

Michigan Journal of Gender & Law

Volume 23 | Issue 1

2016

The Incest Horrible: Delimiting the *Lawrence v. Texas* Right to Sexual Autonomy

Y. Carson Zhou

Follow this and additional works at: <https://repository.law.umich.edu/mjgl>



Part of the [Constitutional Law Commons](#), [Family Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Y. C. Zhou, *The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187 (2016).

Available at: <https://repository.law.umich.edu/mjgl/vol23/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE INCEST HORRIBLE:
DELIMITING THE *LAWRENCE V. TEXAS*
RIGHT TO SEXUAL AUTONOMY*

Y. Carson Zhou**

ABSTRACT

Is the criminalization of consensual sex between close relatives constitutional in the wake of Lawrence v. Texas and Obergefell v. Hodges? Justice Scalia thought not. The substantive due process landscape has changed dramatically in response to the LGBTQ movement. Yet, when a girl in a sexual relationship with her father recently revealed in an anonymous interview with New York Magazine that they were planning to move to New Jersey, one of the only two states where incest was legal, the New Jersey legislature introduced with unprecedented speed a bill criminalizing incest. But who has the couple harmed? The very mention of incest conjures fears of deformed babies, yet when people think about sex in most other contexts, procreation is the last thing on their minds. Steeped in a near-universal incest taboo, judges are unlikely to strike down incest legislation any time soon. But they must still respond to any constitutional challenge in the language of the law. This Article evaluates the constitutionality of criminalizing sexual relationships between first-degree relatives. First, the Article situates incest statutes within the sociological incest taboo and the biological mechanism known as the Westermarck Effect. It asserts that incest laws are counter-natural exercises in socio-biological engineering. Second, it argues that incest cannot be excluded from the fundamental rights to sexual intimacy and reproduction. Third, it questions the constitutional sufficiency of a range of possible government interests, and the tailoring of existing laws to those interests. Fourth, it proposes revised statutory language that would prohibit certain incestuous relationships without violating the constitution. The Article concludes by suggesting that norms against incest, like norms against same-sex relationships, can change and may already be changing.

* I offer my sincerest and deepest gratitude to Professors Michael Klarman and Laurence Tribe. Without their teaching, guidance, and invaluable comments, this paper would not have been possible. An early draft of this Article was awarded Harvard Law School's prize for best paper on an LGBTQ legal issue for 2015.

** *Disclaimer: the views and opinions expressed in this Article are solely the author's own, and do not reflect, and are not in any way associated with, any institutions, organizations, or business entities with which the author has been, is currently, or will be affiliated.*

TABLE OF CONTENTS

INTRODUCTION	• 189
I.	THE WESTERMARCK EFFECT AND GENETIC SEXUAL ATTRACTION • 197
II.	THE RIGHTS . . . • 206
	A. <i>Autonomy of Intimate Sexual Conduct</i> • 206
	1. Defining the Right • 206
	2. The Equal Dignity Doctrine • 211
	3. Standard of Review • 218
	B. <i>Reproduction</i> • 224
III.	. . . AND THE COUNTERVAILING GOVERNMENT INTEREST[S] • 225
	A. <i>Morality</i> • 227
	B. <i>The Traditional Family and Familial Stability</i> • 230
	C. <i>Eugenics or Genetic Health?</i> • 234
	D. <i>Children</i> • 238
	E. <i>Inherently Coercive Relationships</i> • 239
	F. <i>Pandora's Box: How to Criminalize Incest</i> • 241
IV.	CONCLUSION: INCEST IN A POST-LAWRENCE, POST-OBERGEFELL WORLD • 243

“Tell me, then: what’s wrong with incest?”. . . .

. . . “You breed too close, you get faulty offspring. Idiots and dead babies without heads and all that.”

“I knew it! . . . Isn’t it wonderful? From the rocky depths of a Stone Age culture . . . all the way out to the computer technocracies, . . . you ask that question and you get that answer. It’s something everybody just *knows*. You don’t have to look at the evidence”. . . .

. . . “Sex is a pretty popular topic on most worlds. Almost every aspect of it that is ever mentioned has almost nothing to do with procreation. . . . But mention incest, and the response always deals with offspring. Always! To consider and discuss a pleasure or love relationship between blood relatives, you’ve ap-

parently got to make some sort of special mental effort that nobody, anywhere, seems able to do easily – some not at all.”¹

INTRODUCTION

Behind the privacy curtain lurks the incest specter—or so the critics warn. In his 1961 *Poe v. Ullman*² dissent, Justice Harlan declared that “the right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State’s rightful concern for its people’s moral welfare.”³ Justice Harlan hoped to reassure his colleagues on the bench that a substantive reading of the Due Process Clause, one guaranteeing married couples’ access to contraceptives as derivative of a constitutional “privacy” principle, would not invalidate prohibitions on activities that were facially repugnant to Justice Harlan and his contemporaries. Four years later, *Griswold v. Connecticut* held that the right to privacy prevents states from criminalizing the use of contraceptives by married couples in the privacy of the bedroom.⁴ *Griswold* gave rise to an active and ongoing privacy jurisprudence grounded, as Justice Harlan originally urged, in the Due Process Clause.⁵ Justice Harlan’s *Poe* dissent is now the law of the land, and at least one element in his parade of horrors—homosexuality—has joined access to contraceptives beneath the privacy umbrella.⁶ Justice Harlan has been gainsaid by history. “The state’s rightful concern for its people’s moral welfare” has not only failed to limit the reach of substantive due process, but since *Lawrence v. Texas* and *Romer v. Evans*,⁷ the soundness of morality as a government interest, without more, has become increasingly dubious.⁸

Incest is one of the last taboos. It implicates three major substantive due process frontiers: sexual autonomy, reproductive rights, and marriage. As such, a candid conversation about its constitutional place has become

1. Theodore Sturgeon, *If All Men Were Brothers, Would You Let One Marry Your Sister?*, in *DAINGEROUS VISIONS* 344, 380-82 (Harlan Ellison ed., 1967).

2. 367 U.S. 497 (1961).

3. *Poe*, 367 U.S. at 552-53 (Harlan, J., dissenting).

4. *See* 381 U.S. 479 (1965).

5. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973).

6. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the fundamental right to marry includes marriage between two people of the same sex); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that laws criminalizing sodomy between two people of the same sex violated a right to privacy under the Due Process Clause).

7. *Lawrence*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

8. *See* discussion *infra* Part III(a).

essential to understanding both our evolving privacy jurisprudence and the role of morality in law. But as Courtney Cahill observed, in the legal imagination, incest has become the “archetypal form of boundary violation and a potent symbol of disgust . . . 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.”⁹ Incest, in short, is now treated as a constitutional laugh-out-loud test; if a court decision compels the decriminalization of incest, the decision must not have been constitutionally compelled. While gay-rights activists use “like-race” arguments to attack sodomy prohibitions,¹⁰ their opponents counter, as Justice Harlan did, with “like-incest” justifications. For instance, justices opposed to the juridification of the gay-rights movement seized on incest as the centerpiece of a new parade of horrors. Justice White wrote in *Bowers v. Hardwick* that “if 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.”¹¹ When *Lawrence* overturned *Bowers* because the privacy principle “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,”¹² Justice Scalia wrote in passionate dissent that:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.¹³

The majority offered but a brief reply to the Scalian slope; *Lawrence* “does not involve minors. It does not involve persons who might be injured or

9. Courtney Cahill, *Same Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1546 (2005).

10. See Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW* 115 (David Kairys ed., 1998) (problematizing the use of like-race arguments by LGBTQ legal advocates).

11. 478 U.S. 186, 195-96 (1986).

12. *Lawrence*, 539 U.S. at 572.

13. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

coerced or who are situated in relationships where consent might not easily be refused.”¹⁴

Only a handful of academics have attempted to respond to the right’s incest challenge in the constitutional context. In 1984, Carolyn Bratt first took the Incest Horrible to its logical extreme by arguing that there is a constitutional right to marry, that only a “substantial, important state interest can justify such an intrusion into the individual’s choice of marriage partner, [that] only a statute narrowly tailored to accomplish such a purpose is permissible.”¹⁵ She rejected the constitutional sufficiency of government interests in genetics, morality, protecting the family unit, and protecting children. But not only has medical and social science come a long way in the three decades since, significant new developments in the case-law have dated Bratt’s article.

Brett McDonnell revisited the topic in 2004, shortly after *Lawrence*. He posited that the core of incest prohibitions against sex between parents and their biological children and between biological siblings would more likely than not survive some form of heightened rational basis review, though government rationales predicated on genetics or social structuring may fail strict scrutiny if the statute in question also proscribes relationships between adopted relatives.¹⁶ McDonnell argued that, given the near universal prohibition of incest by the states, “incest is clearly not a fundamental right with ancient roots.”¹⁷ History matters to a “liberal Burkean majority of the Court” which, McDonnell believed, “did not jump the gun in *Lawrence*. They did not want to get ahead of the prevailing moral views of their time, and they have not done so.”¹⁸

Just a year later, a student note in the DePaul Law Review came to the opposite conclusion.¹⁹ Brendan Hammer argued that in *Muth v. Frank* the 7th Circuit erred in sustaining Wisconsin’s criminal incest statute by inter-

14. *Lawrence*, 539 U.S. at 578.

15. Carolyn Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L. Q. 257, 266 (1984).

16. Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337, 352, 355 (2004).

17. *Id.* at 351.

18. *Id.* at 360.

19. Brendan Hammer, Note, *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 DEPAUL L. REV. 1065, 1081 (2007). Another student note in the Harvard Law Review, arguing for improved incest legislation turning on the consent versus non-consent fulcrum, also opines briefly that, “in a post-*Lawrence v. Texas* world, it is at least highly problematic to retain laws that can criminalize consensual intimate relationships on the basis of nothing more than unexplained references to ‘morality’ or ‘family.’” Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the ‘Sexual Family’*, 119 HARV. L. REV. 2464, 2467 (2006).

preting *Lawrence* as applicable only to homosexual sodomy.²⁰ Hammer noted that *Lawrence* was not a “narrow precedent,” but rather, was “broadly and generously written.”²¹ Hammer’s note advocated complete autonomy between consenting adults in the bedroom, declaring that “love is a passionate and profound area of mankind’s existence. The criminal law is ill-equipped to enter into such an area, and it should probably not attempt to do so absent realistic harm to another person.”²² In stark juxtaposition, however, John Tuskey harnessed that same argument—that *Lawrence* is broadly written—to push Justice Scalia’s original objection that the right *Lawrence* recognized is overly broad. Tuskey wrote that the 7th Circuit had little option but to “read *Lawrence* more narrowly than its language would seem to allow.”²³ Tuskey accused the Supreme Court of playing politics: “The [*Lawrence*] Court has applied the . . . definition of liberty arbitrarily, in effect exposing [it] as a trump card to play when necessary to hold unconstitutional, without any real basis in the Constitution, statutes a majority of Justices find objectionable.”²⁴ The Hammer-Tuskey dichotomy exemplifies how substantive due process opponents rally behind incest as a monster *Lawrence* released, even whilst some in the sexual autonomy movement deny the very premise that incest is a monster to be caged.

These competing policy agendas are a major theme in Cahill’s 2005 article explicating her boundary violation theory, described *supra*. The most thorough examination of the Incest Horrible so far, Cahill departed from the blackletter approach taken by Bratt, McDonnell, Hammer, and Tuskey, focusing instead on how incest “has been used to define a normative vision of sexuality and the family.”²⁵ Cahill first argued that incest is “a bad fit for slippery slope arguments.”²⁶ Some aspects of the Incest Horrible have already been realized because incest is not an easily delineated, cohesive concept. Rather than a “monolithic taboo,” incest varies “from state to state, including who can commit, and what constitutes incest . . . it is unlikely that same-sex marriage will cause us to slide down the slope because in some ways we have already slipped.”²⁷ To Cahill, harm-based rationales cannot explain why incestuous relationships must be legally invalid.²⁸ Rather, “the

20. Hammer, *supra* note 19, at 1081 (discussing *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 575 (2005)).

21. *Id.* at 1081.

22. *Id.* at 1098.

23. John Tuskey, *What’s a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 *TOURO L. REV.* 597, 663 (2005).

24. *Id.*

25. Cahill, *supra* note 9, at 1546.

26. *Id.* at 1548.

27. *Id.*

28. *Id.* at 1571.

emotion of disgust” is the only explanation for the “depth and breadth of the incest taboo and its persistent place of ‘honor’ at the bottom of the slippery slope.”²⁹ Cahill asked rhetorically:

But should disgust, which is largely socially contingent, 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?³⁰

Cahill also questioned traditional rationales for incest legislation, suggesting that genetic harm and child abuse justifications “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.”³¹ But having undermined the underpinnings of incest prohibition Cahill pointedly did not offer a verdict on their constitutionality.³² Instead, she implied that a compelling countervailing state interest could be located in “anthropological accounts that have highlighted [incest’s] socially-constructed character.”³³ Cahill noted approvingly that “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 ‘being primarily cultural in origin, the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties.’ ”³⁴

Cahill responds to Justice Scalia: be careful what you wish for. But at the same time, she dodged the actual question: does *Lawrence* undermine criminal prohibitions on incest? By doing so she avoided a legalist mire. The majority of constitutional cases may have clear answers,³⁵ but sexual autonomy is at the forefront of a narrow and perpetually shifting no-man’s-land

29. *Id.* at 1549.

30. *Id.* at 1549-50.

31. *Id.* at 1548-49.

32. *See id.* at 1547 (“As a normative matter, I am more interested here in examining and critiquing the way in which the incest taboo has defined the other limits of kinship than in assessing whether laws against incest either will, or should, be repealed.”)

33. *Id.* at 1611.

34. *Id.* at 1609.

35. Or at least answers the vast majority of justices agree upon. *See, e.g.*, Kedar Bhatia, *A Few Notes on Unanimity*, SCOTUSBLOG (July 10, 2014, 10:40 AM), <http://www.scotusblog.com/2014/07/a-few-notes-on-unanimity/> (finding that 66% of judgments and 52% of majority opinions in the 2013 term were unanimous. 38% of cases were completely unanimous with no concurrences or dissents.).

of doctrinal change situated in between established realms of clearly constitutional and clearly not. Additionally, incest is one of the ultimate violations of communal norms. When these two factors coincide, extra-legal considerations are at their ascendancy, and determining the constitutionality of incest legislation seems a futile exercise in straw grabbing. But Cahill's hedging was similarly futile. Incest is indeed a diffuse phenomenon. Nevertheless, the reality that we "have already slipped"³⁶ does not undermine the considerable rhetorical force of Justice Scalia's *Lawrence* dissent. The image Justice Scalia conjured is not of relationships on the fringe of non-normative behavior. It is the prospect of sexual relations between fathers and their biological daughters or between biological brothers and sisters, of deformed offspring, of an incestuous road to the church altar. Does *Lawrence* mandate the legalization of consensual adult incest? If so, can states prohibit blood relatives from procreating? Must states also sanction their unions? The only way to resolve the "slippery slope" argument is to address it directly.

Deflection silences the cause of incestuous couples in the interests of the LGBTQ culture war. The Incest Horrible is not just a hypothetical illuminating *other* rights; real people want to pursue incestuous relationships without fear of criminal punishment. In December 2010, David Epstein, a political science professor at Columbia University, was charged with incest under New York law after being accused of having a three-year consensual relationship with his biological daughter, then in her early-twenties. Epstein's daughter was over 18 when the relationship began, and the two supposedly exchanged "twisted text messages."³⁷ Epstein's daughter refused to testify against him, and he pled guilty to "attempted incest," a misdemeanor.³⁸ Epstein's daughter was not charged. Did the Epsteins have a right to maintain their relationship free from government intrusion? If not, how do we determine who is the "victim" and who is the "perpetrator?" What if the case involved twins instead? Consensual participants in incest could be our neighbors, friends, students, or professors, and the constitutional conundrum amounts to more than the interstices of familiar jurisprudential battlefields.

