

The Grammar of Incest: Boundary Violation, Disgust, and the Slippery Slope Trope

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Abstract

This Article examines the role that the incest taboo has played in shaping a normative vision of the family in the law, and argues that the law must reappraise the extent to which disgust, rather than reasoned argument, sustains laws governing sexual and familial choice. It takes issue with the claim that discussion of the taboo has led to its erosion, and contends that it has remained a powerful symbol of non-normative sexuality that is used as the extreme case against which kinship relations are measured. In order to explain why the taboo has persisted over time as a point of comparison to any non-normative family arrangement (interracial marriage, same-sex marriage), it maintains that incest, more than any other taboo on the slippery slope of sexual deviance, represents an archetypal form of disgust and boundary violation. This theory of incest as a core symbol of disgust looks to other disciplines, including political theory, anthropology, and psychology, that have described disgust in similar terms, namely, as a mechanism triggered in response to any perceived instance of boundary violation. After situating the taboo within this theoretical framework, this Article explores more fully how, and why, the law has relied on the taboo to discriminate against consensual sexual relationships, and suggests reasons why the law has an investment in casting the taboo as a symbol of non-normative kinship. It concludes by suggesting ways in which the law might turn away from the taboo and embrace other models that conceive of kinship in more expansive and less disgust-driven ways.

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

David Schneider, *The Meaning of Incest*²

[I]t seems that incest is not a species of lust, but is lust itself.

St. Thomas Aquinas, *Summa Theologica*³

Just a few months ago, Peter Munz, a highly respected professor emeritus of history at the Victoria University of Wellington, New Zealand, and former student of Karl Popper and Ludwig Wittgenstein, suggested to lawmakers in Parliament that they repeal New Zealand’s criminal prohibition against sexual relations between close relatives.⁴ The immediate response by the Members of Parliament (MPs) was silence. As *The New Zealand Herald* reported the following day, “[m]embers were so bewildered they failed to even stare at him with their mouths open: ‘Total lack of comprehension, and then they simply said no.’”⁵

Professor Munz, whose research for a book on the evolution of cultures led to his interest in the incest taboo, later remarked to the *Herald* that “‘I was amazed with the reaction of the select committee . . . I don’t expect them to agree with me but I did [*sic*] expect them to ask intelligent questions.’”⁶ Although Munz made clear that his proposal was limited to consensual relationships, it was too late: The mere mention of incest signaled the death knell to any further discussion. As the *Herald* afterwards commented, “[t]he topic [of incest], like legalising

² David Schneider, *The Meaning of Incest*, 149 J. POLYNESIAN SOC. 85, 90 (1976).

³ ST. THOMAS AQUINAS, SUMMA THEOLOGICA II.II.154 (trans. Fathers of the English Dominican Province) (Benziger Bros. ed., 1947).

⁴ See Catherine Masters, *Academic Takes on Incest Taboo*, THE NEW ZEALAND HERALD (May 22, 2004); see also Patrick Goodenough, “*Legalize Incest*” Suggestion Shocks Lawmakers, CNSNews.com (May 21, 2004) <http://www.cnsnews.com/ViewCulture.html>; David Asman, *Family Affair?*, Fox News Live (June 8, 2004) <http://www.foxnews.com/story.html>; *Legalize Incest Suggestion Shocks NZ Lawmakers*, Poe News (May 22, 2004) <http://www.poe-news.com/stories.php>.

⁵ Masters, *supra* note ____.

⁶ *Id.*

homosexuality and same-sex marriages, is highly emotional and people do not really reason it out.”⁷ A number of commentators in the United States made precisely this connection – between incest and same-sex marriage – when reacting to Munz’s suggestion with remarks such as “[t]he media laughed at Rick Santorum when he mentioned it, but look . . . it’s already starting to happen,” and “[y]ou laugh now. But the truth is that legally after *Lawrence v. Texas* Pandora’s box is now open.”⁸ Or, as *National Review* cartoonist, Roman Genn, recently quipped in light of Munz’s suggestion, “Oh dear, we knew it would come to this – what with the whole same-sex-marriage thing – but so soon?”⁹

The silent dismissal of Professor Munz’s suggestion reflects a more deep-seated fear surrounding sexual taboos in general and the incest taboo in particular. Merely to discuss the possibility of decriminalizing incest, would be to acknowledge that the erosion of certain sexuality morality laws in New Zealand has inevitably led – or could inevitably lead – to the elimination of all of those laws.¹⁰ So, too, in the United States. Prior to the Supreme Court’s decision in *Lawrence v. Texas*, Senator Rick Santorum warned that “[i]f the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”¹¹ While publicly condemned for his glib remark, Santorum was simply reiterating what the majority in *Bowers v. Hardwick* had already said in 1986¹² and what one dissenting Justice in *Lawrence* would soon say in 2003. Adding, among

⁷ *Id.*

⁸ *Legalize Incest Suggestion Shocks NZ Lawmakers, supra* note ____.

⁹ Roman Genn, NAT’L REV. (June 28, 2004).

¹⁰ New Zealand decriminalized sodomy in 1986 under the Homosexual Law Reform Bill. Before the bill passed, discussion in New Zealand, as in the United States prior to *Lawrence*, centered on the possibility that decriminalizing homosexual “conduct” would lead to the decriminalization of other sexual “crimes,” like incest.

¹¹ Senator Rick Santorum, Associated Press Interview (Apr. 7, 2003).

¹² *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986) (White, J.) (stating 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

others, bestiality, fornication, and obscenity to the mix, Justice Scalia declared in his *Lawrence* dissent that “[s]tate 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.”¹³ Santorum and Scalia’s remarks reflect the extent to which incest has been a key player on the proverbial slippery slope, a favorite of jurists and political pundits alike.

Although the topic of incest has recently percolated into public and political discussion, leading one scholar to remark that “[i]ncest is in the public eye,”¹⁴ the incest taboo has a long and mythic past. Indeed, incest has been an object of literary and anthropological interest since long before 429 B.C., when Sophocles wrote the tragic play from which the incest taboo derives its Freudian underpinnings. Despite its longevity, however, the subject of the taboo and the way in which it has shaped the law specifically, and culture more generally, has received surprisingly limited attention in legal scholarship. With few exceptions,¹⁵ little critical work has been

right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road”).

¹³ 123 S. Ct. 2472 (Scalia, J., dissenting). Justice Scalia cleverly took the ‘sting’ out of the extreme conservative position that same-sex conduct is like incest – abusive and non-abusive alike – by qualifying then Justice White’s remark with “adult incest.”

¹⁴ Thomas Strong, *Kinship Between Judith Butler and Anthropology*, 67 *ETHNOS* 400, 402 (2002) (“Incest is in the public eye. Indeed, I was dumbfounded by the coincidental appearance of an article on incest and genetics on the front page of the *New York Times* just as I was completing this essay. Making reference to immigration, state laws, and genetic counseling, the article symbolizes many of the concerns and themes of the new kinship studies: the interdigitation of biotechnology, globalization, new social movements, and the state”).

¹⁵ See, e.g., Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *LAW & SOC. INQ.* 529 (2002); Amy Adler, *The Perverse Law of Child Pornography*, 101 *COLUM. L. REV.* 209 (2001); Courtney Megan Cahill, “*What is Our Bane, That Alone We Have in Common*”: *Incest, Intimacy, and the Crisis of Naming*, 21 *STUDIES IN LAW, POLITICS & SOC’Y* 3 (2000); Milton Regan, *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 *VA. L. REV.* 1515 (1993); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 *LAW & CONTEMP. PROBS.* 79 (1988).

devoted to the way in which sexual taboos – including, but not limited to, the incest taboo – work their power to influence and shape the law, politics, and public perception.

In this Article, I limit myself to the way in which one sexual taboo – incest – has operated in two related legal domains, namely, in the law surrounding sexuality and in family law. Specifically, I examine the structure of the incest taboo, paying particular attention to the way in which it has been used to define a normative vision of sexuality and the family. While incest is not the only taboo on the slippery slope of sexual deviance, it is the one taboo that, I shall argue, represents in the collective imagination (including the legal imagination) an archetypal or prototypical form of boundary violation. Or, in the words of the late David Schneider, incest symbolizes “the wrong way to act in a relationship.”¹⁶ It is for this reason that incest has been a recurring object of comparison, by legal actors, policymakers, and others, to a range of relationships that provoke disgust in ways that recall the mythic horror of the incest taboo.

In the Parts that follow, I shall take issue with the argument, advanced by some legal commentators, that discussion about the taboo has led to its erosion and that “incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage.”¹⁷ While states have surely lifted certain incest prohibitions, and while courts have been analyzing the legitimacy of incest laws for quite some time, the incest taboo remains a potent symbol of non-normative sexuality – indeed, it continues to represent a

¹⁶ Schneider, *supra* note _____, at 90.

¹⁷ Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 292 (1995); *see also* WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION, 59-60 (1983); Regan, *supra* note _____, at 1526 (stating that “the continuing vulnerability of family law [including incest prohibitions] to the Enlightenment critique has fueled a movement in recent years that has demanded considerable deregulation of family life in the name of individual rights”); Schneider, *supra* note _____, at 96 (stating that “[r]ational analysis of taboos is not only likely to miss this point, but even itself to weaken the taboo. Once you begin to think about which kinds of incest-like activities lack particular identifiable harmful consequences for particular identifiable participants, you begin to think about the unthinkable and about why some ‘incest’ is harmless incest. As this process continues, the emotional force of the taboo, its force as a general deterrent, is eroded”).

“serious” threat to the ideal family unit, one that is comprised of heterosexual parents who have children through a “natural” mode of reproduction. In addition, despite the multiplicity of meanings that attach to incest among the states, it has recently emerged as a single and monolithic force – *incest* or *the incest taboo* – in debates over the constitution of the family and its mode of reproduction. In this Article, I am more interested in examining and critiquing the way in which the incest taboo has given rise to certain forms of kinship – and has maintained those forms as the only natural and legitimate ones – rather than in assessing whether laws against incest either will, or should, be repealed.¹⁸ While this Article agrees with the statement that “the proffered explanations for incest prohibitions should be deeply problematic for any same-sex marriage advocate,”¹⁹ among others, it does not aim to provide a systematic framework for overturning incest laws specifically. Rather, it questions the privileged position that the incest taboo has maintained in the law governing sexuality and the family more generally, and argues that the law must reappraise the extent to which disgust, rather than reasoned argument, sustains laws directed at sexual and familial choice.²⁰

Part I will examine the structural features of the slippery slope, one of the primary means by which taboos in general, and the incest taboo in particular, have been transmitted in an effort to influence public opinion and to shape legal norms. After providing a theoretical analysis of slippery slopes, I shall turn to the role that incest has played on the slope of sexual deviance and

¹⁸ For arguments that either propose that certain incest laws be repealed or analyze the possibility of this taking place after *Lawrence*, see Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN’S L.J. 337, 337 (2004) (examining “how the decision in *Lawrence* affects laws regulating other forms of sexual behavior, choosing in particular consensual adult incest as a way to give the argument focus”); Christine McNiece Metteer, *Some “Incest” is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL’Y 262 (2000); Martha Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993); Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 298-309 (1984).

¹⁹ Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 762 (2002).

²⁰ Perhaps it’s needless to say, but to paraphrase Antony: I come to understand incest, not to defend it.

examine a recent case in which *Lawrence* and its so-called companion case, *Goodridge v. Department of Public Health*,²¹ have appeared to figure in the feared movement down the slippery slope to incest.²²

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

Parts III and IV will move from the slippery slope to a closer examination of the justifications for the incest taboo. These Parts will reveal the extent to which the irrational emotion of disgust, which presumably has no place in the rational enterprise called the law, is really doing the work to sustain laws against incest and the other sexual relationships to which incest has been compared. These Parts will provide the theoretical framework that I shall use to explain not only why the incest taboo has remained a powerful and monolithic taboo (*the* incest taboo) on the slippery slope, but also why incest has been compared to other sexual (and

²¹ 798 N.E.2d 941 (Mass. 2003).

²² I refer to *Lawrence* and *Goodridge* as "companion cases" in the sense that critics have approached them in similar terms with respect to their perceived roles in activating the so-called "slippery slope to incest."

reproductive) taboos pertaining to the constitution of the family. Part III will first ask the more general question why incest provokes such disgust. Here, I shall contend that the genetic harm and child sexual abuse justifications for the incest taboo fail both to capture the full range of disgust that incest represents and to explain why incest continues to remain a potent symbol of non-normative sexuality. Part IV will then provide the critical framework that I shall use to situate my theory of the incest taboo as a form of boundary maintenance as well as the more general theory of disgust as boundary violation. This Part will look closely at the way in which comparisons have been made between incest and other taboos, old and new, in order to help bring into focus the theory of boundary violation that I put forward.

In Part V, I shall draw from the theoretical claims made in the previous Parts to explore more fully how, and why, incest has been strategically used to articulate an ideal vision of the family – a vision grounded in a particular understanding of nature and the natural family unit. Here, I shall contend that the incest taboo has continued to shape a normative understanding of the family with respect to who can get married and how they can reproduce, despite the claim that “rational analysis” of the incest taboo has “weaken[ed] the taboo.”²³ In addition, I shall return to the logic of disgust in order to illuminate the symbiotic relationship that exists between the law and the incest taboo.

