforces not only a particular vision of the family—heterosexual parents having children through “natural” sexual means—but also the reproductive imperative behind having a family and what it means to be a family. The claim that “incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage,”<sup>239</sup> thus overlooks the extent to which incest continues to signify any non-normative arrangement that poses a serious risk to our traditional understanding of the family.

In her recent work on the incest taboo, Judith Butler has provided a theoretical context in which to examine the persistence of the taboo in contemporary rhetoric over nontraditional family structures. Specifically, she

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<sup>238</sup> While beyond the scope of this Article, it is telling that in some societies, adultery and incest are grouped under the same rubric defining that which is incestuous. HÉRITIER, *supra* note 159, at 286–87.

<sup>239</sup> Grossberg, *supra* note 13, at 292.

has argued that same-sex relationships and incest both represent a “departure” from the symbolic norm—namely, a deviation from the prototypical way in which sexual identity is created, and maintained, in the family. She has observed that

the law that would secure the incest taboo as the foundation of symbolic family structure states the universality of the incest taboo as well as its necessary symbolic consequences. One of the symbolic consequences of the law so formulated is precisely the derealization of lesbian and gay forms of parenting, single-mother households, and blended family arrangements in which there may be more than one mother or father, where the symbolic position is itself dispersed and rearticulated in new social formations.<sup>240</sup>

In other words, incest is a way of describing what is troubling about those new formations. Butler maintains that the incest taboo assumes or presupposes a certain kind of family structure—mother, father, and children whose sexual desires are allocated along well-defined axes of biological sex—that is simply not present in alternative family arrangements. In her estimation, it is for this reason that

the horror of incest, the moral revulsion it compels in some, is not that far afield from the same horror and revulsion felt toward lesbian and gay sex, and is not unrelated to the intense moral condemnation of voluntary single parenting, or gay parenting, or parenting arrangements with more than two adults involved (practices that can be used as evidence to support a claim to remove a child from the custody of the parent in several states in the United States). *These various modes in which the oedipal mandate fails to produce normative family all risk entering into the metonymy of that moralized sexual horror that is associated perhaps most fundamentally with incest.*<sup>241</sup>

Similarly, David Schneider has remarked that “[i]ncest’ is symbolic of the special way in which the pattern of social relationships, as they are normatively defined, can be broken. ‘Incest’ stands for the transgression of certain major cultural values, the values of a particular pattern of relations among persons.”<sup>242</sup>

It is important, then, to understand that incest is a powerful symbol of disgust not simply because it confuses lines of genetic inheritance that

<sup>240</sup> JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* 70 (2000).

<sup>241</sup> *Id.* at 65 (emphasis added); see also Judith Butler, *Quandaries of the Incest Taboo*, in *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 43–44 (Peter Brooks & Alex Woloch eds., 2000) (“[T]here are probably forms of incest that are not necessarily traumatic or that gain their traumatic character by virtue of the consciousness of social shame they produce. But what concerns me most is that the term *incest* is overinclusive, that the departure from sexual normalcy it signifies blurs too easily with other kinds of departures. Incest is considered shameful, which is one reason it is so difficult to articulate, but to what extent does it become stigmatized as a sexual irregularity that is terrifying, repulsive, unthinkable in the ways that other departures from normative exogamic heterosexuality are?”).

<sup>242</sup> Schneider, *supra* note 1, at 166.

should be kept separate. Even worse, and as the above quotation from Schneider bears out, incest throws into confusion nominal differences (brother, sister) and the social relationships that those names signify. The incest taboo thus represents a social practice over and above an innate biological response—or, in the words of the *Israel* court, a “natural repugnance.” Indeed, the strength behind the historical analogy between incest and miscegenation derives less from the fact that these are two crimes of blood—for, as I have suggested, they represent opposite fears—and more from the fact that they signify confusion over one’s social and proprietary inheritance.