Evaluations of Supreme Court precedent from a doctrinal perspective have become less popular in recent years. Many scholars have argued, broadly speaking, that the Court often decides constitutional issues in ac-

36. Cahill, *supra* note 9, at 1548.

37. *Columbia Professor Charged With Sleeping With Daughter*, HUFFINGTON POST, Dec. 10, 2010, http://www.huffingtonpost.com/2010/12/10/david-epstein-incest-char_n_794864.html.

38. *David Epstein Pleads Guilty to Misdemeanor Incest*, HUFFINGTON POST, June 10, 2011, http://www.huffingtonpost.com/2011/06/21/david-epstein-pleads-guil_n_881639.html.

cordance with prevailing societal winds.³⁹ No doubt, the Justices are as steeped in communal norms as everyone else. Indeed, considering their average age, the Justices' vision of propriety may tend to be a few years out of date. But we must be careful not to dismiss the explanatory power of doctrinal reasoning too quickly. In a 2013 speech on the subject of same-sex marriage, Justice Kennedy voiced his worries that if "[w]e come in too soon and too broad, we terminate" the democratic debate on marriage equality.⁴⁰ But he also mused, "'suppose you have a person with an injury, a person is hurting. He comes to court seeking relief.' The court could say 'go away for 10 years, then I'll see you . . . That would be better for the court,' but the individual might be denied his or her rights in the interim."⁴¹ Two years later, Justice Kennedy's majority opinion in *Obergefell* recognized that the fundamental right to marriage protects same-sex relationships. "The dynamic of our constitutional system," he proclaimed, "is that individuals need not await legislative action before asserting a fundamental right."⁴² This undermines the notion that Justice Kennedy and his fellow Justices believe that constitutional meaning is determined by the culture war victors.

The judicial outcome may well turn on external factors like intuitions about permissible behavior, changes in popular opinion, and the Justices' concerns about interfering with a nearly-universal taboo. But constitutional law must nevertheless be performed in the language of legal doctrine, and at present, considerable doctrinal ambiguity exists. For one, *Lawrence* does not explicitly specify the applicable tier-of-scrutiny for intrusions on our right to sexual intimacy, while *Obergefell* speaks directly only on same-sex couples' right to marry. Indeed, even if *Lawrence* did state the level of scrutiny used

39. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 381 (2009) ("Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to popular will. The justices in *Brown v. Board of Education* argued they were protecting constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement."); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 66-67 (1996) (calling for a reexamination of recent cases from a vantage point external to the doctrine: "It is my belief that the myth of the Court as countermajoritarian savior is largely responsible for this gap in the literature. . . It is time for constitutional historians to explode that myth, to identify and describe the parameters within which judicial review actually operates, and to create a richer and more credible account of the twentieth century's civil rights and civil liberties revolutions.").

40. Jess Bravin, *Justice Kennedy Speaks Out on Gay Marriage, Shutdown*, WALL ST. J., Oct. 10, 2013, <http://www.wsj.com/articles/SB10001424052702304500404579125862192123886>.

41. *Id.*

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

to evaluate sexual autonomy claims, when have tiers-of-scrutiny ever offered certainty or cohesion?⁴³ Lower courts and lawyers must express the law within the boundaries set by precedent, and make some sense of the incoherent morass that is the space between the lines. Doctrine is far from the final word on the constitutionality of incest prohibitions, but it is a fitting starting point for that conversation.

This Article evaluates the constitutionality of criminalizing intimate sexual relations between consenting adult parent-child and sibling couples. Part I situates criminal incest legislation as the legal manifestation of a sociological incest taboo as differentiated from the biological incest-avoidance mechanism known as the Westermarck Effect. It suggests that incest legislation can operate as a counter-natural legal intervention that suppresses natural impulses produced by the phenomenon known as Genetic Sexual Attraction. Part II asks whether incest falls within a constitutionally protected right. Part II(a) argues that the fundamental right to intimate sexual conduct articulated by *Lawrence* must encompass incestuous relationships. Incest cannot be meaningfully distinguished from same-sex sexual behavior. Part II(b) asserts that the fundamental right to bear children would be implicated by any law mandating the use of contraception by incestuous couples. Part III casts doubt on the sufficiency of the various countervailing state interests in criminalizing incestuous relationships. It evaluates government interests in morality, family structure, child welfare, genetic health, and the prevention of inherently coercive relationships. It argues that government interests in genetic health and coercion prevention are the strongest rationales for criminal prohibition, but, not only are existing state statutes poorly tailored to those interests, both theories pose considerable analytical difficulties. Part III(f) suggests a more constitutionally robust justification by casting incest as a Pandora's Box of diffuse social harms. Destroying the common nexus of a multiplicity of injuries becomes itself a compelling state interest. It proposes revised statutory language that would allow states to continue prohibiting sexual relationships between first-degree blood relatives in a manner consistent with the constitution. The Article then concludes by suggesting that doctrinal consistency may be too much to expect from judges steeped in the incest taboo, but that this thought experiment is nevertheless relevant as societal mores change.

43. See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 996 (2004) ("The venerable institution of tiered scrutiny is threatened with collapse. As its structure has become ever more complicated, its application has become increasingly unwieldy and uncertain . . . Deference to government judgment, once the exclusive hallmark of minimal scrutiny, now is an aspect of strict scrutiny, while minimal scrutiny sometimes lacks any deference to governmental judgment.").

I. THE WESTERMARCK EFFECT AND GENETIC SEXUAL ATTRACTION

The very idea of a sexual relationship between two first-degree blood relatives is unfathomable to many. Indeed, more states allow bestiality than incest.⁴⁴ Although states differ on whether sexual relationships between cousins or non-blood relatives are considered incestuous, there are near-universal state prohibitions against parent-child and sibling relationships.⁴⁵ Only a handful of outliers exist, and that pool has been shrinking since 2003. Ohio bans incestuous marriages, but only parental figures who engage in sexual conduct with their children commit a crime.⁴⁶ Rhode Island also bans incestuous marriages, but consensual sex is legal.⁴⁷ Rhode Island's permissiveness was until 2006 shared by South Dakota, which then passed a

44. At the moment, 13 states (Hawaii, Kentucky, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Texas, Vermont, Virginia, West Virginia, and Wyoming) have no law against bestiality. See Maria Turcios, *Bestiality Laws: Our Dirty Little Secret*, HASTINGS WOMEN'S L. J. BLOG (Feb. 20, 2014), <http://hastingswomenlj.org/journal/2014/2/20/e3y5p9h4xformoldf658mebzcse7va>. Alabama criminalized bestiality in 2014 and New Jersey is in the process of doing so. See ALA. CODE § 13A-6-221 (2014); S2296, 216th Leg. (N.J. 2014).

45. Compare TEX. PENAL CODE ANN. § 25.02 (2009) (Texas incest statute criminalizing sexual intercourse between cousins, adopted or otherwise), with N.Y. DOM. REL. LAW § 5 (McKinney) (cousins permitted to marry in New York), and N.Y. PENAL LAW § 255.25 (McKinney 2006) (cousins excluded from New York criminal incest statute.). 20 states include adoptive relatives within their incest legislation, while 30 states and the District of Columbia do not. 46 states and D.C. criminalize sex between uncles or aunts and nephews or nieces, while 4 do not. 26 states bar first-cousin marriages, while 17 states and D.C. permit them. Seven states permit first-cousin marriages conditionally, usually on the condition that the couple is infertile or otherwise will not have children. Only nine states criminalize sex between first-cousins. These figures include Michigan and South Dakota. New Jersey's statute is not included because it has yet to be signed into law. See Cahill, *supra* note 9, at 1563-64 (Cahill summarizes the diverse statutory approaches among the states, but since her article was first published South Dakota has banned incest and New Jersey is about to. See text accompanying notes 38-46. Cahill also mistakenly included Michigan along with Rhode Island as one of the states that permits consensual incest whilst prohibiting marriage. In 1996, Michigan banned sex between relatives up to the third degree, which includes first-cousins. See MICH. COMP. LAWS ANN. § 750.520e (2013).). See also National District Attorney's Association, *Statutory Compilation Regarding Incest Statutes* (2013) (This compilation is up-to-date as of March 2013.).

46. See OHIO REV. CODE ANN. § 2907.03 (2009).

47. See R.I. GEN. LAWS ANN. § 15-1-1 (2014); R.I. GEN. LAWS ANN. § 15-1-2 (2014); R.I. GEN. LAWS ANN. § 15-1-3 (2014). Interestingly, otherwise prohibited marriages between blood relatives are allowed if the partners are Jewish and follow religious precepts. See R.I. GEN. LAWS ANN. § 15-1-4 (2014). Rhode Island's criminal incest statute was repealed in 1989. See Cahill, *supra* note 9, at 1564.

criminal incest statute that also encompasses sex between first cousins.⁴⁸ Until 1979, New Jersey too possessed a criminal incest statute, but a new criminal code enacted that year “left a section planned for incest blank.”⁴⁹ On January 15, 2015, *New York Magazine* published an interview online with an anonymous 18 year old girl in a sexual relationship with her father. She was separated from him as a child. The girl stated: “we plan to move to New Jersey where we can be safe under the law, since adult incest isn’t illegal there, and once I’m there I’ll tell everyone. I’ll call my mom and let her know that we are in love and we are having children.”⁵⁰ In response, on February 5, 2015, a bill criminalizing incest was introduced in the New Jersey Assembly,⁵¹ followed 5 days later in the Senate.⁵²

Social norms may have changed with regard to homosexuality, but the incest taboo remains strong in America. This section summarizes the current bio-social consensus on the origins of this taboo—is it nature or nurture? In doing so, I conclude that neither the incest taboo, nor its derivative legal expression, derives from natural biological imperatives; far from being “natural,” criminal prohibitions on incest are “unnatural” efforts to improve on nature.

For nearly a century, scholars drawing on a now outdated medical-biological consensus that inbreeding does not have negative effects⁵³ believed the incest taboo to be entirely a social construct. Claude Levi-Strauss famously theorized that it evolved to discourage endogamy and encourage exogamous inter-communal alliances.⁵⁴ This “alliance theory” posits that the taboo prevents kinship networks from mating within, forcing them to exchange their women with other networks.⁵⁵ In other words, the incest taboo encourages the circulation of women between communities in order

48. Compare S.D. CODIFIED LAWS § 22-22A-2 (2014), with Cahill, *supra* note 9, at 1564.

49. *Angelini Bill Would Ban Incest in New Jersey*, NJ ASSEMBLY REPUBLICANS, Jan. 21, 2015, <http://www.njassemblyrepublicans.com/?p=17649>. New Jersey already prohibits incestuous marriages. See N.J. STAT. ANN. § 37:1-1 (2007).

50. Alexa Tsoulis-Reay, *What It's Like to Date Your Dad*, SCIENCE OF US, Jan. 15, 2015, <http://nymag.com/scienceofus/2015/01/what-its-like-to-date-your-dad.html>.

51. Assemb. B. 4150, 216th Leg., 2d Ann. Sess. (N.J. 2014).

52. S. 2743, 216th Leg., 2d Ann. Sess. (N.J. 2014).

53. Leslie White, *The Definition and Prohibition of Incest*, 50 AMERICAN ANTHROPOLOGIST 416, 417 (1948) (“[I]nbreeding as such does not cause degeneration; the testimony of biologists is conclusive on this point.”).

54. See, CLAUDE LEVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 42-51 (1969); see also JOSEPH SHEPHER, *INCEST: A BIOSOCIAL VIEW* 151-63 (1983) (summarizing the progression of thinkers and arguments that comprise the “Alliance School”).

55. *Id.*

to build affinity, commodifying women for social advantage.⁵⁶ The incest taboo reifies hierarchies of class and gender considered highly problematic in the 21st century. In the same constructivist vein, Sigmund Freud's adherents argued that the taboo is not only artifice, but counter-natural artifice.⁵⁷ To Freud, it is a necessary source of social anxiety and sexual dysfunction that forces us to repress our innate Oedipal tendencies.⁵⁸ Our desires frustrated, the incest taboo allows us to maintain the social structure of the family.⁵⁹

Today, however, the development of modern genetics has proven without a doubt that inbreeding can be biologically harmful.⁶⁰ Consequently, an increasing number of scholars believe that, contrary to at least one jurist's belief that "the taboo is neither instinctual nor biological,"⁶¹ humans are indeed hardwired to avoid inbreeding rather than are mere prisoners of artifice.⁶² First posited by Finnish anthropologist Edward Westermarck in 1891,⁶³ what has been termed the "Westermarck Effect" is comprised of three main hypotheses. William Durham⁶⁴ describes them as (1) "a lack of inclination for, and a feeling of *aversion* associated with the idea of, sexual intercourse between persons who have lived in a long-contin-

56. Examples include the marital alliances formed between aristocratic families.

57. See SHEPHER, *supra* note 54, at 135-50 (summarizing the work of Freud and his adherents, collectively referred to as the "Socialization School"); see also SIGMUND FREUD, *TOTEM AND TABOO* (1950).

58. See SHEPHER, *supra* note 54, at 135-50.

59. *Id.*

60. See discussion *infra* Part III(c); see also Arthur P. Wolf, *Introduction to INBREEDING, INCEST, AND THE INCEST TABOO* 1, 3 (Arthur P. Wolf & William H. Durham eds., 2005) ("When Aberle et al. met at Stanford in 1956, they too appear to have taken the position that inbreeding is not necessarily deleterious. But by the time they published the results of their deliberations in 1963, they had changed their minds because of 'new information' 'which appeared after the 1956 argument had been developed' . . . This led to the published conclusion that 'the biological advantages of the familial incest taboo cannot be ignored.' . . . The present state of our knowledge of the consequences of inbreeding is summarized in this volume by Alan H. Bittles in Chapter 2. For Bittles the question is not whether inbreeding is injurious; it is how injurious.").

61. *Benton v. State*, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring).

62. See e.g., Debra Lieberman & Adam Smith, *It's All Relative: Sexual Aversion and Moral Judgments Regarding Sex Among Siblings*, 21 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 243, 246 (2012) (Discussion finding that people's aversion toward their own siblings "predict the intensity of moral judgments regarding sibling incest in general," suggesting that "psychological adaptations guiding personal sexual decisions can color moral judgments about the behavior of other people.").

63. See 2 EDWARD WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (1922).

64. See William H. Durham, *Assessing the Gaps in Westermarck's Theory*, in *INBREEDING, INCEST, AND THE INCEST TABOO* 121, 122 (Arthur P. Wolf & William H. Durham eds., 2005).

ued intimate relationship.”⁶⁵ (2) Aversion is an evolutionary *adaptation* against the negative effects of inbreeding. (3) Aversion causes the incest taboo, which *expresses* itself “in custom and law as a prohibition of intercourse between near kin.”⁶⁶ Westermarck was ignored in the early-20th century when his theory seemed counter-factual.⁶⁷ Now, at least in the form of aversion theory, the Westermarck Effect is hegemonic.⁶⁸

But while the existence of sexual aversion between close childhood associates is now established consensus,⁶⁹ there is strong evidence against the expression hypothesis. In other words, the incest taboo, and its legal manifestations, are *not* a causal product of instinctive biological impulses. For one, expression theory is undermined by the diffuseness of norms. If the taboo were biologically caused, then it should be universal and hew closely to the subjects of the aversion effect—relationships between close childhood companions. But the incest taboo is far from universal; in many cultures, what Americans consider quintessential incest is not taboo, and may even be

65. 2 WESTERMARCK, *supra* note 63, at 198 (emphasis added).

66. *Id.* at 193.

67. *See, e.g.*, LORD RAGLAN, *JOCASTA’S CRIME* 16 (1933) (critiquing Westermarck’s theory for assuming that incest is harmful “in the face of all the evidence”).

68. *See, e.g.*, Durham, *supra* note 64, at 121 (“The skepticism and dismissal that plagued Westermarck’s incest theory in the wake of early critiques by Sigmund Freud and Sir James Frazer have given way to a recent groundswell of empirical validation and approbation. Today, Westermarck’s theory is often held up as paradigmatic of current understandings of the relationship between genes and culture in human evolution. Frans de Waal, for example, writes that the Westermarck effect—that is, the absence of sexual interest between adults who were reared together as young children—serves as ‘showcase’ of new Darwinian approaches to human behavior. Other authors claim that sibling incest avoidance not only vindicates Westermarck but also shows that ‘a tight and formal connection can be made between biological and cultural change.’ And in his recent treatise on the unity of knowledge, E. O. Wilson notes that Westermarck’s argument is, simply, ‘the current explanation’ of incest avoidance.”).