The basic thrust of the Article is this: The incest taboo has figured – and continues to figure – crucially in slippery slope arguments over sexuality and the constitution of the family, and yet it is a bad fit for the slippery slope model. Further, harm justifications for the incest taboo are suspect. The question then arises why, despite these weaknesses, the incest taboo and its role in the slippery slope metaphor should figure so heavily in contemporary arguments about acceptable and unacceptable familial arrangements. I shall argue that the emotion of disgust is

²³ Schneider, *supra* note _____, at 96.

the only way to comprehend the depth and breadth of the incest taboo and its persistent place of ‘honor’ at the bottom of the slippery slope. But can disgust, which is largely socially contingent, carry the freight of such a powerful metaphorical symbol? In other words, can 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 other so-called deviant, perverse relationships?

Part I Incest and the Slippery Slope

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

A. Structural Features of the Slippery Slope

What do slippery slopes tell us about sexual taboos like incest? Or, more appropriately, how might we define the precise relationship that exists between sexual taboo and the slippery slope in the legal, social, and political domains? Sexual taboos and slippery slopes often go

hand-in-hand in both legal reasoning and political debate. In fact, we might even say that one of the primary functions of the sexual taboo is to define the parameters of the slippery slope (or at least a certain kind of slippery slope), for the more taboo the prohibition, the steeper, and hence more slippery, the slope. Sexual taboos and slippery slopes, or rather sexual taboos *on* slippery slopes, have been key players in the culture wars over the extent to which the state may control the intimate realms of family and sexuality – to say nothing of the highly contested issue of whether the state has any business interfering in the latter of those two realms at all.

As a constitutive feature of the slippery slope, sexual taboos have been effective in scripting the controversy over same-sex marriage, providing the language that we now use, in nearly unconscious fashion, to frame this legal and political issue.²⁴ Prior to *Lawrence*, sexual taboos and slippery slopes were routinely deployed in an attempt to influence public opinion with respect to whether consensual sexual behavior should be subject to criminal penalties. Even after *Lawrence*, one suspects that legal actors and policymakers will continue to rely on sexual taboos and slippery slopes in order to regulate a range of issues concerning the queer community, including, among others, marriage, adoption proceedings, and custody determinations.²⁵

The classic formulation of the slippery slope resembles the following: While A, the case under consideration or the “instant case,” is innocuous enough, B, the danger case, must be avoided at all costs – even if that means forfeiting A. As Frederick Schauer explains, “[a] slippery slope argument claims that permitting the instant case – a case that it concedes to be facially innocuous and that it linguistically distinguishes from the danger case – will nevertheless

²⁴ See GEORGE LAKOFF, *METAPHORS WE LIVE BY* (1980).

²⁵ Whether or not *Lawrence* enjoins courts from considering sexual orientation as one factor among many in adoption proceedings and custody disputes remains unclear. See, e.g., *Lofton v. Sec. of Dept. of Children and Fam. Svcs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. Accordingly, we need not resolve the second prong of appellants’ fundamental-rights argument: whether exclusion from the statutory privilege of adoption because of appellants’ sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy”).

lead to, or increase the likelihood of, the danger case.”²⁶ While Schauer insists that A, the instant case, is innocuous and perhaps even desirable,²⁷ other commentators, including Eugene Volokh and Eric Lode, have qualified Schauer’s structural prototype by observing that the inoffensive nature of A is not a necessary predicate for a slippery slope argument: “Sometimes appeals to SSAs [slippery slope arguments] are . . . attempts to help us see what their proponents believe is the objectionable nature of A. While SSAs may implicitly concede that A is unobjectionable considered alone, such arguments need not make this concession.”²⁸

Two species of slippery slope arguments exist: rational grounds and empirically-based. Rational grounds slippery slope arguments assume that a distinction cannot be made between A, the object under consideration, and B, the object of comparison. This kind of argument “rel[ies] on the idea that there is no non-arbitrary stopping place anywhere along the slope. Typically, such arguments maintain that there are no important differences between A and m, between m and n . . . and the clearly objectionable B.”²⁹ Take the following argument as an example: Because marijuana and cocaine are in essence the same – each a mind-altering substance – the law cannot, within the bounds of logic, permit the use of one drug and prohibit the other. Insofar

²⁶ Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 368 (1985).

²⁷ *Id.* at 368.

²⁸ Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1479 (1999). Lode defines slippery slope arguments generally as “arguments that urge us to resist some practice or policy, either on the grounds that allowing it could lead us to allow some other practice or policy that is clearly objectionable, or on the grounds that we can draw no rationally defensible line between the two.” *Id.* at 1479. Lode thus makes a distinction between rational SSAs and empirical SSAs, observing that “[e]mpirical SSAs maintain that we should not allow A on the grounds that allowing it would increase the likelihood of our allowing each successive case on the slope, until we finally reach some objectionable result.” *Id.*; see also Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1090 n.12 (2003) (“Slippery slope arguments are sometimes made by people who dislike both A and B: the arguer may say ‘Even if A is good on its own, it might lead to a bad B,’ while really thinking that A is bad itself. But the argument is framed this way only because the arguer thinks some listeners may like A but oppose B”).

²⁹ *Id.*

as “we can draw no non-arbitrary line along the slope, rational grounds SSAs maintain that we should not step on it in the first place.”³⁰

By contrast, empirical slippery slope arguments assume that while differences between A and B exist, A should nevertheless be prohibited “on the grounds that allowing it would increase the likelihood of our allowing each successive case on the slope, until we finally reach some objectionable result.”³¹ Take now the slightly modified version of the first drug argument: While marijuana and cocaine might reflect different orders of magnitude on the mind-altering substance scale, the legalization of marijuana might lead to the legalization of cocaine; for this reason, the law should allow neither. Whereas rational grounds SSAs thus posit that there is no principled distinction between A and B – *e.g.*, marijuana and cocaine, or, more relevant here, same-sex marriage and incest – empirical SSAs are slightly more discriminating, recognizing the difference between A and B but nonetheless wary that one could easily slip from A to B by making a series of concessions along the way down the slope.

Whether we characterize slippery slopes as rational-grounds or empirically-based, however, the fear is largely the same, namely, that A will either collapse, or slip into, B, which sits near, or at, the bottom of the slope and threatens to pull A down through sheer gravitational force. While rational-grounds slippery slope arguments might posit that no principled distinction exists between A and B, they nevertheless still employ the metaphor of the slope – one that reflects a moral hierarchy whereby B, or whatever rests at the bottom, is worse than A. It is for this reason – the avoidance of B, at all costs – that the slippery slope argument is deployed in

³⁰ Lode, like Schauer before him, describes this as a version of Sorites paradox, according to which “taking a grain of sand away from a heap of sand makes no significant difference: What we are left with will still be a heap of sand.” Lode, *supra* note _____, at 1485; *see also* Schauer, *supra* note _____, at 172.

³¹ Lode, *supra* note _____, at 1504.

order to maintain the *status quo*, or what Schauer calls the “state of rest.”³² Put less abstractly, for some individuals, same-sex marriage (A) and incest (B) might very well be equally contemptible and share common characteristics. Nevertheless, there is still no getting around the fact that incest, our “B” here, remains at the bottom of the slope and thus in some sense enjoys the privilege of being the worst of a bad lot.³³

While the claim that A will cause or result in B might in some ways be “illogical,”³⁴ and while slippery slope arguments are not always “logically compelled,”³⁵ they are nevertheless highly persuasive because they appear to “describe a behavioral reality” – that is, they seem to reflect the way people think. Moreover, slippery slopes can be potent rhetorical tools, and, according to Volokh, “present a real risk – not always, but often enough that we cannot lightly ignore the possibility of such slippage.”³⁶ As Volokh has recently demonstrated, the “mechanisms” of slippage are wide-ranging, and include the driving role of precedent in American law, the vagaries of the democratic process, linguistic imprecision, and the degree to which the consideration (and eventual legalization) of A might cause an attitudinal shift – leading legislators, jurists, and the public alike to find B less threatening and perhaps inevitable.³⁷ To this list one might add the gravitational force of the landmark case, that is,

³² Schauer, *supra* note ____, at 172.

³³ Lode, *supra* note ____, at 1528 (“Some SSAs can be viewed, at least in part, as expressions of disapprobation toward allowing A. Allowing A will often represent the corruption of some value that is important to the proponent of the SSA. This corruption will frequently be accentuated or magnified in the case of B. B thus can put us in a better position to understand why the proponent of the SSA is troubled by the thought of allowing A. This, in turn, may enable us to do more justice to the deeper concerns that lie behind her invocation of the argument”).

³⁴ Schauer, *supra* note ____, at 369 (“[The slippery slope claim] seems not to be an appeal to logic. Indeed, it is in some sense illogical”).

³⁵ *Id.* at 370.

³⁶ Volokh, *supra* note ____ at 1038; *see also* Schauer, *supra* note ____, at 382 (“It is true that the phenomenon of the slippery slope is not strictly logical and that a slippery slope effect is always in logical and linguistic theory eliminable. But as long as law and life are inhabited by people with human weaknesses of bias and deficiencies of understanding, who govern with laws of limited complexity, the claims of slippery slope effect will not necessarily be invalid”).

³⁷ Volokh, *supra* note ____, at 1036 (“Attitude-altering slippery slopes happen when the expressive power of law changes people’s political behavior as well as their other behavior, by leading them to accept proposals that they

“cases we use to chart our course to future decisions” and that “alter[] our jurisprudence by introducing some new value into it or by altering the significance we attach to some value already existent in our discourse.”³⁸ Proponents of the slippery slope might argue that “[i]f a decision allowing A is likely to be viewed as a landmark, we may have good grounds for fearing that the judiciary will gradually allow practices further down the slope.”³⁹ Some slippery slope enthusiasts have already conceptualized *Lawrence* and *Goodridge* in precisely this way, that is, as two such landmark cases that could lead us down the slope toward several different Bs, including same-sex marriage and the decriminalization of all sexual morality laws, such as laws prohibiting incest.⁴⁰

B. Incest and Slippery Slope Arguments

Both prior to and following *Lawrence* and *Goodridge*, two species of incest slippery slope arguments were current: First, the movement from sodomy to “incestuous” sex (the decriminalization of incest); and second, the movement from same-sex marriage to incestuous marriage (the civil recognition of incestuous relationships).⁴¹ To be sure, these same parade of

would have rejected before”); *see also* Lode, *supra* note _____, at 1515 (“Other closely related factors can also lead to such slides. First, going through some process may change our views of that process. By allowing each successive case on a slope, judges’ views on the law may begin to change in ways that lead them to neglect their possible hesitancy to step on the slope in the first place. Second, allowing some practice could lead to a shift in our norms regarding when uses of that practice are appropriate. Third, certain decisions may become landmarks – cases we use to chart our course to future decisions”).

³⁸ Lode, *supra* note _____, at 1519.

³⁹ *Id.*

⁴⁰ *See* Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (stating that “the best we can do now is take the measure of *Lawrence* as a landmark in its own right by placing its logic in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution’s elusive but unquestionably central protections of liberty, equality, and – underlying both – respect for human dignity”).

⁴¹ It should be noted that the division that I have made between criminal incest (sexual relations) and the civil prohibition against incestuous marriage is not entirely apt in light of the fact that in several states, criminal incest is defined as *either* marriage *or* sexual relations. Such is not the case with respect to the criminal/civil distinction between sodomy and same-sex marriage, which are clearly different. If anything, the fact that in some states

horribles' arguments pre-dated *Lawrence*, and were, in fact, fairly commonplace in the mid-1990s. For instance, testifying before Congress prior to the passage of the Defense of Marriage Act (DOMA),⁴² Hadley Arkes, Professor of Jurisprudence and American Institutions at Amherst College, posed the following question: If same-sex marriage were allowed, “[w]hat is the ground on which the law would turn back challenges” to incest?⁴³

It is important to note, however, that slippery slope arguments that raise the specter of incest are neither new nor particular to the debate over the legalization of sodomy and same-sex marriage. Rather, incest has occupied a privileged position on the slippery slope of sexual deviance for quite some time now, as the taboo against incest was once used to support the taboo against miscegenation in arguments that bear a striking resemblance to the arguments that have more recently surfaced. Incest therefore has a history of appearing on the slippery slope at times when law and culture are confronted with threatening forms of sexuality and non-normative family arrangements.

For instance, in 1872, the Tennessee Supreme Court considered whether the state could prosecute an interracial couple for violating Tennessee’s anti miscegenation law. In that case, *State v. Bell*,⁴⁴ the plaintiffs, a white man and an African-American woman, were married in Mississippi, which, unlike Tennessee at that time, permitted interracial marriage. Although recognizing that such unions were permitted in the state of Mississippi, the *Bell* court nevertheless upheld the couple’s conviction for miscegenation in the state of Tennessee by adverting to three related forms of boundary control: State sovereignty, anti-miscegenation laws, and the incest taboo.

incestuous sex is no different from incestuous marriage insofar as *either* would constitute the crime of incest, highlights the ambiguity of the very term “incest” as it has been deployed in legal and political debate.

⁴² 28 U.S.C. 115, sec. 1738 (1996).

⁴³ 150 CONG. REC. (May 15, 1996) (testimony of Hadley Arkes).

⁴⁴ 66 Tenn. 9 (1872).