Second, this analysis of incest as boundary violation shows that the incest taboo has created an additional space in which to talk about sexual deviance. The cloning-incest analogy provides a good example of the way in which comparisons between non-normative family arrangements and incest (on the slippery slope) provide an opportunity to talk in negative ways about any unconventional relationship and to reinforce the norm. For instance, Laurence Tribe has suggested that the debate over cloning has provided a platform for critics to inveigh against *any* non-normative relationship.<sup>243</sup> He has remarked that “the arguments supporting an ironclad prohibition of cloning are most likely to rest on, and reinforce, the notion that it is unnatural and intrinsically wrong to sever the conventional links between heterosexual unions sanctified by tradition and the creation and upbringing of new life.”<sup>244</sup> Similarly, Professors Eskridge and Stein have pointed out that “antigay sentiments probably contribute to anticloning sentiments. . . . [S]ome of the same impulses that form intense homophobic reactions would generate reactions to the possibility of cloning.”<sup>245</sup> Kass’s cloning-incest analogy represents a good case in point, for the analogy has allowed Kass not only to articulate what is disturbing about cloning, but also to express his views on same-sex parenting and single-parenting as well. Although Kass insists that his repugnance for cloning derives from a prerational intuition (or wisdom) to which we should give heed, he nevertheless grounds his arguments against cloning within the larger social context of the family, and, more specifically, untraditional families.

For instance, it is not repugnance at cloning per se that drives most of Kass’s arguments, but rather revulsion at the *kinds* of untraditional families

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<sup>243</sup> Laurence Tribe, *Second Thoughts on Cloning*, N.Y. TIMES, Dec. 5, 1997, at A31 (“Human cloning has been condemned by some of its most articulate detractors as the ultimate embodiment of the sexual revolution, severing sex from the creation of babies and treating gender and sexuality as socially constructed. But to ban cloning as the technological apotheosis of what some see as culturally distressing trends may, in the end, lend credence to strikingly similar objections to surrogate motherhood or gay marriage and gay adoption.”).

<sup>244</sup> *Id.*; see also *id.* (“The entrenchment of that notion cannot be a welcome thing for lesbians, gay men and perhaps others with unconventional ways of linking erotic attachment, romantic commitment, genetic replication, gestational mothering and the joys and responsibilities of child rearing.”).

<sup>245</sup> Eskridge & Stein, *supra* note 231, at 108.

and “unnatural” modes of reproduction that cloning not only signifies, but, even worse, facilitates and encourages. In his estimation, cloning represents the absurd extension of the “sexual revolution” that has undermined the naturally-conceived, two-parent, heterosexual family. He states,

Cloning turns out to be the perfect embodiment of the ruling opinions of our new age. Thanks to the sexual revolution, we are able to deny in practice, and increasingly in thought, the inherent procreative teleology of sexuality itself. But, if sex has no intrinsic connection to generating babies, babies need have no necessary connection to sex. Thanks to feminism and the gay rights movement, we are increasingly encouraged to treat the natural heterosexual difference and its preeminence as a matter of “cultural construction.” But if male and female are not normatively complementary and generatively significant, babies need not come from male and female complementarity. Thanks to the prominence and the acceptability of divorce and out-of-wedlock births, stable, monogamous marriage as the ideal home for procreation is no longer the agreed-upon cultural norm. For that new dispensation, the clone is the ideal emblem: the ultimate “single-parent child.”<sup>246</sup>

Similarly, James Wilson has argued that “[t]he major threat cloning produces is a further weakening of the two-parent family,”<sup>247</sup> and, worse yet, the “possibility that a lesbian couple will use cloning to produce a child.”<sup>248</sup> Wilson in fact questions whether “we wish to make it easy for a homosexual pair to have children?”<sup>249</sup> Even Baudrillard has tacitly expressed disdain for the likelihood that cloning and lesbian parenting will go hand-in-hand:

This matter of the clones, in fact, could call a number of things into question—and that is the irony of the situation. The clone, after all, could also appear as a grotesque parody of the original. It is not hard to imagine a whole range of potential problems and new conflicts issuing from cloning that would turn oedipal psychology upside down. Consider, for instance, a clone of the future overthrowing his father, not in order to sleep with his mother—which would be impossible, anyway, since she is nothing but a matrix of cells, *and besides, the “father” could very well be a woman*—but in order to secure his status as the Original.<sup>250</sup>

Lesbian and single mothers figure prominently in these parade of horribles scenarios—explicit in Kass and Wilson, implicit in Baudrillard—and appear to bear the largest brunt of the debate surrounding cloning. In this sense, antigay rhetoric and anticloning rhetoric are mutually constitutive and reinforcing—the former leading to, and doubling back on, the latter, and vice versa.