69. Research on the Israeli Kibbutz and Sim-Pua Marriages in Taiwan constitute the canonical studies confirming the Westermarck Effect. In both instances, there were fewer marriages and higher rates of divorce than would have been expected had there been no close childhood association between mates. In the instance of the Sim-Pua, betrothed girls were raised by their in-laws alongside their future husbands. Thus, there was not only no social taboo that would otherwise account for the results, but in fact an opposite expectation of marriage. *See* ARTHUR P. WOLF, *SEXUAL ATTRACTION AND CHILDHOOD ASSOCIATION: A CHINESE BRIEF FOR EDWARD WESTERMARCK* 198-213 (1995); SHEPHER, *supra* note 54, at 51-67. Nevertheless, the Westermarck consensus is not without its dissenters. *See* Eran Shor & Dalit Simchai, *Exposing the Myth of Sexual Aversion in the Israeli Kibbutzim: A Challenge to the Westermarck Hypothesis*, 117 *AM. J. SOC.* 1509 (2012).

encouraged.⁷⁰ Egyptians married brother and sister. This practice was common among everyday people, not just the elite.⁷¹ In at least twenty European countries, consensual incest between adult siblings is legal.⁷² In some European countries, the incest taboo in its legal form has unraveled or is beginning to unravel. France legalized consensual incestuous conduct in 1811, Portugal in 1983, and Serbia in 2006.⁷³ In 2010, the Swiss upper-house drafted a law decriminalizing incest, noting that there had been only three cases since 1984 and they all involved children already protected by laws against child abuse.⁷⁴ But in terms of intensity of feeling, there was a clear difference between those who favored and those who opposed decriminalization; one MP said he saw nothing wrong with consensual incest, while another retorted that “murder is also quite rare in Switzerland but no one suggests that we remove that as an offense from the statutes.”⁷⁵ In Germany, the recent case of Patrick Stübing and Susan Karolewski, a sibling couple who had four children together, was appealed all the way to the Federal Constitutional Court.⁷⁶ Stübing was convicted under a statute

70. See e.g., ROBERT J. SMITH & ELLA LURY WISWELL, *THE WOMEN OF SUYE MURA* 68-72 (1982) (describing a pre-war Japanese rural practice of masturbating young children to put them to sleep).

71. See e.g., Walter Scheidel, *Brother-Sister Marriage in Roman Egypt*, 29 J. BIOSOCIAL SCI. 361 (1997) (Using Roman census records showing that 37% of marriages in the city of Arsinoe were between full siblings, the author finds that reproduction could not have occurred at replacement-levels.).

72. See *Stübing v. Germany*, App. No. 43547/08, Eur. Ct. H.R. (2012) (“Out of thirty-one Council of Europe Member States, sixteen States (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Greece, Iceland, Ireland, Liechtenstein, Macedonia, Moldova, San Marino and Slovakia) the performance of consensual sexual acts between adult siblings is considered a criminal offence, while in fifteen of them (Armenia, Azerbaijan, Belgium, Estonia, Georgia, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Portugal, Serbia, Slovenia and Ukraine) it is not punishable under criminal law . . . and were not subject to criminal liability in five further countries (France, the Netherlands, the Russian Federation, Spain and Turkey).”).

73. See *Stübing v. Germany*, App. No. 43547/08, Eur. Ct. H.R. (2012) (“[I]ncest between adult siblings has been decriminalised in Portugal in 1983 and in Serbia in 2006.”); Max Planck Institute, *Criminal Prohibition of Incest in International Legal Comparison*, in *LIMITS ON THE PROTECTION OF LEGAL INTERESTS IN THE CRIMINALIZATION OF INCEST* (2015), https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html (“The systems without criminal incest provisions include France (in accordance with the Napoleonic Code of 1811). . .”).

74. Allan Hall, *Switzerland Considers Repealing Incest Laws*, TELEGRAPH, Dec. 10, 2010, <http://www.telegraph.co.uk/news/worldnews/europe/switzerland/8198917/Switzerland-considers-repealing-incest-laws.html>.

75. *Id.*

76. BVerfG [Federal Constitutional Court], 2 BvR 392/07, Feb. 26, 2008, http://www.bverfg.de/e/rs20080226_2bvr039207.html.

barring vaginal sex between lineal ancestors and descendants, and between full and half-siblings.⁷⁷ The court commissioned a study by the Max Planck Institute estimating the total prevalence of consensual sex between siblings at 2-5% of the population, some 1.6 to 4 million Germans.⁷⁸ Although the court upheld the law, a ruling subsequently affirmed by the European Court of Human Rights,⁷⁹ Stübing sparked a heated debate on consensual adult incest.⁸⁰ The question was forwarded to the German Ethics Council, which released a non-binding opinion that “consensual intercourse between adult siblings should in future not be treated under criminal law.”⁸¹ Clearly the incest artifice we observe and experience (“taboo”) does not map onto its biological counterpart (“aversion”). But aversion itself is only crudely correlated with inbreeding. It is over-inclusive in that not all children who grow up together are blood-relatives. It is under-inclusive in that children who do not grow up together might, of course, be blood-relatives. Aversion and incest avoidance are thus not the same, and if law mirrored nature, law would no longer be an incest prohibition but rather a prohibition against sexual conduct between close childhood associates. Although expression theory implies a cohesive and universal taboo matching our aversions, it turns out that taboo, aversion, inbreeding, and the law overlap only loosely.⁸² As we shall see in Part III, this poses particular challenges for the constitutional tailoring doctrine.

77. StGB [Penal Code], § 173, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

78. See *Incest in Criminology and Genetics, in Limits on the Protection of Legal Interests in the Criminalization of Incest*, MAX PLANCK INSTITUTE (2015), https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest_krim.html.

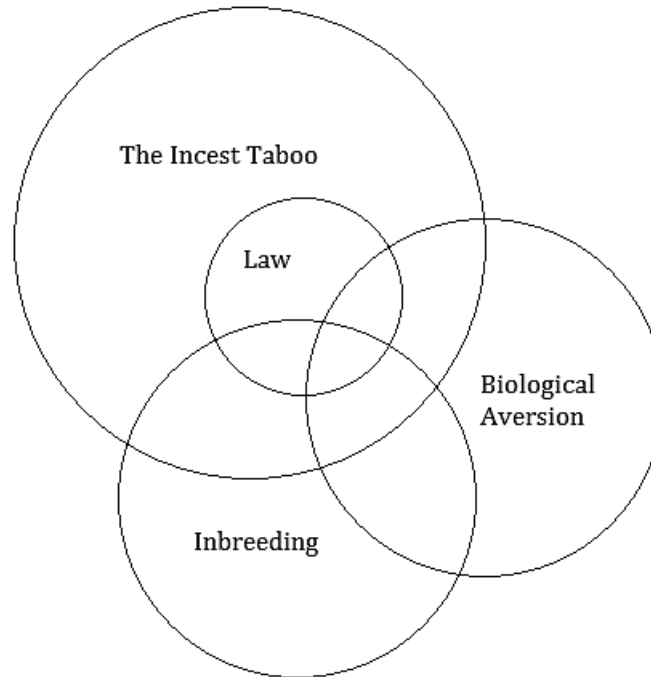
79. See *Stübing v. Germany*, App. No. 43547/08, Eur. Ct. H.R. (2012).

80. See, e.g., Daniel Sokol, *What's So Wrong With Incest? The Case of Stübing v. Germany*, UK HUMAN RIGHTS BLOG (Apr. 15, 2012), <http://ukhumanrightsblog.com/2012/04/15/whats-so-wrong-with-incest-the-case-of-stubing-v-germany/>.

81. Press Release, German Ethics Council, A Majority in the Ethics Council Recommends a Revision to Section 173 of the German Criminal Code Regarding Consensual Incest Between Siblings (Sept. 24, 2014) (on file with author).

82. See *infra* Figure 1.

FIGURE I: THE RELATIONSHIP BETWEEN THE INCEST TABOO, AVERSION, INBREEDING, AND LAW



Moreover, the incest taboo is likely not a product of nature because the same evidence in favor of aversion being a biological adaptation simultaneously undermines the expression hypothesis. We know that aversion is biological rather than social because the empirical support derives from three different environments where there were “clear signs of the lack (or decrease) of sexual attraction between childhood associates, although sexual contacts between the individuals in question were not prohibited but even encouraged.”⁸³ But as Durham notes, if the expression hypothesis is correct, then sexual aversion also should have produced a concurrent incest taboo. The absence of the taboo in one study may be an outlier, but its absence from all three studies done in vastly different communities (child socialization in Israeli kibbutzim, Taiwanese sim-pua marriages, and Lebanese arranged cousin marriages) militates against a causal connection. Of course this is only dispositive against expression theory in that biology is not a sufficient ingredient, but paired with the fact that the incest taboo is non-universal, non-cohesive, and does not and cannot hew closely to its biologi-

83. Neven Sesardic, *From Genes to Incest Taboos: The Crucial Step*, in INBREEDING, INCEST, AND THE INCEST TABOO, 109, 116 (Arthur P. Wolf & William H. Durham eds., 2005).

cal roots, it seems unlikely that the taboo is merely an expression of our biology.

Due to this disjunction, biological and sociological explanations for the incest taboo are now locked in an uneasy coexistence. Incest legislation builds on only one of two different but overlapping phenomena, the first social (“taboo”) and the second biological (“aversion”). Law is a manifestation of taboo; consequently, social justifications for criminalization—morality or protection of the family unit—are actually self-perpetuating. Via exclusion of non-normative family structuring we strengthen preexisting social norms, and increase the cost of violating those norms. Meanwhile, public-health rationales recast criminal prohibitions as a man-made prophylactic against inbreeding operating parallel to and independent of biological aversion. Some of these manmade prophylactics work better. Laws tailored to encompass only real blood relatives have improved on the state of nature. There is nothing inherently “natural” about incest legislation.

In fact, Genetic Sexual Attraction (“GSA”) suggests that incest laws are counter-natural. GSA refers to the strong attraction felt by blood relatives reunited after being separated as children. A phenomenon that has attracted only a scattering of scholarly attention so far,⁸⁴ the name was coined in the late 1980s by Barbara Gonyo, the founder of a support group for adoptees reunited with blood relatives.⁸⁵ Post-adoption agencies are familiar with GSA, and the present consensus is that it occurs in approximately 50% of all reunions.⁸⁶ This high percentage rate reinforces the limited evidence we have suggesting that the absolute number of GSA cases is not negligible. We do not know how many adoptees search for their biological family,⁸⁷ but the United Kingdom Office of National Statistics has

84. See, e.g., Maurice Greenberg & Roland Littlewood, *Post-Adoption Incest and Phenotypic Matching: Experience, Personal Meanings, and Biosocial Implications*, 68 BRIT. J. MED. PSYCH. 29 (1995).

85. See BARBARA GONYO, I’M HIS MOTHER BUT HE’S NOT MY SON (2011) (ebook); Alex Kirsta, *Genetic Sexual Attraction*, GUARDIAN, May 16, 2003, <http://www.theguardian.com/theguardian/2003/may/17/weekend7.weekend>.

86. See Greenberg & Littlewood, *supra* note 84, at 35 n.2; Kirsta, *supra* note 85.

87. See Marshall D. Schechter & Doris Bertocci, *The Meaning of Search*, in THE PSYCHOLOGY OF ADOPTION 62, 67 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (“The question is often raised as to the prevalence in the total adoptee population of search interest and search behavior. (Search *ideation* must be distinguished from *activated* search, which may or may not follow.) However, with reference to the United States, not even remote numerical estimates are possible for either category. This is in part because, according to the Department of Health and Human Services in Washington, D.C., since 1971, no national statistics have been compiled on the numbers of legally adopted persons in any age group The studies from Great Britain, where adults have legal access to original birth certificates, indicate that less than 1% of eligible adoptees have availed themselves of the

projected that roughly a third of those in the UK will eventually request their birth records.⁸⁸ In the age of social media, this likely underestimates the search rate. Additionally, familial reunions from those raised in divorced and single-parent homes further swell the number of those who may experience GSA. With exceptions, lurid tabloid stories outing incestuous relationships often involve blood relatives separated at a young age,⁸⁹ and nearly all of the real-life examples of consensual adult incest found in the course of researching this Article (and cited within) are examples of GSA.⁹⁰ This tabloid sampling likely reflects the distribution of consensual adult incest in the First World. On the one hand, incest is taboo regardless of explanation, so those who experience GSA are no less likely to share their stories. On the other hand, non-GSA relationships would be rarer due to the Westermarck Effect. Freud's Oedipus Complex has returned with a vengeance, this time armed with empirical evidence.

Incest elicits from most of us an intuitive revulsion that we are tempted to justify in the language of natural versus unnatural. The Court has rationalized legal decisions with reference to this dichotomy in the recent past. In 1989, it ruled that a father has no due process right to paternity of and visitation with his biological child.⁹¹ Justice Scalia's plurality opinion observed that "California law, like nature itself, makes no provision for dual fatherhood."⁹² But in the context of incest at least, the natural/unnatural distinction is unsound. Incest laws can only be understood as an effort to socially and genetically engineer society, and human beings, to be better than what we find in nature. It is important to emphasize that the creation of artifice alone does not render legislation constitutionally suspect. Hobbes would remind us that the very purpose of law is to transcend the natural state. But if we accept the validity of alliance theory, an approach that retains considerable weight in the academy, then the social rationales

open record *within any given year*. In a recent essay, Triseliotis (1984) suggests that a more meaningful figure would be the proportion of adoptees who search *over the course of their lifetime* which, by his calculations, would raise the figure to about 15%. In any event, one cannot reasonably assume a direct applicability from Scotland to the United States. American adoptees who have joined search organizations number in the tens of thousands It is impossible to know the numbers of adoptees searching independently.") (citations omitted).

88. Rupert Rushbrooke, *The Proportion of Adoptees Who Have Received Their Birth Records in England and Wales*, 104 *POPULATION TRENDS* 26, 30 (2001).

89. See, e.g., Roya Nikkhah, *Grandmother and Grandson to Have Child Together*, *TELEGRAPH*, May 1, 2010, <http://www.telegraph.co.uk/news/newsttopics/howaboutthat/7662232/Grandmother-and-grandson-to-have-child-together.html>.

90. The only exception is the case of Professor David Epstein, and Czech twin brothers Elijah and Milo Peters.

91. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

92. *Michael H.*, 491 U.S. at 118. (Scalia, J., plurality).

undergirding criminal prohibition become normatively dubious in that they are inherently inequitable; we no longer think it acceptable to build social kinship by exchanging women like chattel.

II. THE RIGHTS . . .

A. *Autonomy of Intimate Sexual Conduct*

In recent years, the legal manifestations of the incest taboo have come to rest on constitutional quicksand. In 2003, in *Lawrence v. Texas*, the Supreme Court overturned *Bowers v. Hardwick* and recognized a right to sexual intimacy that protects the private sexual conduct of homosexual couples.⁹³ Careful examination of *Lawrence*'s reasoning reveals that sexual intimacy must also encompass sexual relationships between first-degree relatives. Of course, *Bowers* casts a lengthy shadow from beyond the grave. *Lawrence* was decided in 2003, a time when community norms had shifted in favor of increasing tolerance toward and indeed affirmative acceptance of LGBTQ rights.⁹⁴ The incest taboo has experienced no comparable erosion in the United States. At the moment, legalized incest remains beyond the comprehension of a public that finds it repugnant. Judges confronted with the question would likely seize the first opportunity to differentiate incest from homosexuality. Yet such efforts face considerable doctrinal obstacles. First, this section argues that *Obergefell* and *Lawrence* foreclose the possibility of manipulating the generality of the constitutional right—for example, by narrowing sexual intimacy into *same-sex* intimacy—so as to omit incest. Second, “incestuous couples” cannot be distinguished meaningfully from homosexual couples via the equal protection elements of *Lawrence*'s reasoning; sexual intimacy protects the freedom to choose one's sexual partners even absent an immutable “incestuous persons” identity group. Third, sexual intimacy is a “fundamental right” subject to strict scrutiny.