The court first noted that because “[e]ach State is a sovereign, a government within, of, and for itself . . . [it] cannot be subjected to the recognition of a fact or act contravening its public policy . . . as lawful, because it was made . . . in a State having no prohibition against it or even permitting it.”⁴⁵ The court’s use of the public policy rationale implicitly rested on the trope of boundary maintenance; indeed, the phrase “within, of, and for itself” represented the linguistic correlative of the geographical, social, and political boundaries that separated the states and ensured their individual sovereignty.⁴⁶ Racial miscegenation here found its counterpart in geographical miscegenation couched in the language of conflict of laws – each an equally dangerous and infective form of boundary violation. Put slightly differently, the physical body (the actual “mixing” of the races) figured as a metaphor for the body politic (protection of state borders), and vice versa.⁴⁷

In addition, the *Bell* court deployed the now proverbial slippery slope argument involving the ineluctable descent to incest: “This would leave the state open to the danger of the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited.”⁴⁸ In addition to considering the threat of racial mixing and to framing the issue as one of state sovereignty, the court thus presaged yet a third form of boundary violation, namely, intra-

⁴⁵ *Id.*

⁴⁶ The *Bell* court was not alone in situating the issue of interracial marriage within the larger context of state sovereignty. For instance, in 1878, the Supreme Court of Virginia remarked that laws against interracial marriage would be “futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another state or country, should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void.” *Kinney v. Com.*, 71 Va. 858, 859 (1878). Similarly, in 1890, the Supreme Court of Georgia underscored the need to maintain boundaries “between” borders and “between” the races: “It will thus be seen how clearly recognized and distinctly fixed is the purpose of the state of Georgia to prohibit within its borders, miscegenation, as the result of marriages between the white and black races.” *State of Ga. v. Tutty*, 41 F. 753, 757 (C.C. Ga. 1890).

⁴⁷ In this sense, one might recall the passage of DOMA and its “mini” state equivalents as similar efforts to delineate boundaries and assert state sovereignty over the definition of marriage.

⁴⁸ *State v. Bell*, 66 Tenn. 9 (1872).

familial sexuality. While I shall return to this idea of incest as an exemplary form of boundary violation in Part IV – one that helps to bring into focus the routine comparison between incest and miscegenation – suffice it to note here that incest once occupied a position at the bottom of the slippery slope with respect to miscegenation that resembles the position that it currently occupies with respect to same-sex relations.

Similarly, slightly more than ten years after *Bell*, the Supreme Court of Missouri considered whether to sustain a demurrer to an indictment charging a white woman with violating a statute that made interracial marriage a felony. The plaintiff in that case, *State v. Jackson*,⁴⁹ contended that Missouri’s anti-miscegenation statute violated the state and federal constitutions. In rejecting the plaintiff’s claim and reversing the lower court’s judgment sustaining the demurrer, the court compared laws against miscegenation to laws against incest, stating that “the State has the same right to regulate marriage in this respect that it has to forbid the intermarriage of cousins and other blood relations.”⁵⁰ As with the *Bell* court, the *Jackson* court deployed a variant of the slippery slope argument in portending the deplorable consequences that would follow should the court find that the federal Constitution guaranteed an unqualified right to marry:

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

⁴⁹ *State v. Jackson*, 80 Mo. 175, 176 (Mo. 1883).

⁵⁰ *Id.*

which regulate marriage and forbid the intermarriage of those nearly related in blood.⁵¹

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

The rhetorical proliferation of the ‘parade of horrors’ that would result should states recognize interracial marriage resonates with the recent declarations with respect to same-sex relations. Like the *Bell* court, critics of sodomy and same-sex marriage have relied on a similar strategy of rhetorical proliferation: “[i]f the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”⁵² In addition to the more formal pronouncements of Justice Scalia and Senator Santorum, a number of commentators have taken up the perceived relationship between incest and same-sex relations in light of *Lawrence* and *Goodridge*. For instance, one commentator has noted that “Santorum has a point in asserting that such a ruling could put us on a slippery slope toward legalizing some forms of incest, the most repellent of the practices he listed.”⁵³

⁵¹ *Id.*

⁵² Senator Rick Santorum, Associated Press Interview (Apr. 7, 2003).

⁵³ Stuart Taylor Jr., *Santorum on Sex: Where the Slippery Slope Leads*, THE ATLANTIC ONLINE (May 6, 2003) <http://www.theatlantic.com/politics/nj/taylor2003-05-06.htm> (“Santorum’s remarks are more plausible as legal analysis than most critics have acknowledged. Might Lord Byron’s problem nonetheless be outlawed because it has long been despised as repugnant and immoral? Not if there is an unqualified constitutional right to consensual adult sex. And sodomy, no less than sibling incest, has for centuries been subject to ‘condemnation . . . firmly rooted in Judeo-Christian moral and ethical standards,’ as the late Chief Justice Warren E. Burger stressed in a concurrence in *Bowers v. Hardwick*. Public opinion is moving toward majority support for a right to have gay sex. But it’s not there yet”); *but see* Austin Bramwell, *Mutilated Debate: Homosexuality Shouldn’t Be Compared to Incest*, NAT’L

More recently, Stanley Kurtz, a research fellow at Stanford's Hoover Center and critic for *The National Review*, has argued that same-sex marriage will lead not only to the dissolution of marriage as an institution, but also to incest. Kurtz contends that the "[t]he taboo against homosexuality works in a similar fashion" as the taboo against incest; consequently, the erosion of one taboo might lead to the erosion of another, such that "[g]ay marriage would set in motion a series of threats . . . from which the institution of marriage may never recover."⁵⁴ Because the mythic specter of incest exists near the bottom, and helps to define the gradient, of the slippery slope, any slippage that might occur through the legalization of same-sex marriage must be prevented before it begins.⁵⁵

The correlation between incest and same-sex relations is by no means a mere rhetorical flourish, although a perennial favorite of conservative commentators. Rather, some less biased commentators maintain that the slippery slope arguments that have been made with respect to incest and same-sex relations might not be entirely far-fetched. For instance, *Slatemagazine's*

REV. ONLINE (March 8, 2004) <http://www.nationalreview.com/comment/bramwell200403040848.htm> (stating that "the incest gambit, while tactically shrewd, is strategically unsound. For one thing, it reinforces the impression that conservatives only object to new rights for gays out of disgust for their conduct. Mere feelings, however, no matter how strong, do not provide reasons for government policies. Besides, if disgust for homosexual acts can be overcome (as, among today's youth, it already has), so, presumably, can disgust for incestuous acts"); Dahlia Lithwick, *Slippery Slope: The Maddening Slippery Slope Argument Against Gay Marriage*, SLATE (May 19, 2004) <http://slate.msn.com/id/2100824> (stating that "[s]ince few opponents of homosexual unions are brave enough to admit that gay weddings just freak them out, they hide behind the claim that it's an inexorable slide from legalizing gay marriage to having sex with penguins outside JC Penney's. The problem is it's virtually impossible to debate against a slippery slope. Before you know it you fall down, break your crown, and Rick Santorum comes tumbling after").

⁵⁴ Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, NAT'L REV. ONLINE (Apr. 30, 2003) <http://www.nationalreview.com/kurtz/kurtz043003.asp>.

⁵⁵ See generally James Dobson, *Marriage Under Fire*, FAMILY.ORG (Aug. 1, 2004) <http://www.family.org>; Louis Sheldon, *Utah Man Uses Sodomy Decision to Push for Polygamy*, TRADITIONAL VALUES COALITION (May 1, 2004) <http://www.traditionalvalues.org/modules> (stating that the "flawed logic" of *Lawrence* "could easily be extended to 'consensual' incest, prostitution, bestiality, and group sex orgies in the 'privacy' of a person's home"); Michelle McCaffe, *Catholic Bishops Say Same-sex Marriage Will Open the Door to Incest* (quoting Jean-Claude Cardinal Turncotte, Archbishop of Montreal, who in the wake of *Lawrence* stated that "[w]hen you change the definition of the institution, you open the door to things you can't foresee. If marriage is a union between two persons who love each other – that's the new definition, without the allusion to sex – where does the notion stop? Will you recognize the marriage between a father and his daughter? Between a brother and his sister? Or two brothers or two sisters? . . . It's very dangerous because we don't know the consequences").

chief political correspondent, William Saletan, has suggested that Santorum’s claim that “being gay [is] on the same legal and moral plane as a person who commits incest” is not so wildly implausible:

In its brief to the Supreme Court in the sodomy case, the [Human Rights Campaign] maintains that “criminalizing the conduct that defines the class serves no legitimate state purpose,” since gays “are not less productive – or more dangerous – members of the community by mere dint of their sexual orientation.” They sustain “committed relationships” and “serve their country in the military and in the government.” Fair enough. But couldn’t the same be said of sibling couples? Don’t laugh. Cousin couples are already making this argument.⁵⁶

While Saletan “[t]hink[s] Santorum is wrong” because a moral difference exists between incest and same-sex relations, he concludes by ceding that “legally, I don’t see why a sexual right to privacy, if it exists, shouldn’t cover consensual incest.”⁵⁷ In the same vein, Volokh has suggested that, contrary to the Massachusetts Supreme Court’s assertion otherwise, it is “eminently plausible” that “the Massachusetts homosexual marriage decision may lead to legalization of adult incestuous marriages.”⁵⁸

Some individuals would agree with Professor Volokh. For instance, four months after deciding *Goodridge*, the Massachusetts Supreme Court decided *Commonwealth v. Rahim*,⁵⁹ a case that has enjoyed considerable notoriety among slippery slope critics. In that case, the court

⁵⁶ William Saletan, *Incest Repellant? If Gay Sex is Private, Why Isn’t Incest?*, SLATE (Apr. 23, 2003) <http://slate.msn.com/id/2082075>; see also Saletan, *Incest Repellant Continued? More on Santorum, Sodomy, and Incest*, SLATE (Apr. 25, 2003) <http://slate.msn.com/id/2082075>.

⁵⁷ *Id.* (Apr. 23, 2003).

⁵⁸ Eugene Volokh, *The Volokh Conspiracy* (Nov. 18, 2003) http://volokh.com/2003_11_16_volokh_archive.html. Volokh remarks that

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

⁵⁹ 805 N.E.2d 13 (2004).

considered whether a Massachusetts incest statute applied to purely affinal⁶⁰ relationships. The defendant was charged with rape, abuse of a minor, and incest in connection with the sexual abuse of his sixteen year-old stepdaughter.⁶¹ Because the defendant was not related to his stepdaughter by either blood or adoption, he moved to dismiss the incest charge, arguing that “the necessary element of consanguinity under the incest statute was absent.”⁶² The *Rahim* court agreed with the defendant on the ground that the plain language of the statute did not include affinal relationships within its definition of incest, and that there was no evidence to suggest that the legislature intended to include such relationships.

Following a lengthy interpretation of the statute and of the etymology of “consanguineous,” the court held that the incest statute applied only to blood relations.⁶³ While recognizing the abusive character of the relationship in question, the court nevertheless expressed concern that criminalizing affinity-based relationships would unduly infringe on consensual adult sexual conduct: “The interpretation that the Commonwealth urges on us sweeps up and criminalizes not only the repugnant conduct alleged in this case, but a wide assortment of relationships between consenting adults.”⁶⁴ In addition, the court emphasized the fact that the state had already successfully charged the defendant under a number of other criminal statutes – in other words, regardless of how the court ruled on the incest charge, the defendant still would have faced additional criminal penalties .⁶⁵ The court finally concluded by remarking that “[w]e leave it to the Legislature to expand the incest prohibition if it so chooses.”⁶⁶

⁶⁰ By “purely affinal” I mean, here and throughout, a relationship based exclusively on marriage (*e.g.*, step-relatives related by neither the whole nor the half blood).

⁶¹ 805 N.E.2d at 13.

⁶² *Id.* at 14.

⁶³ *Id.* at 23.

⁶⁴ *Id.*

⁶⁵ *Id.* at 23.

⁶⁶ *Com. v. Rahim*, 441 Mass. 273, 287, 805 N.E.2d 13, 23 (Mass. 2004).

One might speculate, as many have, that the *Rahim* decision and its focus on consent were motivated, in part, by the same court's decision in *Goodridge* four months earlier and by the Supreme Court's decision in *Lawrence*. Language such as laws that "sweep up" a "wide assortment of relationships between consenting adults" could be lifted directly out of *Lawrence*, whose focus was on private, consensual sexual activity between adults. Not surprisingly, this is precisely what slippery slope enthusiasts proclaimed in the wake of *Rahim*. For instance, after *Rahim* was decided, a student writing on Harvard Law School's Federalist Society's weblog, *Ex Parte*, opined that "[e]very week, it becomes clearer – *Lawrence* and *Goodridge* do undermine the criminalization of incest."⁶⁷ Similarly, in an article that was circulated widely over the Internet, entitled "Massachusetts Burning: Gay Marriage Leads to Incest," the writer declared that

making no sense and running roughshod over the voters and families of Massachusetts is what this same 4-3 majority has begun to get really good at. I said earlier this year – when this same majority ordered by executive fiat that the acceptance of sexual unions of the same-sex (homosexual) "marriage" be mandated and recognized by law – that rulings like this [*Rahim*] were on their way. I just never believed that they would come so quickly.⁶⁸

The problem with this statement – as with so much information on the woefully unedited Internet – is that it got the facts wrong: With the exception of one Justice, the 4-3 majority in *Rahim* was not the same 4-3 majority in *Goodridge*. In fact, the Justice who authored a dissenting opinion in *Goodridge*, Justice Cordy, was the same Justice who authored the majority opinion in *Rahim*, thus casting doubt on the slippery slope contention that the majority in *Rahim* was somehow compelled to recognize "consensual adult relations" between stepfathers and

⁶⁷ http://fedsoc.blogspot.com/2004_03_01_fedsoc_archive.html (Mar. 23, 2004).