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<sup>246</sup> KASS & WILSON, *supra* note 220, at 8–9.

<sup>247</sup> *Id.* at 72.

<sup>248</sup> *Id.* at 68.

<sup>249</sup> *Id.*

<sup>250</sup> BAUDRILLARD, *supra* note 224, at 26 (emphasis added).

By placing incest in the same category as cloning, and cloning in the same category as same-sex and single parenting, critics have thus managed to use the cloning debate as a platform from which to denounce any kind of untraditional family marked by “Oedipal confusion.” It is in precisely this sense that the taboo against incest has been “mobilized to *establish* certain forms of kinship as the only intelligible and livable ones,”<sup>251</sup> and that the discussion surrounding cloning has cast all nontraditional forms of desire and reproduction as “some version of original sin.”<sup>252</sup> As Tribe reminds us, any prohibition, be it the taboo against incest or the related taboo against cloning, carries with it enormous residual social costs—particularly when that prohibition applies to a method of human creation or bears on the constitution of the family.<sup>253</sup>

Third, this analysis of incest as boundary violation has demonstrated the extent to which nature, or the notion of what is “natural,” continues to shape the ideal conception of kinship in the context of family law. That is, same-sex relations and cloning are often grouped together with incest in slippery slope arguments because all three represent a perversion of what is considered to be a natural form of the family and a natural form of sexual reproduction. Hadley Arkes expressed these sentiments when testifying before the House Judiciary Committee on behalf of DOMA, stating that “one thing can be attributed to the gay activists quite fairly and accurately: and that is that they do have the most profound interest, rooted in the logic of their doctrine, in discrediting the notion that marriage finds its defining ground in ‘nature.’”<sup>254</sup> A number of other critics of same-sex marriage, as well as cloning, have similarly adverted to the paradigm of nature to support their position against these alternative kinship arrangements.

That nature has continued to remain an organizing principle of kinship relations in the family law context is a large part of the reason why the law in some states does not permit same-sex couples to adopt as well as the reason the incest taboo *itself* does not apply in some states to step- and adoptive families. While many individuals are disgusted when confronted with sibling incest between non-blood-related family members—recall, for instance, the respondents in Haidt’s study or the public reaction to the Woody Allen scandal—the law (in many states) continues to rely on the paradigm of nature to determine whether sexual relationships between certain family members are a source of disgust (the *Israel* court’s “natural repugnance”) and therefore constitute a form of incest that warrants legal prohibition.

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<sup>251</sup> BUTLER, *supra* note 240, at 70.

<sup>252</sup> Laurence Tribe, *On Not Banning Cloning for the Wrong Reasons*, in CLONES AND CLONES, *supra* note 218, at 229.

<sup>253</sup> Tribe, *supra* notes 243, 244 & accompanying text.

<sup>254</sup> *Defense of Marriage Act Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 102 (1996) (statement of Prof. Hadley Arkes), available at <http://judiciary.house.gov/legacy/25728.pdf>.

The impulse that leads to comparisons between incest and same-sex relationships—because each is unnatural—is therefore part of the same impulse that has led to the uneven application of the incest taboo in families with an “artificial” basis, for it is only in those states where adoptive and step-relatives are fully naturalized into the family that the incest taboo applies. In either case, the law relies on the incest taboo to define the contours of the natural family unit. While it would appear that our understanding of what is natural has changed and shifted over time, the incest taboo has remained a relatively constant symbol of the “unnatural” in legal discourse. In other words, even as the taboo has expanded to cover other familial arrangements—such as stepfamilies and adoptive families—it continues to rely on natural law precepts in order to determine what merits legal recognition.

Fourth and last, this analysis has revealed the discomfort that society experiences with relationships based on too much similarity or too much difference, as well as the degree to which notions of similarity and difference are deeply entrenched in law and culture. Related to its symbolic importance as an exemplary form of boundary violation, incest represents an unnatural mixing of the same and for this reason has functioned as a point of comparison to other so-called unnatural forms of sameness, such as same-sex relations and cloning. While the incest-miscegenation analogy would appear to represent a variation on this theme, anthropologists have suggested that forms of excessive similarity (incest) and excessive difference (miscegenation) are equally forbidden and thus constitute analogous, companion taboos. For instance, Hérítier has found that the incest taboo works in an expansive way to forbid the mixing of the too identical as well as the mixing of the too different. She maintains,