1. Defining the Right

Before *Obergefell*, courts could ensure a troublesome plaintiff's defeat by manipulating the generality of the rights claimed. When homosexuality

93. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

94. Over 50% of Americans favored anti-sodomy laws in 1986, while in 2003 during the run-up to the *Lawrence* decision, over 50% of Americans thought that sodomy should be legal. See ANDREW R. FLORES, THE WILLIAMS INSTITUTE, NATIONAL TRENDS IN PUBLIC OPINION ON LGBTQ RIGHTS IN THE UNITED STATES 18 (2014).

was considered by many to be just as repulsive and alien as incest, the *Bowers* court avoided decades of case-law securing privacy interests attached to bedroom activities by restating the right claimed by the plaintiff with extraordinary specificity; it was not that the intimacies of the body and the private home had been overpowered by a sodomy prohibition narrowly tailored to a compelling state interest, but rather that the constitution did not recognize a “fundamental right to engage in homosexual sodomy.”⁹⁵

Rights are no longer so elastic. Although we cannot divine the Court’s future consistency, *Obergefell* now binds us to applying rights at the level of generality articulated by the precedents establishing those rights. Writing for the majority, Justice Kennedy refused to narrow the right at issue in *Obergefell* from the “right to marry,” recognized since *Loving v. Virginia*, into a “new and nonexistent ‘right to same-sex marriage.’”⁹⁶ This stands in some tension with *Washington v. Glucksberg*’s call for a “careful description” of fundamental rights.⁹⁷ But, as Michael Dorf and Laurence Tribe distinguished in their amicus brief, whereas same-sex couples seeking to marry fell within an established fundamental right, the right to physician-assisted death claimed by the *Glucksberg* plaintiffs was instead encompassed within a right to suicide unprecedented in the legal canon.⁹⁸ Justice Kennedy agreed:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.⁹⁹

95. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

96. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). *See also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

97. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

98. Brief for Laurence Tribe & Michael Dorf, as Amici Curiae Supporting Petitioners at 2-3, *Obergefell*, 135 U.S. 2584 (No. 14-556) (citations omitted) (“Some defenders of state same-sex marriage bans contend that this Court changed its analysis of fundamental rights in *Washington v. Glucksberg*, and mandated a very narrow delineation of the fundamental right claimed to be at issue in any given case. But in *Glucksberg*, which declined to categorically invalidate state laws prohibiting assisted suicide, the Court found no fundamental right to commit suicide comparable to the right to marry, and then went on to find no reason to permit persons to assist others in committing suicide.”).

99. *Obergefell*, 135 S. Ct. at 2602.

Instead, the Court decided, a right must be as narrow or as wide as prior cases specify. Future deployment of a right cannot be limited only to the particular contexts of its past usage:

Loving did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.¹⁰⁰

Obergefell thus repudiated Justice Scalia’s suggestion, in footnote 6 of the *Michael H. v. Gerald D.* plurality, that a fundamental right should be defined at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹⁰¹ When footnote 6 was written in 1989, it was joined only by Justice Rehnquist. Justice O’Connor, joined by Justice Kennedy, wrote a separate concurrence opposing such a restrictive analytical approach:

I concur in all but footnote 6 of Justice Scalia’s opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be “the most specific level” available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.¹⁰²

The concerns expressed in the rejoinder were echoed by many in the academy,¹⁰³ and *Obergefell* allowed Justice Kennedy the opportunity to refine his

100. *Obergefell*, 135 S. Ct. at 2602.

101. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality).

102. *Michael H.*, 491 U.S. at 132 (O’Connor, J., joined by Kennedy, J., concurring).

103. See, e.g., J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990) (“His test assumes that constitutionally protected liberties match or do not match existing traditions in an unproblematic way. For each asserted right there either is or is not a specific tradition associated with its protection. Yet there are many different ways of describing a liberty, and many different ways of characterizing a tradition. For example, we might point out that under his test, there has been no established tradition in California for protecting Justice Scalia’s own rights to visit his children, since there is no tradition of affording protection to fathers who are children of Italian immigrants and who graduated from Ivy League law schools before 1965, were appointed to the United States Supreme

three-decades-old reservations about Footnote 6 into the Court's first clear pronouncement on the generality of rights to command a majority of votes. With *Obergefell*, Justice O'Connor's *Michael H.* concurrence is now indisputably the law of the land.

Under *Obergefell*'s generality guidelines, to characterize *Lawrence* as a case about autonomy of same-sex intimacy rather than autonomy of sexual intimacy is to commit the same mistake the *Bowers* majority did. As Tribe, who argued *Bowers* on behalf of Michael Hardwick, observed, "the Georgia statute [in *Bowers*]*—*which was challenged on its face*—*criminalizes *all* oral and anal sexual contact, whether homosexual or heterosexual, married or unmarried . . . the gravamen of Hardwick's offense was the physical act he performed, not the gender of the person with whom he performed it."¹⁰⁴ The four *Bowers* dissenters agreed,¹⁰⁵ and by overturning *Bowers*, *Lawrence* vindicated the view that the particular right at stake hinged on the inherent intimacy of sexual relationships and not on the identity or sexuality of the persons involved. Unlike the facially neutral Georgia statute in *Bowers*, the Texas statute challenged in *Lawrence* criminalized "deviate sexual intercourse with another individual of the same sex."¹⁰⁶ In her concurrence, Justice O'Connor seized on this distinction, arguing that the Texas statute was invalid under the Equal Protection Clause as an instance of impermissible animus.¹⁰⁷ It was a vain attempt to save *Bowers*; "I joined *Bowers*, and do

Court by former governors of the state of California and have more than two children but less than thirteen. Indeed, the question has hardly ever come up. Justice Scalia would no doubt have responded that these are the wrong factors to consider in matching liberty to tradition. And we might reply: How do you, oh purveyor of neutral principles, know this?"); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-1098 (1990) (critiquing Footnote 6's devotion to tradition and specificity as an invitation to arbitrary decision making).

104. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 1431 (2d ed. 1988).
105. *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) ("[T]he Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.").
106. *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).
107. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citations omitted) ("We have consistently held, however, that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

not join the Court in overruling it.”¹⁰⁸ If Texas’ unequal treatment of homosexual and heterosexual sodomy were the crux of the decision, Justice O’Connor’s concurrence would have controlled.

Instead, the *Lawrence* majority held that “*Bowers* was not correct when it was decided, and it is not correct today.” Rather than sexual orientation, *Lawrence* was premised on an “emerging recognition that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁰⁹ The Court reaffirmed that the liberty inherent in the Due Process Clause protects matters—

—involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, choices central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹¹⁰

A person’s sexual and romantic relationships are surely among these deeply private matters central to that individual’s identity. As Justice Scalia suggested in his dissent, it would be difficult to exclude consensual adult incest from such a broadly articulated principle.¹¹¹ *Lawrence* clarified that liberty is not derivative of physical locality.¹¹² Intimate acts are constitutionally protected because such conduct is integral to self-definition regardless of where it occurs; the freedom to choose one’s own life path cannot be intruded upon without compelling cause. The Court emphasized that this self-definitional liberty first recognized in *Griswold* would mean little if it did not protect “the most private human conduct, sexual behavior, and in the most private of places, the home. [Sodomy prohibitions] do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as

108. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring).

109. *Lawrence*, 539 U.S. at 572 (majority opinion).

110. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

111. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

112. *See Lawrence*, 539 U.S. at 562 (majority opinion) (“[T]here are other spheres of our lives and existence, outside the home, where the state should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”).

criminals.”¹¹³ The freedom to pursue a sexual relationship, Justice Kennedy continued, “should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”¹¹⁴

Distilled, *Lawrence* establishes autonomy to decide in matters of sexual and relational intimacy, a right that is inclusive of but not exclusive to same-sex relationships and conduct. *Lawrence* pegged the proper generality level of the right for us. “Sexual behavior” with a family member is still “sexual behavior,” and the enforcement of criminal incest laws invokes the same concerns that animated both Justice Douglas in *Griswold* and Justice Kennedy in *Lawrence*: the state barging into a private bedroom (“the most private of places”) to police consensual sexual relationships (“the most private human conduct”).¹¹⁵

The sense of intrusion underlying *Griswold* and literally played out by the facts of *Lawrence* does not suddenly evaporate in regards to criminal incest legislation. It would be arbitrary to restrict sexual liberty to same-sex relationships merely because *Lawrence* invoked the right specifically in regards to a statute policing same-sex conduct. As Justice Kennedy remarked in *Obergefell*, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”¹¹⁶ *Bowers* would still be law. Instead, just as *Obergefell* “inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right,”¹¹⁷ jurists are obligated to do the same for the right to sexual intimacy.

2. The Equal Dignity Doctrine

So what exactly does “sexual intimacy” encompass? One might be tempted to differentiate incest from same-sex relationships by emphasizing choice of partner. *Lawrence*’s holding secured individual freedom to engage in consensual adult sexual relationships, but partner choice may yet be tied to identity politics. In the equal-protection context at least, identity attribution has become the primary mode of claims-making,¹¹⁸ and the LGBTQ

113. *Lawrence*, 539 U.S. at 567.

114. *Lawrence*, 539 U.S. at 567.

115. *Lawrence*, 539 U.S. at 567.

116. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

117. *Obergefell*, 135 S. Ct. at 2602.

118. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1883 (1987) (“Even this usual conception of rights, premised on autonomy, relies on a social and communal construction of boundaries among people. Boundaries, whether social, psychological, or legal, do not exist naturally; they are invented and

rights movement has pursued a general legal strategy that makes much of like-race arguments.¹¹⁹ Tribe notes that an individual's freedom of action is only ancillary to the *Lawrence* holding.¹²⁰ Rather, *Lawrence* ensured that one person's chosen sexual relationship with another will be treated by the state with the same dignity and respect as other sexual relationships.¹²¹ The right to "sexual intimacy," then, is as much derived from principles of equality as it is from liberty and privacy:

Lawrence, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact. And the Court left no doubt that it was protecting the equal liberty and dignity not of atomistic individuals torn from their social contexts, but of people as they relate to, and interact with, one another.¹²²

Thus, while *Lawrence* was built on the due process clause, its equality implications cannot be ignored.¹²³ By criminalizing what was commonly viewed as quintessentially "homosexual" activity, even when engaged in by opposite-sex couples, Texas attached a stigma to same-sex relationships that "de-means the lives of homosexual persons" and detracts from their dignity as individuals.¹²⁴

reinvented by people in formal and informal ways. As a psychological matter, the very experience of a bounded personal identity requires not just one individual, but many who help constitute the boundaries. In the words of one theorist, autonomy is a process of 'parts that mutually specify themselves,' like M.C. Escher's drawing of two hands, drawing each other.").

119. See Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., 1998).

120. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1898 (2004).

121. *See id.*

122. *Id.*

123. This is especially true in light of *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.").

124. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

Although ultimately unpersuasive, a state could distinguish between homosexuality and incest by asserting that, in the case of incest, there is no immutable identity that is being demeaned. The current scientific consensus is that homosexuality is in part biologically intrinsic and encoded in our DNA.¹²⁵ Thus, as states could potentially argue, there are no “incestuous persons” like there are “homosexual persons.” Banning incest is to deny heterosexuals and LGBTQs a very circumscribed set of partners in a manner applicable to *everyone*, regardless of orientation. Sexual autonomy is indeed protected, the state would concede, but a law restricting our freedom to enter into sexual relations with our parents and siblings, yet giving us free choice as to the remaining 7 billion on the planet, is only a *de minimis* burden on liberty if a burden at all. Since society does not recognize “incestuous persons” as a category akin to “homosexual persons,” or “women,” or “African-Americans,” incest is outside the sexual autonomy umbrella. Though his freedom of action is slightly reduced, the dignity of a white heterosexual male is not impinged when the state prohibits him from sleeping with his sister.

Such reasoning does not survive close examination. To begin, GSA provides a group of people potentially identifiable *ex ante* who are particularly and specifically burdened by incest legislation. Criminal prohibition sends a message to those who experience GSA that their natural, biological reactions to meeting a long-lost relative are morally repugnant. These are not feelings they opt into, or can easily opt out of. Falling madly in love with a family member is not something they chose, and criminalization not only demeans the relationships that result, but also the individual who must now ask “what is wrong with me?” GSA is, of course, not a disability and should not be so stigmatized. It is a biological reaction innate in greater or lesser degree to all of us triggered by a particular social context.¹²⁶ Adoptees and children from divorced households are not a suspect class, but one need not belong to a suspect class to be treated unequally by the state.

Privacy and liberty cannot be a function of the immutability of the burdened identity association, nor is an immutable identity association a prerequisite for Fourteenth Amendment protection. If *Planned Parenthood of Se. Pa. v. Casey* had been decided solely on the basis of gender discrimina-

125. Of course, it must be noted that “in part” includes much dissensus. See, e.g., Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1828 (2004) (“Sexual orientation probably is not determined by any one factor but by a combination of genetic, hormonal, and environmental influences. In recent decades, biologically based theories have been favored by experts. The high concordance of homosexuality among monozygotic twins and the clustering of homosexuality in family pedigrees support biological models.”).

126. See *supra* Part I.

tion,¹²⁷ abortion before the point of viability would receive only intermediate scrutiny. *Eisenstadt v. Baird* invalidated a Massachusetts statute barring the distribution of contraceptives to unmarried individuals under the Equal Protection Clause because the statute mandated “dissimilar treatment for married and unmarried persons” in regards to their fundamental right to “decide whether to bear or beget children.”¹²⁸ It would be strange indeed to interpret *Eisenstadt* to elevate bachelordom to a suspect status alongside race or gender. Instead, *Eisenstadt* stood for the principle that the Equal Protection Clause compels the government to treat all persons equally in their exercise of a fundamental right. Kenji Yoshino has proposed that this dignity-based approach to equality, characterized by Tribe as a “double helix of Due Process and Equal Protection” tightly wound “into a doctrine of equal dignity,”¹²⁹ adapts to public anxiety over increasing pluralization by dodging a judge-led inquiry into the validity of an asserted identity grouping.¹³⁰ Thus, unlike the Court’s traditional suspect-class jurisprudence, the equal dignity doctrine avoids Balkanizing the American social fabric in the wake of the heightened awareness and proliferation of identity politics over the past few decades.¹³¹ It does so by circumventing the “suspect class” as an instrument of constitutional analysis.

This conceptual turn was integral to *Lawrence*, where the Court invalidated Texas’ anti-sodomy statute because the law demeaned the dignity of same-sex vis-à-vis heterosexual couples,¹³² even though the Court had never expressly admitted sexual orientation into the traditional suspect-class classi-

127. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding that a state can only regulate abortions if the regulation does not pose an “undue burden” on the woman’s fundamental right to choose whether to bear or beget a child).

128. 405 U.S. 438, 454 (1972).

129. See Laurence Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (“*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity.”); see also Tribe, *supra* note 120, at 1898.

130. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751-87 (2011) (describing the rise of pluralism anxiety in the United States, and the Court’s reaction to that anxiety by denying constitutional protection to new groups under the Equal Protection Clause, whilst compensating for the resultant civil-rights deficit by expanding the reach of the Due Process Clause).

131. *Id.* at 787-802 (arguing that the shift from traditional group-based equality to a dignity-based liberty-equality fusion is a desirable process that quiets pluralism anxiety and maintains social unity).