⁶⁸ Kevin McCullough, *Massachusetts Burning: Gay Marriage Leads to Incest*, WORLDNETDAILY (Mar. 23, 2004) <http://www.worldnetdaily.com>.

stepdaughters because that same majority had extended the civil right of marriage to same-sex couples in *Goodridge*.

More important, though, is the fact that the *Rahim* court was simply following an approach that it had followed in prior cases when dealing with similar matters of statutory interpretation. For instance, in an earlier case, *Commonwealth v. Smith*,⁶⁹ the same court considered whether digital penetration and oral sex fell within the scope of the state incest statute, which defined the act of incest as marriage and/or sexual intercourse. There, the court held that “in light of . . . legislative activity, we are compelled to limit the meaning of ‘sexual intercourse’ in G.L. c. 272, § 17, to penile-vaginal penetration, with or without emission, and to conclude that the incest indictments against the defendant were properly dismissed.”⁷⁰ As a result of the court’s holding in *Smith*, the Massachusetts legislature amended the incest statute two years later to include “unnatural sexual intercourse” in the list of prohibited activities. In light of *Smith*, it would appear that, rather than sliding down a slippery slope that *Goodridge* and *Lawrence* put into motion, the *Rahim* court simply felt that its hands were tied – as it surely felt, and openly conveyed, in *Smith* – because the legislature had chosen to define incest in a rather narrow way.

I submit that whether *Rahim* in fact reflects a movement down the slippery slope is largely speculative, and, as I have contended, highly unlikely. However, I would also submit that *Rahim* is useful because it suggests at least two reasons why the privileged position that the incest taboo has enjoyed on the slippery slope deserves closer attention.

First, *Rahim* reveals the extent to which a uniform definition of incest does not exist. The legal heuristic of the slippery slope as something on which we slip from A to B assumes that

⁶⁹ *Com. v. Smith*, 431 Mass. 417, 728 N.E.2d 272 (Mass. 2000).

⁷⁰ *Id.* at 419-20, 728 N.E.2d at 275 -76.

there is something definite (or definable) into which we might slip. However, *Rahim* shows that what might be incestuous behavior in one state – *e.g.*, sexual relations between a stepfather and stepdaughter – might be permissible, non-incestuous behavior in another.

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

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

Part II Problems With the “Slippery Slope to Incest” Formulation

A. No Single Definition of Incest Exists

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

For instance, whereas several states criminalize sexual behavior between parents and children related by affinity, Massachusetts, *Rahim* tells us, does not. In fact, the criminal codes of twenty other states, following the Model Penal Code,⁷¹ do not define as “incest” sexual relations between family members related by affinity; some of those same states, however, do prohibit marriage between affinally related adults.⁷² Dissenting in *Rahim*, Justice Greaney highlighted this paradox when he observed that “the court leaves us with a situation where this defendant will avoid prosecution for incest, and (unless the statute is changed) a stepfather can have consensual sexual intercourse with his sixteen year old stepdaughter without fear of criminal sanction. (But, he will not be able to marry her).”⁷³ Other states punish affinal incest

⁷¹ For this discussion, see *Com. v. Rahim*, 441 Mass. 273, 290, 805 N.E.2d 13, 26 (Mass. 2004). The Model Penal Code has rejected affinity-based incest. See Model Penal Code and Commentaries § 230.2, comment 2(c)-(e), at 405-07 (1980).

⁷² For instance, while in Massachusetts there is no criminal prohibition for sexual relations between individuals related by affinity, those same individuals are prohibited from getting married under the state’s domestic relations statute. See M.G.L.A. c. 272, § 17.

⁷³ *Rahim*, 441 Mass. at 290, 805 N.E.2d at 26.

only if the victim is a child (variously defined) or if the sexual contact was nonconsensual. For example, Montana’s incest law provides that “[c]onsent is a defense . . . to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.”⁷⁴

The states also vary in their application of incest statutes to first-cousins, adopted children, in-laws, and even uncles and nieces. For instance, eighteen states and the District of Columbia permit first-cousin marriages, whereas twenty-five do not. The remaining seven states permit such marriages only if certain criteria are met. In Arizona, Illinois, Indiana, Utah, and Wisconsin, first-cousin marriage is permitted on the condition that the couple will not bear children either because the woman is post-menopausal or because the couple is infertile.⁷⁵ In Maine, first-cousin marriage is permitted on the condition that the couple receives genetic counseling prior to marriage.⁷⁶ And in North Carolina, first-cousin marriage is permitted on the condition that the marriage is not between double first cousins (*i.e.*, those that share all lineal and collateral relatives).⁷⁷ With respect to criminal prohibitions, only eight states continue to criminalize sexual relations between first cousins. As Brett McDonnell has observed, “[a]t the time the Model Penal Code was drafted, eighteen states prohibited sex between first cousins, while we have seen that that number has now dropped to eight. Thus, incest between first cousins today is forbidden by fewer states than forbade sodomy before *Lawrence*.”⁷⁸

⁷⁴ Mont. Code Ann. § 45-5-507 (2003).

⁷⁵ See Ariz. Rev. Stat. Ann. § 13-3608 (West 2001); 720 Ill. Comp. Stat. 5/11-11(2) (West 2003); Ind. Code Ann. § 35-46-1-3 (Lexis 1998); Wisc. Stat. Ann. § 765.03 (West 2001); Utah Code. Ann § 30-1-1 (West 2001).

⁷⁶ Me. Rev. Stat. Ann tit. 65 § 3 (West 2001).

⁷⁷ N.C. Code Ann. tit. 51 § 3 (West 2001). A rarity, double first cousins are the children of two brothers who reproduce with two sisters. Suppose A and B, brothers from one family, marry C and D, sisters from a separate family. A and C have children, and B and D have children. Those children are double first cousins because they share both sets of grandparents (*i.e.*, the children of A and C have the same grandparents as do the children of B and D).

⁷⁸ McDonnell, *supra* note _____, at 350; see also MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE (1996) (noting the definitional variety in first cousin incest prohibitions in the United States and arguing that the U.S. prohibition against such unions originated largely because of the belief that it would promote more rapid assimilation of immigrants).

Moreover, whereas twenty states include adoptive relatives (adoptive parent and adopted child; adopted child and adoptive siblings) within their criminal incest prohibitions, thirty states and the District of Columbia do not. In addition, whereas forty-four states and the District of Columbia criminalize incest between uncles or aunts and nephews or nieces, six do not. That said, with the exception of Rhode Island, no state permits uncles/aunts and nephews/nieces to marry. Rhode Island, which repealed its criminal incest law in 1989, has retained a civil incest law that exempts *any* individuals who are related either by blood or through marriage from the marriage prohibition, provided that they are Jewish and are governed by religious precept.⁷⁹

Finally, some states, like Rhode Island, do not even criminally define sexual relations between close blood-related individuals as incestuous. For instance, South Dakota's criminal code defines incest as "[a]ny person, fourteen years of age or older, who knowingly engages in sexual contact with another person, other than that person's spouse, if the other person is under the age of twenty-one and is within the degree of consanguinity or affinity within which marriages are by the laws of this state declared void."⁸⁰ Similarly, Michigan and New Jersey's laws prohibit incest involving persons under eighteen, but not if both are above that age.⁸¹ The irony here, however, is that South Dakota also has a civil prohibition against marriage between any individuals within certain degrees of blood relatedness, regardless of age.⁸² In other words, while certain blood relatives cannot get married in South Dakota, they *may* engage in sexual relations – as long as they are over the age of twenty-one. Indeed, these are just a few examples of the vast diversity of the law surrounding this taboo that is routinely grouped under the

⁷⁹ See R.I. § 15-1-4 (West 2001) ("Marriages of kindred allowed by Jewish religion. – The provisions of §§ 15-1-1 to 15-1-3 shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion"). Similarly, the Uniform Marriage and Divorce Act, which has not been adopted by every state, would permit uncle-niece and aunt-nephew marriage if the couple is from an "aboriginal" culture.

⁸⁰ S.D. Code Ann. § 22-22-19.1 (West 2001).

⁸¹ See McDonnell, *supra* note _____, at 361 (Table 1).

⁸² See S.D. Code Ann. § 25-1-6 (West 2001).

collective, umbrella term “incest.”

In addition to a lack of uniformity over the class of individuals to which state incest statutes apply, a lack of consensus also characterizes the precise behavior that constitutes incest. For instance, whereas some criminal statutes define the prohibited activity more broadly as “sexual contact” or “sexual conduct,” others have rather narrow definitions of the crime by limiting it to sexual (penile-vaginal) intercourse and/or marriage (Wisconsin, Utah).⁸³ Still others grade the crime of incest into degrees based on the kind of behavior in question, with sexual intercourse constituting first degree incest and sexual conduct constituting second degree incest (Washington).⁸⁴

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

If, for instance, the “slippery slope to incest” argument has been used to presage the sexualization of the family that will follow from cases like *Lawrence* and *Goodridge*, that argument becomes less persuasive in light of the fact that many states do not characterize sexual relations between stepparents and stepchildren, adoptive parents and their adopted children, and

⁸³ Wisc. Code 944.06 (West 2001); Utah Code. Ann § 76-7-102 (West 2001).

⁸⁴ Wash RCW 9A.64.020 (West 2001).

even some blood-related parents and their children as “incest.” In other words, some states had already determined that it was acceptable for sexual relations to occur between certain family members before these two landmark cases were decided. In addition, if, as many believe, legalized incest would be tantamount to legalizing intra-familial sexual abuse, then the narrow criminal definition of incest that currently obtains in many states (*e.g.*, penile-vaginal sexual intercourse) suggests that such abuse is already legal – or at least not treated by the law as incestuous *per se*. Finally, if slippery slope believers have adverted to incest in order to warn others of the Darwinian nightmare that would result should incest bans be lifted, their argument becomes less convincing in light of the fact that many states do not prohibit either sexual relations or marriage between first cousins – where a genetic risk, while not great, is nonetheless present – as well as that in some states (South Dakota, Rhode Island) close relatives may reproduce without facing criminal penalties.⁸⁵ I shall return to the weaknesses of the genetic (or biological) argument in greater detail in Part III. For now, however, it is sufficient to note that the genetic argument alone fails to capture the particular threat that incest represents.

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

Slippery slope arguments presume that the boundary separating the “extant state of affairs” or “the state of rest” from the “danger case” (*i.e.*, the boundary separating the flat ground at the top of the slope from the danger that lurks at the bottom) is “firmer than the one between the instant case and the danger case” (*i.e.*, the boundary separating that which has moved, or

⁸⁵ And, to recall, Rhode Island does not prohibit any individuals related by either blood, marriage, or adoption from getting married if they are Jewish. For the debate surrounding whether first cousins run the risk (or perhaps the benefit) of having children with certain recessive traits should they decide to reproduce, see McDonnell, *supra* note _____, at 352-53; 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 97 (2002) (estimating that the additional risk of deleterious genetic conditions falls in the range from 4.7 to 6.8 % for first cousin unions, as opposed to 3-4% for the general population); Bratt, *supra* note _____, at 267-76.

might move, us off the flat ground and closer to the dangerous nadir).⁸⁶ For this reason, anything that brings us closer to the danger case, including the instant case, is verboten. Applying this formulation to the same-sex marriage-to-incest slippery slope, the likelihood of legalizing incest based on the existing state of affairs – where we are now – is much less than the likelihood of legalizing incest should bans against same-sex marriage be lifted.

Incest laws, however, have been subject to constitutional attack well before *Lawrence* and *Goodridge*. Indeed, even just a brief survey of the state reporters reveals that legal arguments and constitutional claims pertaining to the danger case at the bottom of the slope – incest – have a lineage that predates the recent cases dealing with same-sex relations.⁸⁷ In other words, the boundary separating the “extant state of affairs” from the danger case is much less definite than the slippery slope enthusiasts would have us believe. Whereas no court in the United States has recognized a legal challenge to laws prohibiting polygamy or bestiality, at least

⁸⁶ Schauer, *supra* note _____, at 378.

⁸⁷ For instance, in *State v. Benson*, the defendant, a father charged with incest and sexual abuse of his biological child, claimed that the incest statute violated his “fundamental right to private consensual acts of sexual intercourse, regardless of the degree of affinity between the parties.” The court disagreed. Finding that the right to engage in an incestuous relationship was not “deeply-rooted” in the Nation’s history, the court subjected the incest statute to rational basis review, concluding that “[w]e need hardly cite authority for the obvious conclusion that this statute bears a real and substantial relation to the public morals.” *State v. Benson*, 81 Ohio App. 3d 697, 700, 612 N.E.2d 337, 339 (Ohio App. 1992). Similarly, in *In re: Tiffany Nicole M. v. Allen M.*, the Wisconsin Court of Appeals considered the constitutionality of a parental termination statute against both a due process and an equal protection challenge. *Interest of Tiffany Nicole M.*, 214 Wisc. 2d 302, 318-19, 571 N.W.2d 872, 878 (Wisc. App. 1997). The defendants in that case, biological siblings involved in a seemingly consensual relationship, had parented three children; the state was attempting to terminate their parental rights as to one of the children on the ground that their incestuous relationship rendered them *per se* unfit. Recognizing that “a parental rights proceeding interferes with a fundamental right,” the court nevertheless found that the state had “compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society.” The court further reasoned that “[g]enetic mutation . . . is but one consequence of incest, and only one of many reasons why Wisconsin and other states have long prohibited incestuous marriage and criminalized incest.” Although the court cited authority for the proposition that “[w]hether consanguineous mating causes genetic defects may be more questionable than generally assumed,” it nevertheless did not find the biological argument to be dispositive. *Id.* at 320, 571 N.W.2d at 878. For other unsuccessful constitutional challenges to state incest statutes, see *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995) (holding that the prohibition against incest was rationally related to the legitimate state interest of protecting children and the family unit); *In the Interest of L.*, 888 S.W.2d 337 (Mo. Ct. App. 1994) (holding that a father’s undisputed acts of incest with his minor sisters involved children “in the family” within the meaning of statutory ground for termination of father’s parental rights to his biological daughter); *State v. Buck*, 92 Or. App. 130, 757 P.2d 861 (1988) (holding that incest statute does not violate federal constitutional right to privacy); *State v. Kaiser*, 34 Wash. App. 559, 663 P.2d 839 (1983) (holding that statute criminalizing incest does not violate equal protection).

one court has already recognized an equal protection challenge – on state constitutional grounds – to a state incest statute.