If “combination of the identical” is thought to produce harmful results, it will be prohibited, and the juxtaposition or combination of different elements will be sought. Inversely, if combination of the identical is thought to produce good effects, it will be sought out and the combining of different things will be avoided.<sup>255</sup>

Others have similarly observed that in some cultures, animals cannot be eaten if they are too close to humans or too distant from humans, and that sexual partners cannot be too much like the self (same sex, same nuclear family) or too distant (animals, people of other races).<sup>256</sup>

The fact that the incest taboo has been used to construct identities based on similarity and difference taps into a key feature of human thought and representation, namely, the notion of similarity and difference that lies “at the origin of our most profound mental categories.”<sup>257</sup> Hérítier’s analy-

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<sup>255</sup> HÉRITIER, *supra* note 159, at 208.

<sup>256</sup> See Tambiah, *supra* note 197, *passim*.

<sup>257</sup> HÉRITIER, *supra* note 159, at 202; *see also id.* (“The identical and the different appear . . . to be the principal categories of thought, anchored in primordial observations of the human body. . . . Indeed, these are not the abstract categories of modern scientific thought, but the categories of thought in gen-

sis is once again instructive. She notes that “a grammar is founded on the opposition between the identical and the different, on the classification of objects in one or the other category, and on the movements that affect these objects because of their attributed character in a classificatory category.”<sup>258</sup> It is in this sense that the incest taboo, which generates a range of social organizations and social categories, is both symbolic and constitutive of human thought itself. Thus, we have come full circle. If the incest taboo is the language or “grammar” that ensures the replication of the categories that society uses to structure acceptable and unacceptable forms of sameness and difference, then incest is symbolic of those ungrammatical human relations—intrafamilial sexuality, same-sex relations, miscegenation, cloning—that give rise to our collective disgust.

### B. Law and the Persistence of the Incest Taboo

Is the taboo an ineradicable part of the law? One way to answer this question is to return to the theory of disgust discussed in Part IV. There, I suggested that a characteristic feature of disgust is the act of drawing a boundary between us and them, or what Miller has called the line separating “purity from pollution.” This same theory of disgust suggests that what exists inside the boundaries—the norm—critically depends on what lies outside the boundaries—the non-normative—to define itself. For this reason, it could be that the law turns to what exists outside the boundaries—here, incest or the incest taboo—as the extreme case by which to define normative kinship relations. This theory of disgust provides at least two reasons why a symbiotic relationship exists between law and the incest taboo and why law and culture need the taboo as a point of reference.

Certain objects of disgust, like incest, can provide a convenient focal point for inciting public opinion around certain morally charged issues. Douglas explains that “when moral principles come into conflict, a pollution rule can reduce confusion by giving a simple focus for concern,” and that “when action that is held to be morally wrong does not provoke moral indignation, belief in the harmful consequences of a pollution can have the effect of aggravating the seriousness of the offense, and so of marshalling public opinion on the side of the right.”<sup>259</sup> Applying Douglas’s analysis to the taboo under consideration, we might say that the incest taboo has been deployed in part to magnify the seriousness of certain acts, such as same-sex sodomy, marriage, or both, that have not universally provoked moral indignation. As discussed above, one of the reasons incest has been such a durable and effective player on the slippery slope is because almost everyone is repulsed by it, regardless of political affiliation. Those who are un-

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eral. All human societies function on the basis of these implicit categories, even if they have not developed ‘scientific’ discourses.”).

<sup>258</sup> *Id.*

<sup>259</sup> DOUGLAS, *supra* note 147, at 55.

decided over the issue of same-sex marriage might be easily swayed by the invocation of incest.

In addition, at the same time that disgust helps to maintain physical, social, and moral boundaries, it also relies on what lies outside those boundaries as a means of defining and sustaining that which lies within. For instance, in offering a structural explanation for the pollution taboos catalogued in Leviticus, Douglas states that “a rule of avoiding anomalous things affirms and strengthens the definitions to which they do not conform. So where Leviticus abhors crawling things, we should see the abomination as the negative side of the pattern of things approved.”<sup>260</sup> In other words, objects of disgust—consensual incest, same-sex relations, cloning—reflect and thereby reinforce the norm from which they depart. It is in this sense that the incest taboo, and anything that becomes indelibly associated with it, work to reify the existing social order and familial structure. As Miller observes, “[l]ike those we hate, those who disgust us define who we are and whom we are connected with. We need them too—downwind.”<sup>261</sup>