132. See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

fication scheme.¹³³ Indeed, the equal dignity doctrine is firmly entrenched in nearly a century of case-law.¹³⁴ In 1942, the Court held in *Skinner v. Oklahoma* that the mandatory sterilization of blue-collar but not white-collar criminals violated Equal Protection by imposing an unequal burden on the fundamental right to procreate, “one of the basic civil rights of man.”¹³⁵ Twenty-five years later, the Court declared anti-miscegenation laws unconstitutional under both Equal Protection and Due Process, writing:

[t]o deny this fundamental freedom [to marry] on so unsupported a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.¹³⁶

And in *Obergefell*, the exclusion of lawful intimate relationships from the fundamental right to marry recognized in *Loving* offended both Due Process and Equal Protection.¹³⁷ With the exception of *Loving*, none of these cases involved one of the traditional suspect classes.

133. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (holding that a Colorado state constitutional amendment fails even rational basis review because it deprives citizens of equal protection of the laws “in the most literal sense,” without specifying whether same-sex couples constitute a suspect class).

134. The liberty-equality synthesis at work in *Obergefell* is the same principle that animated the forbearers of the privacy doctrine. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-04 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. . . . Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. . . . Here the marriage laws enforced by the respondents are in essence unequal [T]his denial to same-sex couples of the right to marry works a grave and continuing harm. . . . And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.”) (citations omitted), with *United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)—which invalidated state laws targeting German language education and Catholic schools, respectively, under the fundamental Due Process right to “establish a home and bring up children,” *Meyer*, 262 U.S. at 399—as exemplifying heightened scrutiny for “statutes directed at particular religious, or national, or racial minorities” (citations omitted)).

135. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

136. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

137. See *Obergefell*, 135 U.S. at 2604 (emphasis added) (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Four-

Under the equal dignity framework, inequality arises whenever a person's sexual relationship with another is criminalized. Criminalization by kind necessarily demeans the dignity of those who wish to pursue sexual relationships of that kind. The very fact of illegality is a scarlet letter branding not only couples pursuing such relationships in secret, but also those who harbor such desires, by reducing their sexual and romantic feelings to the status of a perversion. Absent appropriately tailored countervailing interests, such a state-imposed stigma is exactly what *Lawrence* deemed impermissible:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons The stigma this criminal statute imposes, moreover, is not trivial.¹³⁸

By pronouncing someone a pervert because of their sexual preference for the same sex, or for a particular sex act, or because they are in love with a blood relative, is to diminish the dignity of that person's existence. In that sense, a law restricting who we can romantically associate with is more invidious an intrusion into the bedroom than a law restricting specific sexual conducts. The latter implicates only our freedom of action, where the former impinges on our existence as whole and equal members of society.

Lawrence did not explicitly say that the liberty of "intimate conduct" implies a freedom to choose *with whom* we engage in that conduct, but it does assert a generic right to "choose without being punished as criminals."¹³⁹ This choice would be meaningless if it did not also encompass, subject to the harm principle, the liberty to select our romantic companions. Relational dignity is as much a concern in incestuous relationships as it is in same-sex relationships. The sexual and feminist revolution has created a world in which we are free to initiate a sexual relationship with whomever we like. Notably, the companionate marriage apparatus,¹⁴⁰ for all

teenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

138. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

139. *Lawrence*, 539 U.S. at 558.

140. See Reva Siegel, "The Rule of Love"; *Wife Beating as Prerogative and Privacy*, 105 *YALE L. J.* 2117 (1996) (describing the 19th century transition from domestic law structured to preserve the early-modern household, to a companionate marriage model

its flaws, rests on the assumption that our sexual partnerships are no longer chosen for us by, and in the interests of, our kin groups.¹⁴¹ Even if we feel no desire whatsoever for much of the population, and most of us feel no desire for our family members, the availability of choice is itself a value that must be considered. If, as Louis Brandeis once mused, the constitutional privacy principle is “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men,”¹⁴² it would be doctrinally nonsensical to hinge the rights sheltered under the privacy umbrella on whether an identity group has been burdened. A heterosexual white male criminally punished for possessing and viewing pornography seized in a warrantless search of his bedroom has suffered no less an injury, indeed the same injury, as if he had been a homosexual woman of color.¹⁴³ Patrick Stübing, deeply in love with his sister Susan Karolewski, served a jail term for their relational preferences. If criminal punishment demeans the dignity of a same-sex relationship, there is no reason why it does not similarly demean the dignity of an incestuous relationship.

While it must be acknowledged that our pool of permissible sexual partners spans the world, reduced only by the members of our family, if sexual intimacy is the right to have one’s chosen relationship be treated with equal dignity as the relationship choice of another, then range and quantity of choice becomes irrelevant as to whether sexual intimacy has been infringed. In striking down Pennsylvania’s partner notification requirement as an undue burden on the right to abortion, the *Casey* majority defined the relevant denominator not as the pool of all women, but rather the subset of women who would be reluctant to notify their partners.¹⁴⁴ In the same vein,

that increases women’s autonomy while simultaneously subjugating them through other means).

141. If one is persuaded by Levi-Strauss’ Alliance Theory, that the incest taboo exists to create a circulation of women meant to promote exogamous kinship networks, then legal enforcement is antithetical both to the companionate marriage model of domestic law, and also the autonomy principle that underpins the due process privacy doctrine.
142. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
143. *See Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the prosecution of a heterosexual white male for the possession of obscene material discovered in a warrantless search of the bedroom violates a right to privacy protected by the interaction between the 1st Amendment and the 14th Amendment Due Process Clause. As in *Lawrence*, the Majority did not address the unreasonable search and seizure issue).
144. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894-95 (1992) (“Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . We disagree with respondents’ basic method of analysis. The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the

while most sexual relationships are unaffected by criminal incest laws, the relevant pool of burdened individuals is those who prefer a sexual relationship with a family member. Elijah and Milo Peters are Czech twins who perform together in pornographic videos:

‘My brother is my boyfriend, and I am his boyfriend . . . He is my lifeblood, and he is my only love’ . . . According to the back story being sold by the twins and the studio, it’s not just about the money for Elijah and Milo: They are two brothers engaged in a real-life romantic relationship, and are simply showing it off on-screen for the enjoyment of viewers. According to them, they live their lives together as a couple, and only have sex with each other (and nobody else) in their private lives.¹⁴⁵

For many, Elijah and Milo included, our romantic preferences are not fungible. It does not matter to a couple that the law leaves them a limitless pool of alternatives if the only foreclosed option is the partner they most desire. Restricting choice of partners restricts self-definition and detracts from equal dignity.

3. Standard of Review

This is not to say that criminal prohibition is necessarily unconstitutional. Including incestuous couples in the right to sexual intimacy merely shifts the inquiry toward the societal imperatives that might be weighed against personal rights. Recall *Lawrence*’s commitment to John Stuart Mills’ harm principle: an individual’s right to make the most intimate and personal decisions free from state compulsion exists only “absent injury to a person or abuse of an institution the law protects.”¹⁴⁶ Central to the puzzle, then, is determining the nature of the balancing test to be applied in a sexual intimacy claim. Commentators and lower courts have suggested everything from strict scrutiny,¹⁴⁷ to rational basis review,¹⁴⁸ to something in

group for whom the law is a restriction, not the group for whom the law is irrelevant.”).

145. Thomas Rogers, *Gay Porn’s Most Shocking Taboo*, SALON, May 20, 2010, <http://www.salon.com/2010/05/21/twincest/>.

146. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)

147. See e.g., Tribe, *supra* note 120, at 1917 n.82 (“In *Griswold*, too, no ‘standard’ was announced by the Court, but what we would today call ‘strict scrutiny’ was plainly at work.”).

148. See, e.g., *Lofton v. Sec’y of the Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“Most significant, however, is the fact that the *Lawrence* Court . . . invalidated the Texas statute on rational-basis grounds . . .”).

between,¹⁴⁹ to something entirely different.¹⁵⁰ Underscoring Justice Kennedy's reluctance to pronounce a new fundamental right, *Lawrence* was deliberately vague. Nevertheless, strict scrutiny is the only possible interpretation of *Lawrence*'s holding, and as of *Obergefell*, Justice Kennedy too, has resigned himself to the reality that *Lawrence* acknowledged a fundamental right to autonomy of intimate sexual conduct.¹⁵¹

Let us first eliminate alternative readings of *Lawrence*. One interpretation is that the Court was attempting to distance itself from tiers of scrutiny altogether.¹⁵² The tiers model has been questioned by, amongst others, Justices Marshall and Stevens,¹⁵³ and its structure has already been eroded by the application of more stringent rational-basis review in cases of suspected animus.¹⁵⁴ Such revision has its appeal. It would relieve judges of the re-

149. See, e.g., *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817-18 (9th Cir. 2008) ("We therefore conclude that *Lawrence* applied something more than traditional rational basis review. . . . However, we hesitate to apply strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in *Lawrence*, and we do not address the issue here.").

150. See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Anatomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 (2003) (suggesting the right to sexual intimacy is a desuetude doctrine operating parallel to the traditional rights-harm balancing test).

151. See *infra*, text accompanying note 178.

152. See, e.g., Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004) ("I see *Lawrence* as marking the emergence of a new approach to substantive due process analysis, one that has been simmering in the concurring opinions of Justices Souter, Stevens, and Kennedy for the last decade. These three Justices apparently now have a majority for extending meaningful constitutional protection to liberty interests without denominating them as fundamental rights."); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?* 23 J. CONTEMP. L. 475 (1997).

153. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("I have never been persuaded that these so-called 'standards' adequately explain the decisional process."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (citations omitted) ("I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.").

154. See e.g., *Lawrence v. Texas*, 539 U.S. 558, 580-83 (2003) (O'Connor, J., concurring) (summarizing the case law on a more rigorous rational basis standard when there is evidence of animus); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (striking down a law under rational basis review because its purpose was to "discriminate against hippies").

sponsibility of ranking our rights. Justice Marshall preferred “an approach in which ‘concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.’”¹⁵⁵ As the Court’s current swing vote, Justice Kennedy’s apparent disinclination toward the traditional model may be a glimpse of the future. Notably, Justices Kennedy, O’Connor, and Souter’s majority opinion in *Casey* created a new test for abortion that strikes down laws posing an “undue burden” for women seeking abortions before viability.¹⁵⁶ *Casey* weighed the character of the right, the burden imposed by the specific circumscription of that right, and the importance of the asserted state interests.¹⁵⁷ *Lawrence*, in turn, relied heavily on *Casey* for the idea that the majority may not use the state to enforce its moral views on society; “[o]ur obligation,” Justice Kennedy quotes, “is to define the liberty of all, not to mandate our own moral code.”¹⁵⁸ In that vein, Justice Kennedy’s silence on the applicable scrutiny level may allow a future Court confronted with the Incest Horrible to devise its own test, extend *Casey*’s balancing approach, or to leave the legal standard in its current state of ambiguity.

The Court, however, has always been wary of disrupting longstanding doctrinal frameworks.¹⁵⁹ It is more reasonable to interpret *Lawrence*’s silence to mean that the Justices were undecided at the time on whether sexual intimacy is fundamental, rather than as abandonment of the tiers apparatus. *Obergefell* may have abrogated *Glucksburg* by untethering the recognition of a fundamental right from the dead hand of historical practice,¹⁶⁰ but

155. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 99 (Marshall, J., dissenting).

156. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

157. *Casey*, 505 U.S. at 874.

158. *Lawrence*, 539 U.S. at 571 (citing *Casey*, 505 U.S. at 850.).

159. See, e.g., Transcript of Oral Argument at 6-7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) (JUSTICE SCALIA: . . . [W]hy are you asking us to overrule 150, 140 years of prior law . . . when you can reach your result under substantive due [process?] . . . [W]hat you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it’s wrong, . . . even I have acquiesced in it.”).

160. Compare *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (“[T]he Court has regularly observed that the Clause specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this nation’s history and tradition.”) (citation omitted), with *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once de-

Obergefell also reaffirmed the strict scrutiny standard by situating same-sex relationships within the fundamental right to marry.¹⁶¹ In pushing the substantive frontiers of the Due Process Clause, Justice Kennedy has “exercise[d] the utmost care” by leaving the standard open for debate and further development by scholars, lower courts, and future Supreme Court decisions.¹⁶² This does not necessarily evince his intent to discard the existing analytical framework, only his commitment to prudent caution and exhaustive experimentation before incorporating doctrinal innovations into settled law. Even as a trailblazer of a legal gay-rights revolution, Justice Kennedy used eighteen years to mold the jurisprudential germs in *Casey* and *Romer* into *Obergefell*'s equal-dignity doctrine, itself but a reinvigoration of settled law a century old.¹⁶³ Justice Kennedy is revolutionizing conservatively.

Persisting in our adherence to tiers-of-scrutiny, it becomes apparent that sexual intimacy makes little sense as anything other than a fundamental right. After all, *Lawrence* is derived from the *Griswold* privacy pantheon, the paradigmatic “fundamental right.” Nothing distinguishes sexual intimacy in *Lawrence* from the intimate decisions at issue in *Griswold* and *Eisenstadt*, or *Roe* and *Casey*. All of the rights involved were deduced from the interlocking principles of autonomous self-definition and relational privacy. As described by *Obergefell*, “the fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”¹⁶⁴ Reasoning from that body of law, *Lawrence* held “that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁶⁵ If every other definitional privacy right is a fundamental right, why would sexual intimacy be different?

A rational basis interpretation of *Lawrence* is untenable. For one, it would not offer the “substantial protection” *Lawrence* mandated for a person’s decisions “pertaining to sex.”¹⁶⁶ If *Lawrence* was really a rational basis

nied. . . . The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” (citation omitted).

161. See *Obergefell*, 135 S.Ct. at 2604 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”).

162. *Glucksburg*, 521 U.S. at 720.

163. See *supra* text accompanying notes 134-37.

164. *Obergefell*, 135 S.Ct. at 2589.

165. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

166. *Lawrence*, 539 U.S. at 559.

case, the Texas statute could have been sustained on flimsy public health grounds. The CDC has estimated the risk of HIV transmission from receptive anal intercourse at 17 times the rate for receptive vaginal intercourse.¹⁶⁷ Heightened scrutiny was clearly at work in *Lawrence*. Additionally, the textual evidence for a rational basis standard is weak. *Lawrence* stated that “the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁶⁸ Rational basis advocates interpret this as the standard of review for governmental intrusions on sexual intimacy. But that statement can stand only for the proposition that the Texas statute failed constitutional muster regardless of scrutiny level.¹⁶⁹ It does not tell us whether the law would have been sustained if Texas did have a “legitimate” state interest. Indeed, *Eisenstadt* too asked whether the government interest is “reasonable” and “rationally explains the different treatment accorded married and unmarried persons.”¹⁷⁰ The absence of the magic words “strict scrutiny” cannot mean the absence of a fundamental right; otherwise, *Eisenstadt* would also be a rational basis case and unmarried couples’ access to contraceptives would receive no more constitutional protection than state laws regulating intrastate businesses.

Moreover, the *Lawrence* majority declared that Justice Stevens’ *Bowers* dissent, which expressly characterized sexual intimacy as a fundamental right, “should have been controlling in *Bowers* and should control here.”¹⁷¹ Justice Stevens had argued strenuously in *Bowers* that “the essential ‘liberty’ that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.”¹⁷² The passage *Lawrence* reproduced from that dissent dispels all doubt that sexual intimacy is a fundamental right as integral to self-definition and relational privacy as contraceptives or reproduction:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married per-

167. See *HIV Transmission Risk*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 1, 2014), <http://www.cdc.gov/hiv/policies/law/risk.html>.

168. *Lawrence*, 539 U.S. at 578.

169. See *Lawrence*, 539 U.S. at 578.

170. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

171. *Lawrence*, 539 U.S. at 578.