The plaintiffs in that case, *Israel v. Allen*,⁸⁸ challenged a provision of a Colorado incest statute that prohibited marriage between a brother and a sister related solely by adoption on the ground that it violated their fundamental right to marry. Although the district court agreed with the plaintiffs that the statute was not supported by a compelling state interest, the Supreme Court of Colorado determined that, regardless of whether marriage was a fundamental right,⁸⁹ the statute failed to satisfy even rational basis review. The Colorado court relied heavily on the biological argument, reasoning that it was illogical to prohibit an adopted brother and sister from marrying because there was no genetic threat:

[O]bjections that exist against consanguineous marriages are not present where the relationship is merely by affinity. The physical detriment to the offspring of persons related by blood is totally absent. The natural repugnance of people toward marriages of blood relatives, that has resulted in well-nigh universal moral condemnation of such marriages, is generally lacking in applications to the union of those only related by affinity.⁹⁰

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

The metaphor of the slippery slope derives much of its power by what it visually depicts and by what that depiction assumes, namely, the existence of something at the bottom to which we should give heed and the fact that we are not *there* yet. In the case of incest, however, neither

⁸⁸ *Israel v. Allen*, 195 Colo. 263, 577 P.2d 762 (Colo. 1978).

⁸⁹ The court maintained that whether marriage was a fundamental right in the state of Colorado was in dispute. *See Israel*, 195 Colo. at 265, 577 P.2d at 764.

⁹⁰ *Id.* at 265, 577 P.2d at 764.

of these assumptions is entirely accurate. Because the meaning of incest varies from state to state, it is uncertain just what is lurking at the bottom of the slope – if father-daughter incest, then that is already permitted in many states, provided that the father and daughter are not related by blood (and, in a few states, certain forms of incest are permitted even despite the existence of a blood relationship). Further, the fact that incest statutes have been challenged, sometimes successfully, on constitutional grounds, suggests that A (*e.g.*, same-sex marriage) is not necessarily higher on the incline than B (*e.g.*, incest) – thus casting doubt on the topography of the slippery slope itself.

Despite the multiplicity of meanings surrounding incest and the fact that the “state of rest” – or the flat ground before case A – is not as staid as the slippery slope model presumes, the incest taboo remains a potent monolithic force at the bottom of the slope. In one sense, Carl Schneider’s observation that “[r]ational analysis of taboos is not only likely to miss the point, but even itself to weaken the taboo,”⁹¹ represents a plausible theory of the way in which prohibition relies on silence to sustain itself. But in another sense, it is arguable whether “rational analysis” of the incest prohibition – including a successful constitutional challenge to an incest statute in *Israel* – has *in fact* led to its decline. Quite the contrary, incest continues to anchor the slippery slope, one that has been instrumental in shaping public opinion as well as the law itself.

How might we then account for the persistence and persuasive force of incest as the abyss that yawns at the bottom of the slippery slope in legal and political debate over the regulation of intimate relationships? I would argue that the only way that we can begin to understand the position that incest occupies on the slippery slope, is to understand the logic of disgust that underlies the incest taboo. Specifically, the slippery slope at least theoretically assumes that a line can be drawn somewhere on the slope – a toehold, so to speak – at the point

⁹¹ Schneider, *supra* note _____, at 96.

where behavior causes harm. As Parts III and IV will show in greater detail, however, disgust is an emotion that is triggered in response to even harmless situations. The principle of disgust suggests that even if we could draw a line between harmful and harmless incest on the slippery slope, it is largely irrelevant because individuals would find even harmless incest to be a source of disgust.

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

Part III Incest and Harm

In her recent work on disgust, Martha Nussbaum has suggested that, while harm might provide a “*prima facie* case for legal regulation,” revulsion, or disgust, alone is never enough.⁹² If that is correct, then it is important to determine whether laws against incest derive from a proper understanding of harm and whether a “*prima facie* case for legal regulation” of incest can be made. If so, then at the very least we might be able to justify those laws and mark a line beyond which certain kinds of incest are harmful and thus warrant regulation. If, however, laws

⁹² MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004); *see also* Martha Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW 19 (Susan A. Bandes, ed. 1999).

against incest, even otherwise *harmless* incest, derive mainly from revulsion, then it is difficult to determine exactly where that “line” should be drawn, which suggests that any form of line-drawing is purely arbitrary. More important, if the taboo has come to symbolize the revulsion surrounding even harmless sexual behavior, then this would provide a firm basis for criticizing the extent to which the taboo has been used in slippery slope arguments against otherwise consensual (and harmless) sexual relationships.

A. Harm-Based Rationales for Laws Against Incest

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

Courts have sometimes referred to either one, or both, of these harm-based rationales for sustaining laws against incest. For instance, in *Israel v. Allen*, discussed in Part II, the Colorado Supreme Court turned to biology (or genetic harm) when stating that “objections that exist against consanguineous marriages are not present where the relationship is merely by affinity. The physical detriment to the offspring of persons related by blood is totally absent.”⁹³ Similarly, in *In re: Tiffany Nicole M.*, the Wisconsin Court of Appeals adverted to biology when recognizing that “genetic mutation” is one of the many consequences of incest.⁹⁴ In addition,

⁹³ *Israel v. Allen*, 195 Colo. 263, 265, 577 P.2d 762, 764 (Colo. 1978).

⁹⁴ *In re: Tiffany Nicole M.*, 214 Wisc. 2d 302, 318-19, 571 N.W.2d 872, 878 (Wisc. App. 1997).

courts have also justified laws against incest on the ground that incest is tantamount to child sexual abuse. For instance, in *Kaiser v. State*, the Washington Court of Appeals stated that “[p]revention of mutated birth is only one reason for these statutes. The crime is also punished to promote and protect family harmony, [and] to protect children from the abuse of parental authority. . . .”⁹⁵

Each of these rationales fails to explain why incest elicits disgust. Considering first the genetic rationale, it would be difficult to argue that the mere fact that a child is born with recessive genetic traits is in itself offensive; any number of children from non-incestuous unions are born with such traits and we would not say that they necessarily elicit disgust. Rather, what could very well be deemed offensive, and thus legally prohibited, is the fact that parents might put their future progeny in harm’s way by increasing the risk that they will be born with such traits. But even this harm does not entirely explain the revulsion triggered by incest specifically or why certain kinds of incest are illegal. For instance, even when there is a strong likelihood that each parent carries a recessive trait, as in the case of Tay-Sachs disease in the Ashkenazi Jewish community, we do not require non-related parents to undergo genetic testing prior to having children to determine whether the child or children will be born with a genetic abnormality. In addition, even if non-related parents knew that they each carried a recessive trait and nevertheless decided to have children, it is unlikely that we would label that decision as disgusting *per se* – while certainly risky and perhaps even irresponsible, probably not disgusting. Perhaps the Supreme Court of Georgia had these inconsistencies in mind when it altogether discounted biology (or genetic harm) as a valid justification for the incest taboo. In *Benton v. State*⁹⁶ the Georgia court found that the state’s criminal incest law applied to stepfamilies and

⁹⁵ *State v. Kaiser*, 34 Wash. App. 559, 663 P.2d 839 (1983).

⁹⁶ *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

biological families alike, reasoning that “the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties. This is evident by the fact that the taboo is often violated – people generally are incapable of violating their instincts – and because society condemned incest long before people knew of its genetic effects.”⁹⁷

Considering now the child sexual abuse rationale, it is unclear whether the thought of child abuse elicits disgust in the same way as does incest. As with related parents who place their progeny in harm’s way by increasing the risk of recessive chromosomal traits, it is plausible that we would find sexually abusive parents and parent-figures disgusting because they severely harm their biological, adoptive, or stepchildren physically as well as psychologically. At the same time, however, child abuse and incest represent different orders of magnitude on the revulsion scale, largely because incest represents much more than child abuse. Indeed, even in the absence of abuse, it is likely that we would label the incestuous relationship disgusting. In addition, and on a more practical level, if the harm that incest statutes are targeting is abuse, then such harm is already adequately captured by statutes dealing with child abuse. As some commentators have pointed out, “child sexual abuse” and “incest,” while used interchangeably, do not have the same meaning. For instance, the National Center on Child Abuse and Neglect defines the former as “[c]ontacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another person.” By contrast, incest is simply defined as “sexual relations between persons so closely related that marriage is legally forbidden.”⁹⁸

These harm-based rationales are an incomplete way of accounting for the disgust that incest provokes and for why certain incestuous relationships must be legally prohibited. To be

⁹⁷ *Id.* at 450, 461 S.E.2d at 204.

⁹⁸ Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, n.150 (1989).

sure, the *Israel* court did draw a line between harmful and non-harmful incest on the basis of genetics and biology – at the point where offspring might suffer “physical detriment.” At the same time, however, the court there suggested that our disgust mechanisms are invariably triggered by *any* sexual relationship between blood-related relatives, stating that “[t]he natural repugnance of people toward marriages of blood relatives, that has resulted in well-nigh universal moral condemnation of such marriages, is generally lacking in applications to the union of those only related by affinity.”⁹⁹ In other words, the *Israel* court assumed that all blood relatives – presumably including cousins – have an innate aversion for incestuous relationships, even biologically harmless incestuous relationships that might not necessarily involve sexual reproduction. Through this one sweeping statement, the court neglected to consider the fact that many blood relatives *have* entered into incestuous relationships *in spite of* this so-called “natural” repugnance. Similarly, although the petitioners’ three children in the Wisconsin Court of Appeals case, *In re: Tiffany Nicole M.*, were healthy and seemingly free from chromosomal defects, and although the court there noted that “[w]hether consanguineous mating causes genetic defects may be more questionable than generally assumed,” it nevertheless evinced disgust over the mere possibility of incest when it stated that “the incestuous parent by his actions has demonstrated that the natural, moral constraint of blood relationship has failed to prevent deviant conduct and thus cannot be relied upon to constrain similar conduct in the future.”¹⁰⁰ In other words, like the *Israel* court, the *Tiffany Nicole M.* court suggested that something – a disgust mechanism, perhaps – exists in the “blood relationship” to prevent even presumably harmless incest encounters. The courts’ rhetoric in these two opinions speaks to a

⁹⁹ *Israel v. Allen*, 195 Colo. 263, 265, 577 P.2d 762, 764 (Colo. 1978).

¹⁰⁰ *In re: Tiffany Nicole M.*, 214 Wisc. 2d 302, 318-19, 571 N.W.2d 872, 878 (Wisc. App. 1997).

much larger belief, shared by many, that incest is a source of disgust or repugnance even when it does not result in harm, genetic or otherwise.

B. Incest and the Insignificance of Harm

Aside from a few court opinions and vague public sentiment, is there more empirically-based evidence that suggests that harm is irrelevant in the context of sexual taboos in general and the incest taboo in particular? Research conducted over the last decade in the fields of cognitive science and behavioral psychology suggests that this is likely the case, that is, that notions of harm matter less in these particular contexts than we might have otherwise assumed. Scientists in these fields increasingly have contended that “for affectively charged events such as incest and other taboo violations, a [social] intuitionist model may be more plausible than a rationalist model.”¹⁰¹ In so doing, they have challenged the widely-held assumption that moral judgment is shaped by one’s perceptions of harm.

¹⁰¹ Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814 (2001); see also Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?* 6 TRENDS IN COGNITIVE SCIENCES 512 (2002). While alternative theories of morality – including the social interactionist and the social intuitionist perspectives – have gained acceptance, “[r]ationalism still rules, and there appears to be a consensus that morality lives within the individual mind as a traitlike cognitive attainment, a set of knowledge structures about moral standards that children create for themselves in the course of their everyday reasoning”). Haidt, *supra*, at 816. For additional work on the subject matter, see Schweder & Haidt, *The Future of Moral Psychology: Truth, Intuition, and the Pluralist Way*, PSYCHOLOGICAL SCIENCE, 4, 360-365 (1993). It appears that the treatment of the social intuitionist model, as well as of the affective basis for moral judgment, have begun to percolate into legal scholarship as well. See, e.g., Cass Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1563 (2004) (“A great deal of recent attention has been paid to the fact that people often have a rapid, largely affective response to objects and situations, including job applicants, consumer products, animals, cars, and causes of action”); Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2004); Jeremy Blumenthal, *Who Decides? Privileging Public Sentiment about Justice and the Substantive Law*, 72 UMKC L. REV. 1 (2003).