Similarly, we might approach the incest taboo as a convenient symbol in structuring what Jonathan Dollimore has referred to as the system of “binary oppositions” that lies at the root of Western thought.<sup>262</sup> Dollimore has argued that “similarity” between what lies within (the “inlaw”) and what lies without (the “outlaw”) creates an anxiety whereby “the outlaw . . . as inlaw, and the other as proximate [prove] more disturbing than the other as absolute difference.” At the same time, he points to the fact that the most effective way to maintain this system of polar opposition is to figure its collapse—that is, to depict the outlaw as proximate and similar to the inlaw.<sup>263</sup> In the same vein, Butler has suggested that the incest prohibition needs “to sustain and manage a specter of its non-working in order to proceed,” that is, that the incest prohibition is effective only when it produces “the specter of its transgression.”<sup>264</sup> It would thus appear that the incest taboo is an indispensable part of all slippery slope arguments presaging the collapse of sexual prohibitions and a world of sexual abandon, as the taboo maintains its power and efficacy by remaining a constant threat.

If we accept this need to structure relationships according to a system of binary oppositions as well as the role that the incest taboo plays in maintaining that system, the question remains as to whether the taboo is a permanent feature of the law. As I have suggested, disgust and the taboos in which it finds expression are constitutive features of the law, which relies on metaphors of lines, grids, slopes, and other varieties of boundary main-

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<sup>260</sup> *Id.* at 55.

<sup>261</sup> MILLER, *supra* note 156, at 251.

<sup>262</sup> JONATHAN DOLLIMORE, *SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT* 15 (1991).

<sup>263</sup> *Id.*

<sup>264</sup> BUTLER, *supra* note 240, at 17.

tenance and boundary control. In this sense, one might argue that positive or enacted law merely reflects and reenacts the rituals of taboo and disgust that have shaped and informed societies from time immemorial. Adding to this difficulty is the increasingly more recognized assumption that moral judgment derives from intuitive disgust reflexes rather than from a more calculated process of ratiocination and moral reasoning. When viewed in this light, it would seem that the eradication of disgust from human decisionmaking is unlikely if not futile—for to require individuals to become cognizant of their prejudices and biases is no small task.

One way to challenge the extent to which incest-revulsion has substituted for rational evaluation of the incest taboo (and anything to which incest has been compared) is to recognize the taboo's distinctly historical and social character. Specifically, it is important to recognize the way in which the incest taboo has surfaced and resurfaced over time in particular social contexts as one of the many vehicles through which the state has controlled sexuality and the constitution of the family. Leigh Bienen has remarked that "[t]he multiplicity of laws governing incestuous behavior" and the fact that the meaning of incest has varied "markedly" over time, reveal the extent to which the legal definition of incest often reduces to an "ideological" or "philosophical" question.<sup>265</sup> At least one court—the Supreme Court of Georgia in *Benton v. State*—has recognized the cultural origin of the incest taboo when stating that "[b]eing primarily cultural in origin, the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties."<sup>266</sup> By placing the taboo squarely within a cultural context, the *Benton* court was able to turn away from binary oppositions and natural law to find that "Georgia's decision to include step-parents in its statutory proscription against incest is neither unreasonable nor out of keeping with the historical purpose and meaning of the taboo."<sup>267</sup> When considered in this broader sociohistorical context, the incest taboo would become less monolithic and comparisons between incest and other non-normative kinship structures less frequent. Indeed, as some scholars have argued, it is no longer possible to think about those "core symbols" of American kinship, like the incest taboo, in the "abstracted framework in which they were first conceived or to neglect the ways in which Americans understand them as 'naturally' gendered configurations."<sup>268</sup>

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<sup>265</sup> Bienen, *supra* note 209, at 1529.

<sup>266</sup> *Benton v. State*, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring).

<sup>267</sup> *Id.*

<sup>268</sup> Susan McKinnon, *American Kinship/American Incest: Asymmetries in a Scientific Discourse*, in *NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS* 25, 30 (C. Delaney & S. Yanagisako eds., 1995); *see also id.* ("[A]n examination of the cultural discourse on incest reveals much about the manner in which ideas about American kinship and the symbols of sexual intercourse, love, and enduring diffuse solidarity are structured in terms of a hierarchy of cultural values and along the power lines of gender.").