172. *Bowers v. Hardwick*, 478 U.S. 186, 218 (1986) (Stevens, J., dissenting).

sons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.¹⁷³

A person’s sexual choices, Justice Stevens continued, fall within a right to privacy that deals “with the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating ‘*basic values*’ as being ‘*fundamental*’ and as being dignified by history and tradition.”¹⁷⁴ This must surely be correct. If the right to privacy does not encompass what *Lawrence* described as “the most private human conduct,”¹⁷⁵ what *would* qualify as a fundamental right? Sexual behavior, including choice of partner, is basic to our very existence and embedded in primordial instinct. By comparison, marriage is a wholly social construct and yet it is indisputably fundamental. As Sunstein observes, a sentiment shared by Tribe,¹⁷⁶ the Court’s “statements would be unintelligible if *Lawrence* were based solely on rational basis review. . . . In the end, *Lawrence* is not plausibly a rational basis decision.”¹⁷⁷ Justice Kennedy may have hoped to cabin *Lawrence*’s reach by discussing only “legitimate” state interests, but his initial reluctance was doctrinally untenable. It seems he is well aware of this wrinkle he left in the constitutional fabric. Thus, in *Obergefell*, Justice Kennedy conceded that *Lawrence* did indeed recognize a fundamental right to sexual intimacy:

[I]n effect, *Bowers* upheld state action that denied gays and lesbians a *fundamental right* that caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. That is why *Lawrence* held *Bowers* was “not correct when it was decided.”¹⁷⁸

173. *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

174. *Bowers*, 478 U.S. at 217 (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719-20 (1976)) (emphasis added).

175. *Lawrence*, 539 U.S. at 567.

176. See Tribe, *supra* note 120, at 1917 n.82 (“In *Griswold*, too, no ‘standard’ was announced by the Court, but what we would today call ‘strict scrutiny’ was plainly at work.”).

177. Sunstein, *supra* note 150, at 47.

178. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2606 (2015) (citations omitted) (emphasis added). This remarkable admission by Justice Kennedy of the proper standard at work in *Lawrence* is practically buried in the Court’s extensive and doctrinally com-

In evaluating government interests for criminal incest statutes, strict scrutiny applies.

B. *Reproduction*

Sexual autonomy and the right to decide whether to reproduce are inextricably intertwined. *Griswold* and the contraception cases, and *Roe* and its progeny, protect the fundamental right both to have, and not to have, children. Tribe characterizes the combination of *Roe*, *Griswold*, and *Skinner* as Supreme Court recognition that “whether one person’s body shall be the source of another life must be left to that person and that person alone to decide.”¹⁷⁹ In fact, Justice Douglas’ holding in *Skinner* that procreation is “one of the basic civil rights of man” predates *Griswold*’s acknowledgement of the reciprocal right not to procreate by two decades.¹⁸⁰ It would be beyond strange if the state could directly penalize couples for potentially procreative sexual relations without substantive constitutional scrutiny when a complicated doctrinal framework has evolved to protect their right to abort a pregnancy. The *Griswold* Court considered the right to decide whether or not to bear a child to be so basic that Justice Goldberg’s concurrence used the hypothetical of a statute sterilizing couples already with more than one child as a *reducto ad absurdum* to refute arguments that there is no right to contraception because such a right has no enumerated textual basis:

If upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.¹⁸¹

In turn, Justice Brennan’s majority opinion in *Eisenstadt* declared that “if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁸² The majority in *Casey* quoted this formulation directly, reaffirming the characterization of reproductive rights as a freedom of choice be-

plex *Obergefell* decision. As far as I am aware, it has gone unnoticed by commentators.

179. TRIBE, *supra* note 104, at 1339.

180. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

181. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

182. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

tween having a child or not.¹⁸³ States regulating who can have children would be confronted with strict scrutiny. A generally applicable law that prohibits vaginal intercourse between relatives may be an incidental burden on the right to bear a child, but if the fundamental right to sexual autonomy indeed protects sexual intimacy between close blood relations, states would have a difficult time arguing that the right to procreate excludes from constitutional review statutes prohibiting reproduction by couples engaged in an otherwise permissible relationship. The problem of inbreeding that emerges in instances of vaginal intercourse raises concerns about genetic health that will be addressed in Section III(b).

III. . . . AND THE COUNTERVAILING GOVERNMENT INTEREST[S]

The Supreme Court's initial silence on the applicable level of scrutiny left it, and lower courts, plenty of leeway (and confusion) in how to dispose of a case antithetical to individual judges' deepest personal beliefs. The Court has already proven reluctant to grapple with the Incest Horrible by denying *certiorari* in *Muth v. Frank*.¹⁸⁴ Denial left in place a muddled status quo, avoiding an otherwise unavoidably problematic extension or limitation of *Lawrence*.

As Judge Manion wrote in the unanimous 7th Circuit ruling, the facts in *Muth* "are not pleasant."¹⁸⁵ Allen Muth "was one of the oldest, and Patricia [Muth] one of the youngest," of a dysfunctional family of 14 children. "[T]hey were in and out of foster care . . . in a cycle of sexual abuse and incest."¹⁸⁶ *Muth v. Frank* was a GSA case; the two siblings were not reunited until Patricia turned 18.¹⁸⁷ The couple married soon after and had three children.¹⁸⁸ The Muths were discovered when they abandoned their middle

183. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992) ("The Court's decisions have . . . recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

184. *See Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 575 (2005).

185. *Muth v. Frank*, 412 F.3d 808, 810 (7th Cir. 2005).

186. *Muth*, 412 F.3d at 811.

187. Jeff Jacoby, *Hypocrisy on Adult Consent*, BOSTON GLOBE, Aug. 28, 2005, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/08/28/hypocrisy_on_adult_consent/.

188. *Muth*, 412 F.3d at 811. Patricia bore one other child prior to their marriage, but it is unclear if Allen is also the father of that child. *See also Interest of Tiffany Nicole M.*, 214 Wis. 2d 302, 306 (Ct. App. 1997) (indicating that the couple had three children).

child, Tiffany Muth, at the babysitter, who reported them to authorities.¹⁸⁹ The child was placed into foster care, and the Muths were tried for incest.¹⁹⁰ At sentencing in November 1997, the judge remarked, “I believe severe punishment is required in this case . . . I think they have to be separated. It’s the only way to prevent them from having intercourse in the future.”¹⁹¹ Allen was sentenced to eight years and Patricia to five in separate maximum security prisons 25 miles apart.¹⁹²

The Muths conviction was affirmed in January 2000 by the Wisconsin Court of Appeals, which held that the Muths’ relationship was not protected by the right to privacy, and that, regardless of the right, Wisconsin may legitimately prohibit incest.¹⁹³ In April 2001, Allen Muth filed a petition for habeas corpus in federal court, now armed with the Supreme Court’s recent decision in *Lawrence*.¹⁹⁴ The resulting 7th Circuit decision affirming the conviction can only be described as lost. Faced with a procedural labyrinth produced by the state court decisions and the retroactive

189. The circumstances of the abandonment are unclear. A large number of news sources suggest that the Muths were truckers who left their children with babysitters while they were working. I have, however, been unable to find the original source. The babysitter contacted the authorities after Tiffany became sick and the parents could not be found. It is clear that Tiffany was indeed neglected, causing “profound development delays.” Interestingly, Tiffany is ultimately taken from the Muths not on the grounds of neglect, but that their incestuous relationship renders them unfit as parents. See *Interest of Tiffany Nicole M.*, 214 Wis.2d 302, 308-13 (Wis. Ct. App. 1997).

190. *Muth*, 412 F.3d at 811.

191. Jacoby, *supra* note 187, at 1.

192. *Id.*

193. See *Wisconsin v. Muth*, 237 Wis. 2d 252 (Wis. Ct. App. 2000).

194. In 1997, the Muths had also challenged in Wisconsin state court the constitutionality of Wis. Stat. § 48.415(7). The statute provided that incestuous parenthood is grounds for terminating parental rights. This raises a separate though related constitutional issue that is beyond the scope of this paper; if the Muths are otherwise capable parents, can a state deprive them of custody? *Meyer*, *Pierce*, *Lochner* (precedents with an active life in today’s substantive due process jurisprudence) suggest that plaintiffs would have a colorable claim if incest were decriminalized. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (“Under the doctrine of *Meyer* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”).

application of *Lawrence*, Judge Manion stated that *Lawrence* applies only to homosexual sodomy despite the Supreme Court's express holding that bans on opposite-sex sodomy and bans on same-sex sodomy stood on the same footing.¹⁹⁵ Relying heavily on Justice Scalia's dissent, Judge Manion asserted that *Lawrence* did not establish a new fundamental right, a questionable claim even before *Obergefell*,¹⁹⁶ and ergo, Muth did not have "a fundamental right to engage in incest free from government proscription."¹⁹⁷ Ironically, it was Scalia's dissent that argued *Lawrence necessarily* protects consensual adult incest,¹⁹⁸ and moreover, the 7th Circuit offered no evaluation whatsoever of the justifications offered by the state.

This Section questions the traditional reasons for prohibiting incest, evaluating in turn state interests in morality, preserving the traditional family and familial stability, genetic health, protecting children, and the prevention of inherently coercive relationships. I argue that the preservation of morality and tradition is unlikely to constitute a valid state interest in this context. Genetic health and the prevention of inherently coercive relationships offer the strongest justifications for criminal prohibition, but both pose doctrinal problems, and existing incest statutes are tailored to neither interest. Of course, the availability of possible (if poor) ammunition for prohibition advocates, combined with a strong prevailing taboo, makes the decriminalization cause an uphill battle.

A. Morality

Lawrence strongly suggests that moral disapproval, without more, is not a legitimate state interest for criminalizing intimate personal relations between consenting adults. First, quoting from Justice Stevens' dissent in *Bowers*, Justice Kennedy declared "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitu-

195. See *Muth*, 412 F.3d at 817-18 ("The ultimate question then is not whether *Lawrence* is retroactive, but, rather, whether Muth is a beneficiary of the rule *Lawrence* announced. He is not. *Lawrence* did not address the constitutionality of incest statutes. Rather, the statute at issue in *Lawrence* was one proscribing homosexual sodomy and the Court, as noted above, viewed its decision as a reconsideration of *Bowers*, another case involving homosexual sodomy There is no mention of incest in the Court's opinion. *Lawrence* also did not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, . . . [g]iven . . . the specific focus in *Lawrence* on homosexual sodomy[.]").

196. See *Muth*, 412 F.3d at 818.

197. See *Muth*, 412 F.3d at 818.

198. *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

tional attack.”¹⁹⁹ Second, Justice O’Connor’s concurrence suggests that “moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”²⁰⁰ Third, the dissent itself interpreted *Bowers*’s reversal to invalidate moral disapproval as a permissible regulatory justification. The Incest Horrible arises from Justice Scalia’s objection that the law “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”²⁰¹

Criminal regulation of sexual behavior, “the most private of human conduct” and essential to self-definition,²⁰² reflects more than moral disapproval of that conduct. It reflects moral disapproval of the group of persons who have decided on that life path. Like anti-sodomy statutes, laws against incest proscribe not only actions, but relationships. To arraign Czech twin brothers Elijah and Milo Peters for incest is to punish them not for what they are doing, but who they are doing it with. Animus toward acts is inextricable from animus toward the actors when the freedom to engage in the prohibited behavior is integral to two people’s ability to delimit the contours of their chosen relationship. Moreover, the right to autonomy of sexual intimacy would be incoherent even if its restriction were based solely on the state’s animus toward pure conduct. Suppose the facially neutral sodomy law in *Bowers* were applied against a married heterosexual couple engaged in oral sex. Evidently, Georgia evinced no animus toward heterosexuals or married couples. Yet the right to privacy would mean nothing if Georgia could nevertheless pull our blinds aside, reach into our bedrooms, and prohibit a specific sex act for no better reason than that the state believes the act itself immoral. Justice Kennedy was right to articulate the impermissible state interest in *Lawrence* as moral judgment of a “particular practice” as opposed to a particular “group.”²⁰³ When a law punishes individuals for their exercise of a fundamental right, like sexual intimacy, the group-conduct distinction unravels.

To justify the enactment of a criminal law on the grounds that the regulated conduct or person violates community morality is to admit that the law is motivated in part by animosity. The origins of that animosity may well be principled, to prevent child abuse for instance, but those principles themselves are what count as state interests. Weighing morality as a regula-

199. *Lawrence*, 539 U.S. at 577-78.

200. *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring).

201. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

202. *Lawrence*, 539 U.S. at 567.

203. *Lawrence*, 539 U.S. at 577-78.

tory justification separately from the impetus behind that normative judgment would double-count the state's position. On the other hand, if the moral condemnation is without reason, or without a constitutionally cognizable reason—i.e., sectarian disapproval—then it is mere animus, and legal prohibition *is* disadvantage imposed out of animosity.²⁰⁴ It is impossible to disentangle morality from a bare desire to harm or inhibit. Thus, Justice O'Connor wrote, "Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy."²⁰⁵ In other words, the state is saying that the prohibition of the thing (incest; homosexuality) is itself the government interest that justifies the prohibition. A morality interest in abridging a fundamental right is an inherently circular argument.

This does not affect prohibitions on conduct not protected by heightened scrutiny. Even if we ignored state interests in promoting market efficiency, or the maintenance of public order, the state can still criminalize an armed bank robbery for no reason other than the "badness" of taking by force property that is not one's own. Anti-graffiti legislation imposing heightened penalties for the defacement of a gravesite, or a law prohibiting the desecration of an animal corpse, may have no rationale besides the community's instinct as to right and wrong. Common to all of these examples is the absence of a fundamental right, for that which one does not have a right to do, the state may freely prevent one from doing.

Of course, even when a claim implicates a fundamental right, the complex relationship between the Court and morality extends beyond the parameters of doctrinal reasoning. Daniel Piar believes there is still "lingering uncertainty as to whether state action based on morality is permissible."²⁰⁶ Piar makes much of Justice Kennedy's 2007 majority opinion in *Gonzales v. Carhart*, which is "laced with moral language,"²⁰⁷ and expresses approval of Congress' moral condemnation of the partial-birth abortion—"a brutal and inhumane procedure."²⁰⁸ When confronted with a practice that is both beyond their understanding and repulses them, the Justices could simply vote with their conscience. Incest is such a practice. But while Justice Kennedy's feelings against partial-birth abortions are apparent, *Gon-*

204. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (invalidating under the Free Exercise Clause a municipal ordinance directed against a minority religious practice deemed "inconsistent with public morals, peace, or safety" when the law was under-inclusive as to both peace and safety).

205. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring).

206. Daniel Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139, 140 (2013).

207. *Id.* at 151.

208. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

zales never stated that morality alone is sufficient, or even has any bearing, on the constitutionality of a statute. Rather, respecting and protecting the life and comfort of the fetus serves as a compelling state interest that also happens to inform why the moral disapproval exists in the first place.²⁰⁹ *Gonzales* does not articulate a vision of morality as a stand-alone interest; it is perfectly consistent with the principle that “moral disapproval, without *any other* asserted state interest” is insufficient to satisfy rational basis review.²¹⁰ Additionally, before we abandon legal coherence entirely, in a case on incest relying directly on *Lawrence*, accepting morality as a valid regulatory justification would be more obviously inconsistent than Justice Kennedy’s incidental distaste in *Gonzales*. Confronting an array of precedents pointing in the direction that, absent a reason beyond mere disapproval, the state has no place in our bedrooms, it is likely the justices would at least realize the existence of such an inconsistency. How the Court responds is another matter.

B. *The Traditional Family and Familial Stability*

In light of *Obergefell*, *United States v. Windsor*,²¹¹ and *Moore v. East Cleveland*,²¹² government is likely constrained from imposing on families a singular vision of traditional familial relationships, at least, without a reason more compelling than age-old tradition. State-imposed maintenance of family structures resembles a government interest in opposing a fundamental right to define one’s own family structure. *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the *Lochner*-ian ancestors of substantive due process, articulated a liberty to “marry, [and] establish a home and bring up children.”²¹³ *Moore* drew on both cases to strike down an East Cleveland housing ordinance limiting home occupancy to nuclear family members, holding that “the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”²¹⁴ Justice Powell’s majority opinion emphasized “freedom of personal choice in matters of marriage and family life” as a liberty protected by the

209. *Gonzales*, 550 U.S. at 183-84 (holding that the state has an interest in protecting fetal life).

210. *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring) (emphasis added).

211. *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013).

212. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

213. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (“Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”) (citations omitted).

214. *Moore*, 431 U.S. at 505-06.