The social intuitionist model claims that “moral judgment is caused by intuitive moral impulses and is followed (when needed) by slow, ex post facto moral reasoning.”¹⁰² According to this model, moral judgments, like aesthetic judgments, are made quickly and intuitively – particularly in response to scenarios, such as incest, that elicit disgust or extreme emotion.¹⁰³ The “intuitionist” aspect of the model presumes that morality is driven by intuitions, which are defined as “the sudden appearance in consciousness of a moral judgment, including an affective valence (good-bad, like-dislike), without any conscious awareness of having gone through steps of searching, weighing evidence, or inferring a conclusion.”¹⁰⁴ The “social” aspect of the model presumes that moral reasoning “is usually an ex post facto process used to influence the intuitions (and hence judgments) of other people. In the social intuitionist model, one feels a quick flash of revulsion at the thought of incest and one knows intuitively that something is wrong.”¹⁰⁵ When asked to justify one’s belief that something – like consensual, harmless incest – is wrong, “[o]ne puts forth argument after argument,” and believes that he is right “even after [his] last argument has been shot down. In the social intuitionist model it becomes plausible to say, “I don’t know, I can’t explain it, I just know it’s wrong.”¹⁰⁶

Jonathan Haidt, a key exponent of this model, has used it to examine the source of moral angst over sexual taboos as well as to account for the various disagreements that have driven a wedge between political conservatives and liberals over issues of sexual morality.¹⁰⁷ For example, in one study, Haidt interviewed self-identified conservatives and liberals in order to

¹⁰² *Id.*; see also Haidt, *supra* note _____, at 829 (“[t]he social intuitionist model . . . is not an antirationalist model. It is a model about the complex and dynamic ways that intuition, reasoning, and social influences interact to produce moral judgment”).

¹⁰³ See *id.*; see also Rozin, Schweder, Andras & Angyal, *Disgust and Related Aversions*, 36 J. OF ABNORMAL & SOC. PSYCH. 393 (1941) (analyzing the role that disgust plays in the formation of moral judgment).

¹⁰⁴ Haidt, *supra* note _____, at 812.

¹⁰⁵ *Id.*

¹⁰⁶ Haidt, *supra* note _____, at 814.

¹⁰⁷ See Jonathan Haidt, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. OF APPLIED PSYCH. 191 (2001).

measure their reactions to three harmless, yet “offensive,” sexual taboo violations – same-sex relations, masturbation (with a bestiality component), and consensual sibling incest – that were then further subdivided into six scenarios intended to elicit varying degrees of disgust.¹⁰⁸ The results of the interviews supported their thesis that moral judgment was driven more by the non-consequentialist and emotional reactions of disgust/offensiveness than by perceptions of harm.¹⁰⁹ The researchers found that conservatives and liberals both responded to the six scenarios in quick and immediate fashion, only later coming up with rationalizations such as “it is wrong because it is harmful” or “it is wrong because, well, it just is” – even when the interviewers called attention to the non-harmful aspects of each scenario.

Haidt’s study shows that political conservatives and liberals differed most over their affective responses to the same-sex scenarios and least over their affective responses to the incest scenarios.¹¹⁰ Most striking, however, was the researchers’ conclusion that negative affect was the most significant predictor of moral judgment for both groups. Whereas most liberals espoused a harm-based morality (*i.e.*, only those actions that cause harm are immoral) and most conservatives espoused a broader morality (*e.g.*, based on community norms and religious

¹⁰⁸ The six scenarios included: a 27-year-old man having intercourse with a 25-year-old man who is his partner; a 30-year-old woman having oral sex with a 29-year-old woman who is her partner; a 34-year-old woman who enjoys masturbating while cuddling with her favorite teddy bear; a 25-year-old man who prefers to masturbate while his dog willingly licks his (the man’s) genitals and seems to enjoy it; a 29-year-old man and his 26-year-old girlfriend who one day discover that they are half brother and sister (raised in separate families) although decide to continue their sexual relationship anyway, using a condom; and a 25-year-old man and his 23-year-old adopted sister who decide to have sexual intercourse. *See id.* at 193.

¹⁰⁹ Haidt defines “affective condemnation” in terms synonymous with disgust: “The following two quotes illustrate the [affective condemnation] code: ‘It’s more along the gross lines, sort of repelling. I just don’t think it’s normal’; and ‘That’s foul, that’s nasty. I mean that’s not right. That’s not right.’” *Id.* at 201. To avoid a situation where one’s perception of harm (what Haidt calls a moral content code) was indistinguishable from one’s affective condemnation (harmful because disgusting and disgusting because harmful), the reliability of all codes for each participant were computed. The interviewers also ran regression analyses in order to determine whether harm or affect was a greater predictor of moral judgment regarding sexual choices.

¹¹⁰ For instance, whereas 0% of the liberals, and 40% of conservatives, interviewed exhibited a negative affective response to gay male sex, 8% of both liberals and conservatives interviewed exhibited a negative affective response to a sexual relationship between an adopted brother and sister. Similarly, whereas 7% of the liberals, and 60% of the conservatives, interviewed exhibited “dumbfounding,” or a confused inability to explain one’s position, with respect to gay male sex, 42% of the liberals, and 50% of the conservatives, interviewed exhibited a dumbfounding response to the sexual relationship between the siblings related by adoption. *See id.* at 209.

belief), for both groups, negative affect (or disgust) determined moral judgment more than *any* of the other predictors in all of the scenarios – and *particularly* in the incest scenarios. While conservatives and liberals disagreed most over their views toward same-sex relations, “[t]he liberal insistence that people have a right to do whatever they choose, so long as they don’t hurt anyone, did not extend to the powerful taboo against incest.”¹¹¹ Haidt explains:

[M]oral judgment was better predicted by participants’ emotional reactions than by their perceptions of harmfulness. Harm was often cited, especially on the incest scenarios, but even there it was not a significant predictor of judgment, once negative affect was included in the analysis. This finding fits with the qualitative finding that participants often condemned the scenarios instantly, and then seemed to search and stumble through sentences laced with pauses, “ums,” and “I don’t know,” before producing a statement about harm. This general pattern of quick affective judgment and slow, awkward justification fits well with an intuitionist model of moral judgment, while it does not fit well with models in which moral reasoning drives moral judgment.

Haidt concludes his study by suggesting that “the best way to change moral judgments may be to trigger competing moral intuitions” rather than by resorting to a process of argumentation that “does not cause people to change their minds,” but rather “forces them to work harder to find replacement arguments.”¹¹²

Like Haidt and his associates, Joshua Greene, a researcher at Princeton’s Center for the Study of Brain, Mind, and Behavior, has conducted a series of magnetic resonance imaging (MRI) experiments that are designed to test the brain’s moral decision-making process.¹¹³ What Greene and others have found strongly supports Haidt’s theory behind the intuitionist model of moral decision-making. Specifically, Greene has begun to uncover the distinctly neuronal foundation of moral judgments. When posed a series of questions that implicated a wide spectrum of moral issues, volunteers participating in the experiments relied on those parts of

¹¹¹ *Id.* at 213.

¹¹² *Id.* at 218.

¹¹³ Carl Zimmer, *Whose Life Would You Save?*, 25 DISCOVER (April 2004) (interview with Joshua Greene).

their brain that produce emotions and feelings of disgust and anger significantly more than on those parts of the brain typically associated with the reasoning process. Based on a variety of such experiments, Greene has concluded that emotions and intuitions play a critical – albeit undervalued – role in the formation of moral judgment. He suggests that Hume, who believed that moral judgment derived partly from an “immediate feeling and finer internal sense,” better captured the etiology of moral judgment than did the primary modern exponents of moral reasoning, Kant and Mill.

An understanding of the intuitionist model of moral judgment, and of the pivotal role that emotions play in the decision-making process, is indispensable to any inquiry into the relationship among disgust, incest, and perceptions of harmfulness for at least two reasons. First, the model challenges the classic liberal or libertarian claim, enunciated by and commonly associated with John Stuart Mill, that the government’s only role in the community is the prevention of harm.¹¹⁴ The Millian position presupposes that, as long as an individual’s choices do not result in harm to others, the state must refrain from intruding upon or constricting them – including, presumably, choices pertaining to one’s sexuality or sexual behavior. This classic harm-based, or consequentialist, position has been widely embraced in American law. Indeed, one might even say that it has shaped the Supreme Court’s substantive due process jurisprudence and was an integral feature of the majority’s opinion in *Lawrence*.¹¹⁵ The intuitionist model, however, not only questions the importance of harm in the formation of moral judgment, but also suggests that the classic liberal paradigm is prescriptive of the way people *should* think rather than descriptive of the way they *do* think.

¹¹⁴ JOHN STUART MILL, ON LIBERTY (1859, Gateway ed. 1955).

¹¹⁵ That said, McDonnell points out that “the Court [n]ever explicitly state[s] that the government can only criminalize behavior that causes harm to others.” McDonnell, *supra* note _____, at 355.

For instance, one might argue, as some commentators have, that it is possible to draw a line on the slippery slope (from sodomy to incest or from same-sex marriage to incestuous marriage) at the point where one's sexual preferences or sexual choices inflict harm on others. At first glance, this position would appear to defuse the slippery slope argument by providing a firm toehold on the slope itself: Of course we are not going to slip down the slope to incest because, given our Millian leanings, we know that a line can be drawn at harm, whether that harm is the coercive nature of any incestuous act or the increased biological risk that consanguineous reproduction poses. The intuitionist model, however, suggests that whether a line theoretically *can* be drawn on the slippery slope is of little to no consequence, for individuals will inevitably find that certain sexual taboos – same-sex relations but incest more so – are worthy of our moral condemnation regardless of whether they cause harm to others. The consensual incest encounters in Haidt's study offer representative examples of precisely this phenomenon. While harm was one predictor of moral judgment, it paled in comparison to the more decisive role of negative affect. These empirically-based conclusions, which suggest that morality is driven largely by disgust, are more in line with Lord Patrick Devlin's assertion that disgust is among the primary "forces behind the moral law"¹¹⁶ than with Mill's harm principle.

Second, and more relevant here, the intuitionist model provides an explanation for why the incest taboo has continued to remain a key player in the culture wars over sexuality, despite the fact that not all incest causes harm. As Haidt points out, incest was the only sexual taboo in his study that elicited extreme affective condemnation or disgust from political conservatives and liberals alike. That moral disapprobation for incest supersedes political affiliation offers one possible explanation for why incest has maintained its position at the bottom of the slippery

¹¹⁶ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (1965). Interpreting this passage, Nussbaum remarks that Devlin's "entire argument is directed against Mill's contention that only . . . harm justifies legal regulation"). NUSSBAUM, *supra* note _____, at 78.

slope, namely, because everybody is repulsed by it. The conservative juxtaposition of same-sex relations and incest is an opportune way of winning the debate by starting from a point of agreement – that incest is disgusting and must therefore be avoided at all costs, even if that means that some people in the mix might end up sacrificing a cause which they tend to support, such as same-sex marriage.¹¹⁷ In this sense, incest performs the powerful role of contaminating anything that becomes associated with it. As I shall suggest in the next Part, placing incest alongside other taboos (same-sex relations, miscegenation, cloning) makes those taboos start to look more and more like incest.¹¹⁸

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

Part IV Incest and The Logic of Disgust

Among the many possible reasons why individuals find incest – and the other taboos to which it is (or was) compared – to be a source of disgust, is the extent to which it represents an archetypal form of boundary violation. Section A will provide the critical background in support of this theory. Section B will then apply this theory to incest specifically. Section C will again rely on this theory to explain how, and why, incest has functioned as a point of comparison to other non-normative family arrangements. This more comprehensive theory of incest as a

¹¹⁷ This is primarily an issue that affects those individuals who are ‘on the fence.’

¹¹⁸ See LAKOFF, *supra* note _____ (examining this process of “contamination” and its political consequences).

prototypical symbol of boundary violation will help to explain why incest has continued to remain a monolithic taboo on the slippery slope – *the* incest taboo – in spite of the problems highlighted in Part II.

A. Disgust and Boundary Violation

Paul Rozin, among the first scholars to lend intellectual respectability to the study of disgust, once remarked to an interviewer that “[d]isgust evolves culturally, and develops from a system to protect the body from harm to a system to protect the soul from harm.”¹¹⁹ Rozin’s inquiry into the nature of disgust starts with what he refers to as the core “elicitors” of disgust, including “food, body products, [and] animals” and their wastes.¹²⁰ Moving centrifugally out from these core elicitors, Rozin identifies additional corporeally-related, disgust-eliciting phenomena, including “sexual behaviors, contact with death or corpses, violations of the exterior envelope of the body (including gore and deformity) [and] poor hygiene.”¹²¹ Rozin and his colleagues have concluded that these disgust elicitors share a common theoretical substrate, namely, they all constitute “reminders of our animal vulnerability” and serve to humanize “our animal bodies.”¹²²

Our revulsion reflexes, however, are not limited to these largely physical and bodily phenomena, but rather extend to social phenomena as well, including “interpersonal contamination (contact with unsavory human beings) and certain moral offenses.”¹²³ While the “presumed origin of disgust [is] a rejection response to bad tastes, in the service of protecting the

¹¹⁹ Paul Rozin, *Disgust*, in HANDBOOK OF EMOTIONS 637 (2000).

¹²⁰ *Id.*

¹²¹ *Id.*; see also *id.* at 638 (locating the origin of disgust in reactions to taste and noting the etymology of “disgust,” *de-gustare* or that which is offense to the taste).

¹²² *Id.* at 642.