In addition, it is necessary for the law to turn to other models or archetypes of the family rather than to rely exclusively on the Oedipal mandate and on the model of the family that it presupposes. Other disciplines, most notably anthropology, have more recently deemphasized the role that the incest taboo has played in structuring kinship relations across a range of cultures. What is now referred to as the “new kinship studies” relies less on the symbolic importance of the incest taboo and more on the “diffuse” forms of “relatedness” that do not adhere to the essentialist or naturalist paradigm that the incest taboo perpetuates.<sup>269</sup> These studies have demonstrated the extent to which the taboo has been used to structure kinship relations according to this paradigm, and, in the process, to denigrate alternative kinship arrangements (e.g., same-sex parenting) and to preserve gender hierarchy. Reacting to the traditional, structuralist accounts of the taboo, Susan McKinnon, echoing Gayle Rubin, has remarked that “[t]he incest taboo . . . [has been] framed as the paternal and fraternal rights to regulate the market of scarce products [i.e., women] to ensure the equal distribution and consumption of women.”<sup>270</sup> In other words, the incest taboo, at least as it has been theoretically conceived, supports a gender hierarchy whereby women are “traded out” of families in order to satisfy the exogamic imperative of marrying outside one’s immediate clan or tribe.

In releasing the incest taboo from its archetypal moorings, these studies have adopted alternative kinship models that supersede the staid conception of the family that currently obtains in American law. Indeed, it is necessary for the law also to adopt—or simply to understand—those models of kinship that do not necessarily conform to the Oedipal prototype. In the United States, kinship relations continue to be determined and structured along blood lines. It is perhaps for this reason that the incest taboo has continued to provide the language—or grammar—in which we articulate and “speak about” the family. Insofar as the incest taboo is an integral part of thought and language, it is necessary for the law, dependent as it is on language, to be one of the primary vehicles through which to challenge the structuralist assumptions that underlie what it means to be a family.

## VI. CONCLUSION

This Article has offered a theory that explains why the incest taboo has been a persistent player on the slippery slope of sexual deviance, even though incest is, for the reasons detailed above, a bad fit for slippery slope arguments. Although it has not suggested that incest laws should be repealed, it has suggested that legal actors and policymakers look more

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<sup>269</sup> See, e.g., *RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES* (Susan McKinnon & Sarah Franklin eds., 2001).

<sup>270</sup> McKinnon, *supra* note 268, at 32; see also Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157 (Ranya R. Reiter ed., 1975).

closely at the connections they make between incest and other sexual relationships—most notably, same-sex relations—and that the law reappraise the extent to which disgust motivates legal and political decisionmaking.

The boundary violation theory that I have put forth serves both a descriptive and a prescriptive function. The descriptive claim that incest, as a mechanism of disgust, represents a prototypical or archetypal form of boundary violation, helps to clarify what has been for political conservatives and liberals alike a strange conflation of otherwise distinct social, sexual, and reproductive practices—be it incest and same-sex relations or incest and cloning. For instance, groups from both ends of the political spectrum have commented on the unfortunate comparison between incestuous and same-sex relations—some conservatives remarking that it does not help their cause and many liberals remarking that it hurts theirs. And yet, the social science literature suggests that incest is perhaps the one taboo that unites both political groups, insofar as everyone is equally repulsed by it. Incest thus has an enormous power to disgust and thereby to unite otherwise divergent camps.

The prescriptive suggestion that the law turn away from the taboo—as a means of structuring and organizing sexuality and kinship relations—is in some ways in tension with the descriptive claims that I have made here. That is, given the extent to which incest inspires disgust, and given the trenchancy of the incest taboo, how is the law to adopt alternative models of sexuality and kinship that do not denigrate a range of relationships in the process? I suggest that while descriptive claims and prescriptive suggestions often conflict in the law, this fact alone should not deter legal actors from turning to more empirically-based and rational accounts of sexuality and the family. I would submit that at least one court, the Georgia Supreme Court in *Benton v. State*, has already made this attempt by focusing less on the taboo as an instinctive and universal given and more on anthropological accounts that have highlighted its socially-constructed character. It would be wise for a range of legal actors and policymakers to follow its lead.