Fourteenth Amendment,²¹⁵ and strong historical traditions of a “larger conception of the family” to “draw together and participate in the duties and the satisfactions of a common home.”²¹⁶

It is unclear what the right was in *Moore*. Before *Obergefell*, reading *Moore* to stand for freedom from state compulsion in defining one’s own family arrangements would not comport with the language in the decision. That is because *Moore* articulated a vision of family that aligned with the traditional family construct, invoking “the tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children.”²¹⁷ “Over the years,” the Court proclaimed:

[M]illions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history.²¹⁸

Whereas *Moore*, and its predecessors *Meyer* and *Pierce*,²¹⁹ could have once been interpreted as bastions of the traditional family, judicial intervention against incest legislation would upset traditional values and leave incestuous couples free to pursue their own radically different vision of a sexualized family.

The gay-rights saga has since detached familial autonomy from its dependency on longstanding community norms. The once ambiguous right at stake stands for freedom from state intrusion now that it has evolved, since *Lawrence*, *Windsor*, and *Obergefell*, into a right of self-definitional autonomy and relational dignity. The “traditional family” is intimately bound with “traditional marriage,” and a compelling state interest in promoting traditional relationships for tradition’s sake would effectively abrogate any right to autonomy in one’s intimate relational choices. In *Windsor*, the federal government could not deprive same-sex couples the benefits of marriage if those couples were legally wed under state law.²²⁰ The Bipartisan Legal Advisory Group’s counsel argued that Congress “has a deep and abiding

215. *Moore*, 431 U.S. at 499 (quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974)).

216. *Moore*, 431 U.S. at 505.

217. *Moore*, 431 U.S. at 504.

218. *Moore*, 431 U.S. at 504-5.

219. It is but slight hyperbole to say that the right “to marry, establish a home and bring up children” in the rural bliss of 1923 Nebraska is practically a line out of Marlowe. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

220. See *United States v. Windsor*, 133 S.Ct. 2675, 2695 (2013).

interest in encouraging responsible procreation and child rearing,”²²¹ but did not address whether government can have an interest in promoting traditional wife-husband families. This seems to have been a judicious choice. *Windsor* recognized that the Defense of Marriage Act was meant to “defend the institution of traditional heterosexual marriage,” referencing a House Report statement that the “effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.”²²² But instead of evaluating the adequacy of the offered rationale, the Court used it as evidence that “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”²²³ In other words, the Court realized that an interest in “traditional” family structure is no interest at all because depriving one kind of relationship of equal dignity in order to benefit another kind cannot be a proper state method of incentivizing individuals to adopt the state’s relational preferences.²²⁴ *Obergefell* amplified this principle, characterizing the traditional definition of marriage as exclusive to a man and a woman as an “unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”²²⁵ As Chief Justice Roberts remarked, *Obergefell* “order[ed] the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Busmen and the Han Chinese, the Carthaginians and the Aztecs.”²²⁶

Obergefell and *Windsor* recognized that reasoning from tradition, like reasoning from morality, is inherently circular. The elevation of “traditional” relationships necessarily implies the subordination of “untraditional” relationships, and in *Obergefell*, “a long history of disapproval of [same-sex] relationships” worked “a grave and continuing harm.”²²⁷ In the incest context, close blood relatives are not yet permitted to pursue even an inherently

221. Brief on the Merits for Respondent, the Bipartisan Legal Advisory Group of the United States House of Representatives at 11, *Windsor*, 133 S.Ct. 2675 (No. 12-307) (quoting House Rep. 12, 13).

222. See *Windsor*, 133 S. Ct. at 2693 (quoting H.R. 3369).

223. *Windsor*, 133 S. Ct. at 2681.

224. This is not to say that government cannot protect the family, far from it. It is presumably free to incentivize the creation of family units by denying an unmarried individual tax benefits slated for married couples. A Tocqueville inspired majority declared in *Obergefell* that “marriage is a keystone of our social order . . . marriage is ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (quoting *Maynard v. Hill*, 125 U.S. 190, 211).

225. *Obergefell*, 135 S. Ct. at 2603.

226. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

227. *Obergefell*, 135 S. Ct. at 2590-91.

unequal relationship. Yet surely, after *Lawrence*, the government cannot promote traditional relational structures by compelling conformity through the compulsory mechanisms of the penal code. It would be incoherent to justify continued interference with a fundamental relational right via reference to states' mere preference for a different relational structure; the whole point of a right is that it can be asserted against the amorphous preferences of the state. Indeed, as the Court realized in *Windsor* and *Obergefell*, appeal to tradition, without more, is not only an illusory interest in preserving what-has-always-been-done for no better reason than that it is what-has-always-been-done, but may itself be evidence of impermissible animus toward certain relationships. Justifying incest legislation as an effort to preserve "traditional" family relationships is to define the government interest as the abridgment of the right.

States' interest in the family becomes a more persuasive argument when articulated as an interest, not in imposing a singular time-bound vision of propriety, but in preserving the stability of existing families. Same-sex intimacy and incest are distinguishable in their impact on family structure. As the Supreme Court of Ohio observed in sustaining the conviction of a stepfather who had consensual sex with his stepdaughter, "stepchildren and adopted children have been included as possible victims of the crime of incest because society is concerned with the integrity of the family, including step and adoptive relationships as well as blood relationships, and sexual activity is equally disruptive, whatever the makeup of the family."²²⁸ As one commentator notes, same-sex couples who raise children have defined the terms of their family structures at the outset, while incest introduces sexual tension into a family that already exists.²²⁹ "Think of all the opposite-sex friendships you and your friends have cumulatively destroyed by 'crossing the line.' Now imagine doing that to your family."²³⁰

But while the "permanency and stability important to children's best interests" is an important consideration, a person's relational autonomy is not hostage to child-rearing.²³¹ "An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any state."²³² A focus on child-rearing also leaves unanswered whether the government's interest in preserving the stability of extant families could overcome a right to sexual autonomy once the children are grown and have left the nest. Child

228. *Ohio v. Lowe*, 861 N.E.2d 512, 517 (Ohio 2007).

229. William Saletan, *Incest Is Cancer – The David Epstein Case: If Homosexuality is OK, Why is Incest Wrong?* SLATE, Dec. 14, 2010, http://www.slate.com/articles/health_and_science/human_nature/2010/12/incest_is_cancer.html.

230. *Id.*

231. *Obergefell*, 135 S. Ct. at 2600-01.

232. *Obergefell*, 135 S. Ct. at 2601.

rearing fades into the background when the participants are all adults. If child abuse is not at issue, why does it matter to the *state* whether relatives alter their relationships with each other? With children out of the picture, imposing on unwilling individuals stability for stability's sake seems just as empty a government justification as perpetuating traditional families for tradition's sake.

It is clear that the recent gay-rights revolution has upset *Moore's* conservative implications and resuscitated the self-definitional approach to family structure. Justice Stevens was far-sighted in comparing sexual intimacy with miscegenation in his *Bowers* dissent.²³³ Just as "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack,"²³⁴ tradition cannot rescue state laws that treat some relationships as lesser than others. *Windsor* and *Obergefell* point away from a historically-oriented conception of family organization toward the liberty of individuals to pursue an arrangement *they* find dignified and proper, freed from normative constraints. The state may not socially engineer the ideal family as defined by history and tradition, or freeze extant families into a stable configuration. It suffices to say that the validity of a governmental interest in either perpetuating or preserving certain family arrangements, without more, may clash with an active jurisprudence that upends state-preferred family arrangements. Concrete policy reasons that support a state's choice to preserve family stability in the first place, such as child welfare, provide firmer foundations for incest legislation.

C. Eugenics or Genetic Health?

Genetic diseases loom large in any talk of incest. Since Sturgeon wrote the excerpt reproduced at the beginning of this paper, the biological sciences have established that inbreeding does indeed increase the chance of offspring inheriting a recessive genetic disorder. Genetic health is not as weak a justification as either Hammer or Cahill suggested, but it is entirely inapplicable to any incest statute that encompasses sexual relationships between adoptive relatives, or same-sex relatives, or prohibits any sexual-behavior other than unprotected vaginal intercourse. Additionally, a genetic health rationale is still problematic in the context of unprotected vaginal intercourse between consanguineous relatives because of interpretative problems

233. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

234. *Lawrence*, 539 U.S. at 577-78.

involving points of comparison and the Supreme Court's anti-eugenics ruling in *Skinner*.²³⁵

The incestuous relationships relevant to us involve relatives of the first degree—between siblings, and parents with children—whose offspring will be homozygous at 25% of gene loci, that is, they inherit identical gene copies from each parent in a quarter of all genes.²³⁶ This is expressed as a coefficient of inbreeding (F) of 0.25.²³⁷ In incestuous relationships between double first cousins, $F=0.125$, and in first cousins, $F=0.0625$.²³⁸ The Center for Disease Control (“CDC”) has estimated the population background risk for congenital defects in the first year of life to be 3-4%.²³⁹ Inbreeding between first cousins leads to a “1.7-2.8% increased risk for congenital defects above the population background risk. There is an approximately 4.4% increased risk for preproductive mortality above the population background risk, some of which include major congenital defects”²⁴⁰ By contrast, offspring born to mothers aged 45 are at a 5-6% risk of Down Syndrome *alone*.²⁴¹

The risk increase is significantly greater in the offspring of first degree relatives, who have four times the number of homozygous genes as the offspring of first cousins. The problem does not lend itself to easy experimentation. The family dysfunction that accompanies many of these relationships makes it difficult to determine whether increased child morbidity is a social or biological consequence, and there are often mental health issues involved that are themselves a product of preexisting genetic disorders.²⁴² Estimates are thus problematic. At first glance, studies done in the late 60s to early 80s suggest that as many as half of such children suf-

235. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear.”).

236. See Bennett et. al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. OF GENETIC COUNSELING 90, Fig. 1 at 100 (2002).

237. See *id.*

238. See *id.*

239. See *id.* at Table II at 104 (exhibiting the finding that this is the risk for “major birth defects in 1st year of life”).

240. *Id.* at 115.

241. See Ernest B. Hook & Agneta Lindsjo, *Down Syndrome in Live Births by Single Year Maternal Age Interval in a Swedish Study: Comparison with Results from a New York State Study*, 30 AM. J. HUM. GENETICS 19, Table 1 at 20 (1978).

242. See Alan H. Bittles, *Genetic Aspects of Inbreeding and Incest*, in INBREEDING, INCEST, AND THE INCEST TABOO 38, 49-51 (Arthur P. Wolf & William H. Durham eds., 2005) (discussing control group inadequacies in existing studies on the genetic impact of inbreeding).

ferred sudden deaths, autosomal recessive disorders, congenital deformations, severe intellectual handicaps, or other problems.²⁴³ Combining these studies, the “excess level of death and severe defect in the offspring of incestuous unions (a proportion of which may have been nongenetic in origin) was 31.4%” above the control group, which itself had an 8% risk of death or serious defect.²⁴⁴ These numbers include non-genetic morbidity and other problems because these studies did not adjust for sample biases, and only two of the studies had a control group.²⁴⁵ Alternatively, since the F-value of first degree relatives is four times that of first cousins, and the offspring of first cousin unions are estimated at a 1.7-2.8% risk above the background, “then the predicted risk to the offspring of first-degree relatives would be at 6.8-11.2% risk above the population background for significant birth defects.”²⁴⁶ Using the CDC estimate of the general background risk, this puts children of first degree relatives at somewhere between a 1 in 10 and 1 in 6.7 risk of significant genetic defects.

At what point is the genetic risk so high that the state should be free to draw the line? The problem (especially from an equal protection perspective) with identifying *any* numerical risk as sufficient to permit government prohibition of procreative activity is that *non-consanguineous* couples who are at as high a risk (or higher) of passing genetic defects to their children are *not* criminally barred from procreation. Parents with schizophrenia, Down Syndrome, congenital heart defects, or who are just over a certain age, can all legally bear and beget children. Of course, this alone does not doom the genetic health justification. But since the Supreme Court has ruled that there is a fundamental right in bearing children, we must ask whether the genetic health of the population is a compelling state interest that fits an incest-triggered prohibition closely enough to pass constitutional muster. *Skinner* offers some indications. Under the dubious reasoning that criminality is inheritable, Oklahoma passed a law mandating the sterilization of “habitual criminals.”²⁴⁷ The Court held that the law violated equal protection because white collar criminals were exempt.²⁴⁸ Justice Douglas’

243. See e.g., Bennett et. al., *supra* note 236, at 106-7.

244. *Id.* at 107. One study had a unique control group available in the offspring of the parents’ other non-consanguineous unions. See Eva Seemanova, *A Study of Children in Incestuous Marriages*, 21 HUMAN HEREDITY 108 (1971).

245. Bittles, *supra* note 242, at 49-53.

246. Bennett et al., *supra* note 236, at 107.

247. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

248. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . . In terms of fines and imprison-

majority opinion was heavily informed by an autonomy undercurrent sounding in the Due Process Clause:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.²⁴⁹

Skinner, decided during the Second World War in the shadow of the Holocaust, renders eugenics a questionable state interest. For one, prohibiting certain groups from having children would have the same effect as physically sterilizing them. For another, eugenics implicates more than bodily autonomy, but also the power to subordinate and destroy undesirable groups.

Incest, however, is distinctively different in that no one is prevented from reproducing by a ban on procreating with a parent, child, or sibling. If Oklahoma deprived prisoners of “a basic liberty” in having children *with anyone*, then incest statutes are far less invasive and the eugenics problem is not implicated. This is separate from the problem of choice of sexual partner in that public health offers a strong reason for imposing a small burden on our range of procreative partners.²⁵⁰ The state can still respect an incestuous couple’s sexual autonomy by requiring them to use contraception, provided that the extent of the harm is enough to outweigh *Griswold’s* concerns over the state monitoring the marital bed. On the other hand, while *Skinner* offers us no definitive answer as to whether our unfettered choice of procreative (as opposed to romantic) partners is a fundamental right, if it is, then

ment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

Skinner, 316 U.S. at 541-42.

249. *Skinner*, 316 U.S. at 541.

250. See discussion *supra* Part II(A)(2).

the burden posed by mandated contraception is not *de minimis* at all for those who want to reproduce only with a specific blood relative.

From a social welfare perspective, the increased healthcare costs for the community combined with the state's interest in preventing children from being born with genetic defects that may cause suffering and death would justify incest prohibitions narrowly tailored to consanguineous relatives. One hesitates in that the same reasoning would justify barring someone with a congenital birth defect from reproducing with someone else who has that defect. The scope of potential procreative partners is minimally constrained in both hypotheticals. One distinction is that the number of people with a given birth defect is (usually) far higher than the number of people in a person's immediate family. Yet, many progressives living in a post-*Lawrence* world would still balk at the idea that a fundamental right to reproduce excludes a fundamental right to choose the particular individual with whom to reproduce. Even narrow preventative means, such as checking to ensure the use of contraception, raise grave privacy concerns. In evaluating the tailoring of individual statutes, those barring procreation with non-consanguineous relatives, or barring sexual conduct beyond intercourse, are over-inclusive.

D. Children

The *Muth* court made sure to include the sordid facts of how Tiffany, the Muths' daughter, had been raised. "Tiffany was significantly underdeveloped" and was:

. . . a non-verbal, three and one-half year old who behaved and physically appeared to be more like a two-year-old child. She was not toilet trained or able to feed herself and she displayed little or no emotion. Other evidence indicated that the child was significantly neglected and that Patricia and Allen had no relationship with the child.²⁵¹

Indeed, most prosecutions for incest are made alongside a concurrent prosecution for child-abuse and statutory rape.²⁵² But, Tiffany's mistreatment, while harrowing, is strikingly irrelevant to whether her parents have a right to be in a sexual relationship with each other.²⁵³ Not all incestuous couples

251. *Muth v. Frank*, 412 F.3d 808, 811 (7th Cir. 2005).

252. Bratt, *supra* note 15, at 257 (stating that 94 out of 96 randomly sampled criminal appellate court decisions allege incest where the participants involved were an adult defendant and a minor child victim).