¹²³ *Id.* at 637.

body,” it branches out to encompass a range of cultural and moral activity, such that disgust might be conceived of as serving the purpose of “protecting the soul.”¹²⁴ In fact, Rozin explains that “[w]hen we elicited lists of disgusting things from North American and Japanese informants, we found that the *majority* of instances referred to moral offenses.”¹²⁵ For instance, a high number of informants alternatively characterized racists, Republicans, and liberals as “disgusting.”¹²⁶ Furthermore, Rozin notes that “the broad expansion of the word disgusting into the sociomoral domain” is not simply a metaphorical extension of the “core” feeling of disgust; nor is it unique to the English language, but rather characterizes a number of languages and cultures. As with the core disgust elicitors, socio-moral disgust arises from a fear of boundary violation (and ensuing contamination) and necessitates the imposition of boundaries in the human body-politic. Although Rozin and his colleagues thus locate the origin of disgust in a “particular motivational system (hunger) and [. . .] a particular part of the body (mouth),” they also underscore the distinctly social and cultural functions of a more fully developed sense of disgust – noting that “along with fear, [disgust] is a primary means for socialization.”¹²⁷ A more common example might be the way in which the word “dirty,” which denotes the actual substance of dirt, has expanded to connote that which is unclean and that which sullies in a moral sense (*e.g.*, dirty magazines, dirty talk, dirty sex).

Anthropologists and researchers in other fields have also called attention to the relationship among disgust, socialization, contamination, and boundary maintenance. Most notably, in her seminal work, *Purity and Danger: An Analysis of the Concepts of Pollution and*

¹²⁴ *Id.*

¹²⁵ *Id.* at 643.

¹²⁶ *Id.*

¹²⁷ *Id.* at 638.

Taboo,¹²⁸ Mary Douglas elucidates the greater social function of ritualistic pollution behaviors or disgust reactions.¹²⁹ Like Rozin, Douglas highlights the relationship between disgust and the socialization process, maintaining that “pollutions are used as analogies for expressing a general view of the social order.”¹³⁰ More specifically, “our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications.”¹³¹ More than Rozin, Douglas conceptualizes the socio-moral domain of disgust within the larger context of boundary maintenance. As creatures of order and “tidiness” with an obsessive need to classify and categorize, humans are compelled to draw boundaries and to banish the anomaly, that is, anything that does not quite conform to the bounded space that we have fashioned:

In a chaos of shifting impressions, each of us constructs a stable world in which objects have recognizable shapes, are located in depth, and have permanence. In perceiving we are building, taking some cues and rejecting others. The most acceptable cues are those which fit most easily into the pattern that is being built up. Ambiguous ones tend to be treated as if they harmonized with the rest of the pattern. Discordant ones tend to be rejected. If they are accepted the structure of assumptions has to be modified. As learning proceeds objects are named. Their names then affect the way they are perceived next time: once labeled they are more speedily slotted into the pigeon holes in the future. As time goes on and experiences pile up, we make a greater and greater investment in our system of labels. So a conservative bias is built in. It gives us confidence.¹³²

Among her more specific case examples of the practical function of boundary control, Douglas points to the North African Nuers, whose taboos against incest and adultery ensure the stability and structure of marriage as an exogamic necessity.¹³³

¹²⁸ MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966).

¹²⁹ While Douglas does not use the term “disgust” *per se*, she conceptualizes pollution control as a kind of disgust reaction.

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 37.

¹³² *Id.* Douglas’ “conservative bias” that “gives us confidence” performs a role not unlike that of *stare decisis* in American law. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1059 (2002) (discussing the aesthetic of *stare decisis*).

¹³³ “The integrity of the [Nuer] social structure is very much at issue when breaches of the adultery and incest rules are made, for the local structure consists entirely of categories of persons defined by incest regulations, marriage payments and marital status.” DOUGLAS, *supra* note _____, at 132.

Douglas' analysis of taboos underscores a key feature of taboos and pollution rituals, namely, the importance of border control and policing the line separating this from that, us from them. Her description of the boundary maintenance function of taboos and pollution rituals captures what Pierre Schlag has referred to as one of the law's foundational aesthetics, namely, the aesthetic of the grid. More precisely, Schlag points out that the "principal role of the judge in the grid aesthetic is to police the grid." He further remarks that this prototypical "grid thinker is preoccupied with the proper location and maintenance of boundaries: 'Where do we draw the line?' 'Will the line hold?' 'How do we avoid the slippery slope?'"¹³⁴ In fact, Schlag's description of the grid aesthetic and its penchant for "tidiness" not only reveals the role that the slippery slope performs in the politics of disgust, but also recalls Douglas' description of the boundary control function of taboo. He continues:

Understandably, the recurrent contact with societal untidiness elicits in legal professionals a desire for an antiseptic law. The grid can be seen as an attempt to shield the lawyer, the judge, and the law itself from contamination. In this light, the grid can be seen as an attempt to ward off contamination. The most prestigious precincts of the law are the most antiseptic, the most clearly marked off from the mess. . . . Both the appellate judge and the academic can become entranced with maintaining or perfecting the grid at the expense of attending to its worldly implications. This is the allure of law cast as geometry. This is the formalist orientation par excellence: the dominance of concern with maintaining the proper form and order of law in terms of its own criteria.¹³⁵

The similarities between Douglas' analysis of taboo and Schlag's articulation of one of the law's foundational aesthetics underlines the extent to which taboo and disgust are constitutive of the law as well as the metaphors – slippery slopes, line drawing – in which it speaks.¹³⁶ This

¹³⁴ Schlag, *supra* note _____, at 1065. Douglas identifies four kinds of social pollution that are conceived in grid-like terms: "The first is danger pressing on external boundaries; the second, danger from transgressing the internal lines of the system; the third, danger in the margins of the lines. The fourth is danger from internal contradiction, when some of the basic postulates are denied by other basic postulates, so that at certain points the system seems to be at war with itself." DOUGLAS, *supra* note _____, at 123-24.

¹³⁵ Schlag, *supra* note _____, at 1060-61.

¹³⁶ Schlag's description of the law's obsession with classification also resonates with Douglas' understanding of the role that classification plays in taboo rituals. "One of the ironic byproducts of the effort to police and maintain the

peculiar relationship between sexual taboo and border control (or policing the line) is perhaps nowhere more clearly dramatized in the law governing sexuality than in the recent expansion of state “mini-DOMAs” as a means of ensuring that state recognition of one sexual taboo – in that case, same-sex marriage – does not “seep over” the borders and contaminate less tolerant states.

More recent inquiries into the etiology of disgust have expanded on Douglas’ original formulation of taboo as a kind of boundary control as well as on Rozin’s understanding of the relationship between disgust and the socialization process. William Ian Miller, for instance, posits that disgust “is especially useful and necessary as a builder of moral and social community. It performs this function obviously by helping define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”¹³⁷ Summarizing the pioneering work of Rozin and others, Miller points out that disgust performs the function of conveying a negative emotion toward the incorporation or assimilation of a contaminant. More important, though, Miller, like Rozin before him, demonstrates the extent to which disgust performs the related, but more overtly political and social functions of maintaining rank and hierarchy. He elaborates:

Our very core, our soul, is hemmed in by barriers of disgust, and one does not give them up unless one is in love or is held at the point of a gun. In fact, the claim seems to be that the core or the essence of one’s identity can only be known as a consequence of which passions are triggered in its defense. Disgust’s durability, its relative lack of responsiveness to the will, suits it well to its role as the maintainer of the continuity of our core character across social and moral domains. Our durable self is defined as much by disgust as by any other passion. Disgust defines many of our tastes, our sexual proclivities, and our choices of intimates. It installs large chunks of the moral world right at the core of our

grid is that this activity ends up producing a plurality of grids – a multitude of different classification schemes. The proliferation of sundry classification schemes in the early twentieth century was intense. In fact, ‘classification’ itself became a subject of inquiry, controversy, and of course, ultimately classification itself.” *Id.* at 1062-63.

¹³⁷ WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 194 (1997); *see also* Lynch, *supra* note _____, at 532 (arguing that sex offender lawmaking “is seeped in a constellation of emotional expressions of disgust, fear of contagion, and pollution avoidance, manifested in a legislative concern about boundary vulnerabilities between social spheres of the pure and the dangerous”).

identity, seamlessly uniting body and soul and thereby giving an irreducible continuity to our characters.”¹³⁸

Some commentators, such as Nussbaum, have been far more critical of Miller’s characterization of disgust as both foundational and necessary. In fact, she mildly criticizes Miller for neglecting to discuss the normative implications of his social theory of disgust.¹³⁹ Regardless of what we might think of Miller’s assessment of disgust as a normative matter, however, his analysis is nevertheless descriptively useful because it highlights the dual function of disgust: Its ability at once to separate (to draw boundaries between and among individuals and groups) and to unite (“hemming in” and “seamlessly uniting body and soul” as well as individuals within the community at large). As one scholar has explained the unlikely conflation of sexual offenses in Deuteronomy and Leviticus, including incest, same-sex relations, bestiality, and adultery, “all these offenses have this in common: not separating that which should be separated, mixing that which should be kept apart, and confusing genera, sexes, kinship, and alliance.”¹⁴⁰

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

¹³⁸ MILLER, *supra* note _____, at 250-51.

¹³⁹ NUSSBAUM, *supra* note _____, at 73; 86. Nussbaum suggests that Miller’s account of disgust, while descriptive rather than prescriptive, nevertheless “gives support to [Lord Devlin’s] general line by arguing that the degree of civilization in a society may properly be measured by the barriers it has managed to place between itself and the disgusting. Legal barriers, in such a view, could easily be seen as agents of the civilizing process.” *Id.* at 72. As Nussbaum points out, “Lord Devlin famously argued that . . . social disgust was a strong reason to favor the prohibition of an act, even if it caused no harm to nonconsenting others.” *Id.*

¹⁴⁰ FRANÇOISE HÉRITIER, TWO SISTERS AND THEIR MOTHER: THE ANTHROPOLOGY OF INCEST 288 (2002).

is not surprising, then, that slippery slope arguments often appear in debates surrounding tabooed forms of sexuality and the revulsion they elicit and that incest has figured so prominently in slippery slope rhetoric.

B. Incest and Boundary Violation

One way to approach the question of how incest represents a prototypical form of boundary violation is to return to Douglas' conceptualization of disgust (or pollution behavior) as a reaction against that which defies or confuses our "cherished classifications." Specifically, in the same quotation excerpted above, Douglas calls attention to the causal relationship that exists between taboo and naming. She notes that as "learning proceeds objects are named. Their names then affect the way they are perceived next time: once labeled they are more speedily slotted into the pigeon holes in the future. As time goes on and experiences pile up, we make a greater and greater investment in our system of labels."¹⁴¹ Douglas' examination of the naming process is a useful heuristic by which to approach the peculiar relationship that exists between names – or naming – and incest as well as the theoretical claim that naming and the incest taboo often go hand-in-hand. Indeed, scholars from a number of different disciplines have taken up Claude Lèvi-Strauss' suggestion, made in 1949, that only by "pursuing the comparison" between language and the incest taboo can we "hope to get to the meaning of the institution" of exogamic marriage and of the role that the taboo plays in ensuring that institution.

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

¹⁴¹ DOUGLAS, *supra* note _____, at 37.

[w]ith the use of the terms ‘mother’ and ‘father’ instead of proper names such as Sally and John, one is describing a part of the individual, a function (one who mothers or fathers), and not the total person including his feelings, sexuality, desires, etc. Using the mother’s proper name would make her too much like a ‘real’ person or a peer, with whom all is possible, and the incestuous conflict together with wishes and anxieties would be reawakened This verbal institution serves to maintain and support the incest taboo.¹⁴²

Similarly, anthropologists have noted that “[t]he naming function of language by which we assert the father/mother/sister/brother/uncle/aunt/cousin placement may well be one of the strongest announcers and enforcers of the taboo.”¹⁴³ This idea that intrafamilial naming represents a “semiotics of incest”¹⁴⁴ – or what I would call the “grammar” of incest – resonates with Douglas’ observation that language constructs categories which, in turn, reinforce social behavior. In other words, “[t]he process of naming is the process of categorizing, which is the unconscious establishment of limits, in [the case of the incest taboo] sexual limits.”¹⁴⁵ It is this very relationship between naming and taboo that prompted David Schneider to remark that incest represents a way of acting “ungrammatically.”

The disgust triggered by incest derives from precisely this sense of name or boundary violation: One should not be in a sexual relationship with someone whom they call brother or sister (or mother, or father, etc.). Even brothers and sisters who are not biologically related but fully naturalized into the family unit – say, through adoption, the aim of which is to incorporate the child into the “natural” family¹⁴⁶ – become part of these nominal categories that comprise the “semiotics of incest.” In families where adopted children and siblings are fully naturalized into

¹⁴² M.J. WEICH, *The Terms ‘Mother’ and ‘Father’ as a Defense Against Incest*, 16 J. OF AM. PSYCHOANALYTIC ASSOC. 783 (1968).

¹⁴³ JAMES TWITCHELL, *FORBIDDEN PARTNERS: THE INCEST TABOO IN MODERN CULTURE* (1987); *see also* KAREN MEISELMAN, *INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS* 19 (1978) (stating that “[c]reation of the incest taboo was made possible by, and probably coincided with, the development of language”). For a more in-depth treatment of the relationship between language and sexual prohibition, see Cahill, *supra* note _____, at 8-23.

¹⁴⁴ TWITCHELL, *supra* note _____, at 9.