253. One possible argument is that incest statutes may provide a helpful alternative for prosecutors who have trouble establishing the elements of child abuse. Yet I struggle

bear children, and not all those who do abuse their children. Child abuse is most directly addressed by laws against child abuse. Even if O'Connor's concurrence in *Lawrence* were controlling, the existence in every jurisdiction of a legal apparatus *already* perfectly tailored to the harm begs the question, what is the incest statute for? The answer leads to other possible explanations, leaving child protection defunct as a plausible rationale.

One possible rejoinder is that incestuous couplings are such radical departures from conventional norms that the parents are themselves more likely both to have been abused, and therefore to abuse or neglect their children in turn. Along this vein, incest legislation is not reactive but prescriptive. It attempts to prevent such unions from forming in the first place thereby reducing the number of at-risk children. But such an explanation is crudely fit, speculative, and lacks scientific support. As the US General Accounting Office reported to the House Subcommittee on Crime, while there is "widespread belief that there is a 'cycle of sexual abuse,'" the research is inconclusive as to whether child victims become child abusers.²⁵⁴

E. Inherently Coercive Relationships

The prevention of inherently coercive relationships offers a stronger basis for distinguishing incest from homosexuality. It is also the basis that the *Lawrence* majority itself offers to inoculate its decision against the Scalian slope: "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."²⁵⁵ The Court has all but invited states to respond to a hypothetical incest challenge using the anti-coercion rationale. Indeed, as Tribe and Dorf wrote in their *Obergefell* amicus brief, "[l]aws forbidding or denying recognition [of incest] can be defended based on their protection of the rights and interests of persons other than fully consenting adults."²⁵⁶ But as is the case for genetic health, a compelling interest in the prevention of "relationships where consent might

to imagine a situation where an offender cannot be prosecuted for either some form of abuse, or statutory rape, but can be prosecuted under an incest statute that would require proof of sexual contact. Even if such a situation could arise, the application of strict scrutiny means that the solution is not to create an alternative offense incidental to the wrong the state means to prevent, but a revised abuse statute with a lower prosecutorial bar.

254. U.S. GEN. ACCT. OFF., GAO/GGD-96-178, CYCLE OF SEXUAL ABUSE: RESEARCH INCONCLUSIVE ABOUT WHETHER CHILD VICTIMS BECOME ADULT ABUSERS 2 (1996).

255. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

256. Brief for Professors Laurence H. Tribe and Michael C. Dorf as Amici Curiae in Support of Petitioners at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

not easily be refused”²⁵⁷ poses not only considerable theoretical problems, but also tailoring difficulties for most state statutes.

For one, none of them addresses the growing challenges posed by GSA and the open-adoption reforms that gained traction in the 1970s. Blanket prohibitions criminalize natural biosocial impulses in a setting where the inherent risk of coercion seems little different than in any other context. For another, even in non-GSA cases, incest statutes are universally over-inclusive by banning sexual relations between siblings close in age.²⁵⁸ By some estimates, sibling incest may in fact be the most common form of first-degree incest.²⁵⁹ The state would have a hard time characterizing a consensual relationship between a sibling pair in their 30s as inherently coercive. In such relationships, the distinction between victim and perpetrator become blurred. One wonders at what age such a presumption of coercion becomes too problematic to sustain under any level of heightened scrutiny. Further, we have not heretofore criminalized sexual relations between bosses and their employees. If the state has the power to punish incest because parent-child relationships are inherently coercive, then we must contemplate whether the state also has the authority to ban consensual office romances. The answer could be a simple—but troubling—yes.²⁶⁰

However, the most troubling aspect of the anti-coercion rationale is its inherently speculative nature. No matter what, incest criminalization will be over-inclusive in that a substantial amount of truly consensual conduct would be swept up in the prohibition. Of course, while strict scrutiny is often described as strict in theory, fatal in fact, a 2006 study by Adam Winkler shows that challenged legislation has been sustained in approximately 30% of such cases,²⁶¹ including 27% of suspect classifications,²⁶² and 22% of substantive due process infringements.²⁶³ Nevertheless, if we acknowledge autonomy of sexual behavior and intimate relationships as a fundamental right, then it is odd that the compelling government interest

257. *Lawrence*, 539 U.S. at 578.

258. *See supra* discussion accompanying notes 45-52.

259. *See, e.g.*, VERNON R. WIEHE, *SIBLING ABUSE: HIDDEN PHYSICAL, EMOTIONAL, AND SEXUAL TRAUMA* 57-58 (2d ed. 1997).

260. At least two states, Connecticut and Ohio, deem it a felony for certain school employees to engage in sexual intercourse with students enrolled at that school regardless of the student's age, or the difference in age between the employee and the student. *See* CONN. GEN. STAT. § 53 A-71(A)(8) (2013); OHIO REV. CODE ANN. § 2907.03(7) (2009).

261. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 818 (2006). This percentage rises to 74% in Free-Exercise claims for exemptions from generally applicable laws, at which point one wonders if it is still strict scrutiny. *Id.* at 861.

262. *See id.* at 834.

263. *See id.* at 863.

offered by the states takes the form of an irrefutable presumption *against* the fundamental right and *in favor* of the government. The very nature of the anti-coercion interest, if adopted by courts, undermines the narrow-tailoring prong. A ban on incest is not a well-tailored means of regulating inherently coercive relationships. States could create a separate age of consent for incest. They can exempt relationships where there is no identifiable victim or perpetrator, for instance, when twins are involved. The anti-coercion interest is not as clear an answer as the Supreme Court would like.

F. Pandora's Box: How to Criminalize Incest

Additionally, the two strongest state interests, genetic health and anti-coercion, are in tension with one another. A genetic health basis would require a statute to apply only to unprotected vaginal intercourse between consanguineous relatives. The prohibition of sexual conduct generally, or of sex between adoptive family members, would be wildly over-inclusive. By contrast, statutes justified under an anti-coercion rationale would probably need some form of exemption for GSA relationships and consanguineous relatives close in age. Prohibitions that are limited to intercourse, or that exclude adopted parents, would be under-inclusive. Many incest prohibitions, as they stand now, are tailored to neither interest.²⁶⁴ Those that remain would be left in a precarious position given that neither genetic health nor anti-coercion may be compelling enough as stand-alone government interests under a strict scrutiny regime. While genetic health condones government restrictions on procreation by those suffering from serious genetic disorders, anti-coercion justifies criminal punishment of workplace relationships between employers and employees.

In a move reminiscent of *Bowers*, the 7th Circuit dealt with the impasse by straining *Lawrence* to apply only to homosexual sodomy, while refusing to acknowledge sexual intimacy as a fundamental right.²⁶⁵ But we need not abdicate hard-fought liberties in such a manner.²⁶⁶ More permissive prohibitions can pass strict scrutiny if we pool the varied regulatory justifications discussed in Part III into an aggregation of concerns that, together, creates a compelling state interest in prohibiting incest. Relation-

264. See, e.g., UTAH CODE ANN. § 76-7-102 (2014) (Utah bans sexual intercourse and insertion of seminal fluid between both blood and adoptive relatives, including first cousins. Limited to intercourse and encompassing relatives that are unlikely to have grown up together, it is under-inclusive as to inherently coercive relationships. At the same time, by including adoptive relatives, the statute is over-inclusive when it comes to the genetic-health rationale.).

265. See generally *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005).

266. For a policy argument on why incest legislation should be reformed on the basis of the harm principle, see *Inbred Obscurity*, *supra* note 19.

ships between employers and employees may be coercive, but incest also raises additional worries about abuse and public health. The tensions between the various points in this continuum of legitimate concerns do not dissipate. The fact that incest poses such diffuse problems requires a legislative response that addresses the core conduct where all of these problems overlap. Incest is the common nexus—the Pandora’s Box—of multiple lesser social ills; as such, it is a significant source of harm, and the elimination of Pandora’s Box itself becomes the compelling state interest.

To satisfy tailoring, we must identify the core of incestuous conduct where all of the constituent components of Pandora’s Box overlap, and criminalize only the conduct that falls within that core. Such a statute, could take the following form:

Vaginal intercourse between blood relatives of the first and second degrees is prohibited where:

1. There is a substantial age-gap between partners,
2. The younger partner has not attained an increased age of consent,
3. Both partners have had significant contact before the age of 18, *and*
4. Both partners are capable of having children *and* neither partner uses contraception.

The state carries the burden of proving each element. The age limitations and the meaning of “significant contact” would be somewhat arbitrary, but line drawing is unavoidable. This statutory framework draws on both genetic health and anti-coercion as its justificatory predicates. Each state interest may be insufficiently compelling in isolation, but they are mutually reinforcing when considered together. This approach addresses GSA and allows consenting adults to exercise their sexual autonomy in contexts where the inherent coerciveness of the relationship is not at issue, and where there is also a low chance of reproduction. The proposed fourth prong, the most suspect element of the proposed framework, would be difficult to prove or enforce. Additionally, enforcement involves the state policing contraception within a private space, which is what the Court found so odious in *Griswold*.²⁶⁷ The state’s interest in genetic health could plausibly obviate the individual’s fundamental privacy right to procreate. But, if genetic

267. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

health divorced of all other concerns is indeed so troubling to us, then our community would need to have a conversation about the morality of barring reproduction between unrelated couples—known carriers of inheritable disorders, those with undesirable traits, or parents above a certain age—that also pose increased genetic risks for offspring.

IV. CONCLUSION: INCEST IN A POST-LAWRENCE, POST-OBERGEFELL WORLD

Given *Obergefell's* extension of the right to marry to non-traditional couples who are entitled to equal dignity under the law, the invalidation of criminal incest legislation on the basis of the right to sexual intimacy would also necessitate the lifting of consanguinity barriers to marriage. Such a result would loom large in the mind of any judge or justice confronted with an incest challenge. Pandora's Box is also an unrealistic prospect. It would require the wholesale revision of incest legislation in every state except Rhode Island and Ohio.²⁶⁸ Doctrine alone cannot explain the Court's constitutional jurisprudence. Oliver Wendell Holmes famously described law as the "evening dress which the new-comer puts on to make itself presentable according to conventional requirements."²⁶⁹ Judges' ultimate refusals to strike down incest legislation could well be informed by their devotion to extralegal norms and subjective right versus wrong, but such considerations must still be expressed in legal form. Indeed, the Court has already pre-selected its doctrinal answers to the Incest Horrible. As Anton Chekov once said of theater, a line Pamela Karlan quoted in commenting on the Supreme Court's 2012 decision upholding the Affordable Care Act,²⁷⁰ "[i]f in Act I you have a pistol hanging on the wall, then it must fire in the last act."²⁷¹ *Lawrence* is littered with pistols. First, one could disfigure the Court's silence and refuse to recognize sexual intimacy as a fundamental right, the way the 7th Circuit did. Second, one could take shelter in the familiar specter of deformed children, blind to grossly over-inclusive state laws and the ethical dilemmas posed by eugenics. Third, one could point to Justice Kennedy's express carve-out for "relationships where consent might not easily be refused,"²⁷² and in so doing ignore poor-tailoring, the plight of GSA plaintiffs, and the oddity of abridging a fundamental right with an irrefutable presumption of coerciveness that works against the plaintiffs and in favor of

268. See *supra* discussion accompanying notes 45-52.

269. Oliver Wendell Holmes, *Book Notice*, 14 AM. L. REV. 233, 234 (1880).

270. See Pamela Karlan, *No Respite for Liberals*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/07/01/opinion/sunday/no-respite-for-liberals.html>.

271. DONALD RAYFIELD, ANTON CHEKHOV: A LIFE 203 (1997).

272. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

the government. Fourth, the justices could discard tiers of scrutiny altogether, an approach that would offer endless flexibility as to the rigor of judicial balancing. But it should be telling that, out of the four, and now five, articles thus far dealing with the constitutionality of incest laws, *every single one* questions the rationality of sustaining criminal prohibitions.²⁷³ To the social progressives I say Scalia had a point.²⁷⁴ To the conservatives I echo Cahill: be careful what you wish for.²⁷⁵

Was this all an interesting but pointless intellectual exercise? The very notion of doctrinal cohesion has been besieged for some time now. But norms change. Remember that in his *Poe* dissent, Justice Harlan thought constitutional protection for homosexuality ridiculous.²⁷⁶ We cannot know what the incest taboo will look like two or three decades from now. Awareness of GSA is growing and incest is making its way into mainstream art and literature.²⁷⁷ In the last decade alone, a not-insignificant number of incestuous adult couples have outed themselves around the world or taken to the anonymous safety of internet forums.²⁷⁸ They have been followed by

273. See Hammer, *supra* note 19 (arguing that criminalization is unconstitutional given *Lawrence's* broad language); Tuskey, *supra* note 23 (arguing that *Muth v. Frank's* constrained interpretation of *Lawrence* was the only way to avoid doctrinal absurdity); McDonnell, *supra* note 16 (asserting that incest laws can pass heightened rational basis review but would likely fail strict scrutiny, and that from a "realist" perspective, the Court would find a way to distinguish incest from homosexuality); Bratt, *supra* note 15 (writing before *Lawrence* or *Bowers* that the *Griswold* line of cases gives incestuous couples a constitutional right to marry).

274. See *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (arguing that the majority holding invalidating anti-sodomy legislation under a right to intimate sexual conduct would also necessitate the invalidation of laws against conduct like incest, bestiality, and polygamy).

275. See *supra* discussion accompanying notes 25-34.

276. *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

277. See, e.g., GEORGE R. R. MARTIN, *GAME OF THRONES* (1996).

278. See Johann Hari, *Forbidden Love*, THE GUARDIAN, Jan. 9, 2002, <http://www.theguardian.com/lifeandstyle/2002/jan/09/familyandrelationships.features103> ("And it began to spill out: that she had made contact with lots of people over the internet (and consequently in person): boys, girls, fathers, mothers, who are sleeping with their kin So now there are chatrooms and websites that are de facto support groups for people engaged in incest. And what they want is to normalise what we have long considered to be profoundly abnormal. It was on this basis that Karen said Rob was 'overreacting' - she had insinuated herself into an online 'community' of people who reassured themselves that they were not freaks. Rob and I spent a few nights gawping at the disguised but fairly developed pro-incest (or, to be more accurate, pro-tolerating incest) areas of the net in an attempt to understand Karen. The exponents of incest that we talked to in cyberspace were very keen to draw a distinction between 'consensual incest' on the one hand and abuse, rape and paedophilia on the other. Consensual incest, we were told by 'JimJim2' from Ontario, is 'when two adults who just happen to be related get it on. You can't help who you fall in love with, it just happens. I fell in love with my sister and I'm not

an increasingly active media debate over whether sex between consenting adults should still be criminal.²⁷⁹ Like homosexuality, what is unthinkable or patently immoral to us today may not be so absurd later on. Legalization could have profound consequences that are impossible to predict; never underestimate the prowess of savvy legal arbitrageurs. In states where sexual relations between adoptive relatives are permitted, the rich are already adopting their lovers to reap the tax benefits.²⁸⁰ Near-universal abhorrence of sex between close relatives still exists. Squeamish judges will likely continue dodging the issue in the manner of *Muth v. Frank*. But if *Lawrence* stands for a fundamental right to intimate sexual conduct, we must confront its implications and demarcate its boundaries. While our rights are not absolute, constitutional law exists in large part to ensure that they are not merely aspirational. I hope that this Article offers a viable stopping point somewhere short of the bottom of the slope. ❁

ashamed . . . I only feel sorry for my mom and dad, I wish they could be happy for us. We love each other. It's nothing like some old man who tries to fuck his three-year-old, that's evil and disgusting . . . Of course we're consenting, that's the most important thing. We're not fucking perverts. What we have is the most beautiful thing in the world.' ”).

279. See, e.g., Curtis M. Wong, *Should Incest Between Consenting Adult Siblings Be Legalized? Experts Sound Off*, HUFFINGTON POST, Oct. 10, 2014, http://www.huffingtonpost.com/2014/10/09/legalization-incestuous-relationships-_n_5959494.html; Paul Behrens, *Do We Need a Law Against Incest?*, THE GUARDIAN, Apr. 15, 2012, <http://www.theguardian.com/commentisfree/2012/apr/15/law-against-incest>.
280. See Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure their Inheritance from Incest Prosecution?* 32 *HAMLIN L. REV.* 95 (2009).