¹⁴⁵ *Id.*

¹⁴⁶ *See* Naomi Cahn, *Perfect Substitutes for the Real Thing?*, 52 DUKE L.J. 1077, 1140-41 (2003).

the family, one would suspect that this “naming function” would work in the same way to enforce the taboo against sexual relations. Such a claim is supported by empirical evidence, for in Haidt’s study, the adopted brother and sister sexual scenario elicited nearly the same degree of disgust as did the scenario involving siblings who were related by blood through one parent.¹⁴⁷ However, in families where adopted children are not considered to be fully naturalized into the family, one would suspect that the naming function does not operate in the same way. As legal commentators have argued, one of the reasons why some states do not apply their incest prohibitions to adopted brothers and sisters and/or to stepsiblings (related only by marriage) is because the law in these states still does not consider those individuals to be naturalized into the family unit – and, by extension, a ‘real’ family in the normative sense.

The *Israel* decision represents a good example of this phenomenon. There, the court employed a botanical metaphor to suggest that adopted children do not become fully naturalized into the family tree, stating that “adopted children are not *engrafted upon* their adoptive families for all purposes.”¹⁴⁸ Other courts, however, have found that adoptive siblings *are* fully naturalized – and thus subject to the incest taboo. The *Israel* court’s repetition of the phrase “adopted brother and sister” and “brother and sister related *only* by adoption” suggests that the semiotics of incest did not apply here because the court was dealing with an “adopted brother” and “adopted sister,” rather than a real “brother” and “sister.” The fact that the court found otherwise reveals the pivotal role that the law plays in creating these names, categories, and the legal relationships that they signify.

In addition to the rich anthropological literature on the subject, judges, policymakers, and even poets have elucidated the relationship that exists between naming and the incest taboo.

¹⁴⁷ See Haidt, *supra* note ____.

¹⁴⁸ *Israel v. Allen*, 195 Colo. 263, 265, 577 P.2d 762, 764 (Colo. 1978) (emphasis added).

Their observations reveal the extent to which the disgust that incest provokes derives from the fact that boundaries have been violated and those “cherished classifications” that we live by have been called into question.

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

Prevention of mutated birth is only one reason for these statutes. The crime is also punished to promote and protect family harmony, to protect children from the abuse of parental authority, *and because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict.*¹⁴⁹

Other courts have similarly observed that, rather than representing an instinctual aversion or a guard against genetic abnormalities, the primary function of the incest taboo is to maintain the nominal and symbolic hierarchy of the family unit.¹⁵⁰ For instance, in *Benton v. State* the Georgia Supreme Court remarked that the incest taboo does not reflect an innate repugnance to incestuous relationships, but rather polices boundaries by forcing “family members to go outside their families to find sexual partners. Requiring people to pursue relationships outside family boundaries helps to form important economic and political alliances, and makes a larger society possible.”¹⁵¹ In addition, the taboo helps to maintain “the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority, and by reducing competition and jealous friction among family members.”¹⁵²

The relationship between the incest taboo and the maintenance of names and the familial hierarchy has been conveyed in more poetic fashion by one of the more infamous figures in

¹⁴⁹ *State v. Kaiser*, 34 Wash. App. 559, 566, 663 P.2d 839, 843 (Wash. App. 1983) (emphasis added).

¹⁵⁰ *See, e.g., Smith v. Tenn.*, 1999 U.S. Dist. LEXIS 289 (Tenn. Crim. App. Mar. 25, 1999).

¹⁵¹ *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

¹⁵² *Id.*

Ovid's *Metamorphoses*, Myrrha, who repeatedly tricks her father into having sex with her – and who eventually turns into a tree as a form of punishment for so doing.¹⁵³ While contemplating the possibility of father-daughter incest early in Ovid's narrative of forbidden desire, Myrrha conjures up an absurd world where incest dissolves linguistic boundaries and the relationships that they signify. As she soliloquizes: “But can you hope for aught else, unnatural girl? Think how many ties, how many names you are confusing! Will you be the rival of your mother, the mistress of your father? Will you be called the sister of your son, the mother of your brother?”¹⁵⁴ For Myrrha, incest is unnatural not because of the desire itself – as she proclaims earlier in her soliloquy, the natural love that exists between father and daughter is merely increased or “twinned” by a sexual bond – but rather because of the unnatural crisis of naming and the dissolution of the familial hierarchy that it produces. Ovid's legendary narrative of father-daughter incest is not the only story in the *Metamorphoses* to explore the subject of forbidden desire in terms that suggest boundary violation and name confusion. To the contrary, Ovid similarly conceptualizes a number of sexual relationships in the *Metamorphoses* that are either in fact incestuous or described in language evocative of incest, including twin brother-sister incest, self-love, and artistic creation. In all of these narratives, Ovid makes clear that the nominal transgression – *e.g.*, what to “call” your brother should he become your lover – is an indispensable part of the sexual transgression.¹⁵⁵

¹⁵³ OVID, THE METAMORPHOSES (vols. 1 & 2) (3rd ed) (Loeb Classical Library) (1916).

¹⁵⁴ *Id.* at 10.345-48.

¹⁵⁵ See generally Cahill, *supra* note _____, *passim*. Interestingly, the same name/role confusion that causes or leads to disgust may also constitute a source of attraction. As mentioned, Myrrha proclaims that love for a family member merely increases – or “doubles” – the natural love that already exists: “And yet they say that there are tribes among whom mother with son, daughter with father mates, so that natural love is increased by the double bond.” In a previous article, and to a lesser extent here, I argued that incest has been portrayed in literature generally, and in Ovid's *Metamorphoses* specifically, as a crime of desiring that which approximates and resembles oneself – a trope that finds its most literal expression in the Ovidian characters of Caunus and Byblis, a *twin* brother-sister pair, the sister of whom desires her brother precisely because he is identical to her. While the law more often than not treats this source of attraction as a failure of boundary maintenance – and, therefore, an elicitor of disgust – it has at least

The theory of incest and disgust that I have proposed here reveals the extent to which disgust is a socially (and society) contingent category, dependent on how we choose to categorize and name objects and people. In other words, that which is an object of disgust in one social context might be entirely acceptable – even encouraged – in another. But what does this theory of disgust tell us about the incest taboo specifically? On the most basic level, it suggests that, even as the incest taboo appears on the slippery slope as something monolithic (*the* incest taboo) and is thought to derive from an instinctive sense of repugnance, the horror surrounding incest is in many ways socially determined. For instance, while the thought of brother-sister incest might provoke horror for some, for others it is an entirely natural manifestation of desire. As Nussbaum has commented with respect to Siegmund’s love for Sieglinde in Wagner’s *Die Walkure*, the “lovers are drawn to one another not in spite of the tie, but precisely because of it: they seem to see their own faces in one another, and to hear their own voices.”¹⁵⁶ Indeed, one would be misguided to argue that certain individuals lack the “instinct” to refrain from committing incest. As the *Benton* court remarked, “people are generally incapable of violating their instincts.” Or, as Françoise Héritier has argued in her cross-cultural examination of the incest taboo,

One might . . . consider Sir James Frazer’s counterargument: Why would a deep human instinct need to be reinforced by law? What nature forbids and punishes does not require a law as well. There is no law obliging people to eat or drink, preventing them from placing their hands in fire, and so on. The very existence of a legal ban would, on the contrary, lead one to infer the existence of a natural

one time recognized that incestuous desire can constitute a natural extension of the affection that already exists. Specifically, in considering whether to recognize a marriage between an aunt and a nephew that was contracted in Italy, the New York Court of Domestic Relations in *Incuria v. Incuria* suggested that the incestuous relationship was the natural outgrowth of the familial one: “There was probably affection between the parties; that would naturally flow from the relationship existing between them.” 155 Misc. 755, 280 N.Y.S. 716 (N.Y. Dom. Rel. Ct. 1935) (emphasis added). *Incuria* is singular in its recognition that incestuous desire might in some way “naturally flow” from the pre-existing familial relationship. While more often than not a source of disgust and repugnance to outsiders, this kind of relationship, as Nussbaum points out and as I have argued elsewhere, is in some sense a logical outgrowth of the affection that already exists.

¹⁵⁶ NUSSBAUM, *supra* note _____, at 81.

instinct toward incest. We know the use Sigmund Freud made of this argument in *Totem and Taboo*.¹⁵⁷

This claim that the incest taboo is more nurture than nature supports the observations made in Parts I and II of this Article with respect to the position that the incest taboo maintains on the slippery slope. Specifically, I there suggested that while the taboo might function in slippery slope arguments as something staid and untouchable (again, *the* incest taboo), the law of incest suggests that it is less definite, more wide-ranging, and society specific. What may be deemed incestuous (and thus prohibited) in one state or country, may be permitted – indeed, encouraged – in another.¹⁵⁸ Despite this definitional variety, however, the incest taboo continues to appear in slippery slope rhetoric as a single and monolithic taboo. In looking more closely at the way in which the incest taboo has been used to articulate an ideal vision of the family in Part V, I shall return to this notion that the definition of incest is a prescriptive, ideological choice rather than a factual description of the way in which families naturally operate.

In addition, this theory of disgust as a form of boundary violation helps to explain why incest has been compared to other non-normative behaviors – including, at one time, miscegenation, and, more recently, same-sex relations and cloning. I have already examined the incest – same-sex relations parallel to some extent throughout this Article, and will return to this comparison in Part V. Here, I turn instead to comparisons between incest and the two other non-normative kinships arrangements. I contend that the incest-miscegenation and incest-cloning

¹⁵⁷ HÉRITIER, *supra* note _____, at 207.

¹⁵⁸ In some countries, certain forms of consanguineous marriage and mating are not only permitted but desirable. See, e.g., Clin Genet, *Consanguinity and its Relevance to Clinical Genetics*, 60 CLINICAL GENETICS 89, 91 (2001) (stating that “Dravidian South Indians regard consanguineous marriage as preferential, whereas in North India consanguinity is prohibited under the Aryan Hindu tradition Like Hinduism, there are conflicting attitudes and opinions in Christianity, with specific dispensation required by the Roman Catholic Church for first cousin marriages, and even more rigorous proscription in the Orthodox Church. By comparison, the Protestant denominations basically follow the Judaic guidelines laid down in Leviticus 18:7-18, with consanguineous unions up to and including first cousins permissible”); see also *id.* at 91 (“some land-owning families also favour consanguineous unions as a means of preserving the integrity of their estates”).

analogies help to bring into focus the peculiar boundary violation that incest represents and the disgust that it provokes. Furthermore, an examination of these analogies provides a context in which to discuss, and ultimately to criticize, the way in which the incest taboo has been used to define acceptable forms of sexuality and kinship.

C. The Incest - Miscegenation/Cloning Analogies

1. Incest – Miscegenation Analogy

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

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

Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.¹⁵⁹

¹⁵⁹ HENRY HUGHES, *TREATISE ON SOCIOLOGY: THEORETICAL AND PRACTICAL* (1852).

Hughes' rhetoric reveals the extent to which miscegenation and incest were seen to be not just similar to each other – objects of frequent comparison and juxtaposition – as so-called biological hazards, but *the same as* each other.¹⁶⁰

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

For instance, a Mississippi statute from 1880 suggested that interracial marriage was a kind of incest, providing that a “marriage [that] is prohibited by law by reason of race or blood” is “declared to be incestuous and void.”¹⁶¹ Similarly, a 1911 Nebraska statute defined as “illegitimate” children produced through either incestuous or interracial marriage: “Upon the dissolution by decree or sentence of nullity of any marriage that is prohibited on account of consanguinity between the parties, or of any marriage between a white person and a negro, the issue of the marriage shall be deemed to be illegitimate.”¹⁶² The frequency with which criminal and civil prohibitions against miscegenation and incest appeared in either the same code section,

¹⁶⁰ While the incest-miscegenation parallels surfaced during particular historical periods in the United States, anthropologists have noted the juxtaposition of these two mutually constitutive sexual taboos in other contexts as well. See, e.g., Lévi-Strauss, who notes in *The Elementary Structures of Kinship* that “incest proper, and its metaphorical form as the violation of a minor (by someone ‘old enough to be her father,’ as the expression goes), even combines in some countries with its direct opposite, inter-racial sexual relations, an extreme form of exogamy, as the two most powerful inducements to horror and collective vengeance.” LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (1949).

¹⁶¹ Courts later in the twentieth century noted this paradox and resolved it by finding that an incestuous marriage could not possibly be a miscegenetic one.

¹⁶² Neb. St. ch. 25, sec. 31 (West 2001).

or consecutive sections, suggests the extent to which the two crimes of blood reflected and reinforced each other.¹⁶³

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

[i]n the case at bar the marriage was impossible under the statute, going out of the state to escape the statute, and going through the form of marriage in a state where the inhibition did not exist, and soon thereafter returning to this state, and all in an effort to accomplish indirectly what cannot be done directly, would be a fraud upon the laws of this state by a citizen of this state, and such a marriage cannot be recognized by the courts, neither can it be ratified or in any manner become legal by time or change of age or conduct of the parties. *The inhibition, like the incestuous marriage, is in the blood*, and the reason for it is stronger still.¹⁶⁴

The Oklahoma court's understanding of the instinctive character of the taboos against miscegenation and incest – the legal prohibition *against* blood-mixing naturally existing *in* the blood – anticipates more contemporary pronouncements with respect to humans' so-called instinctual aversion to incest. As noted above, in *Israel v. Allen*, the Colorado Supreme Court averred that individuals have a “natural repugnance” toward marriages between blood relatives.¹⁶⁵ Similarly, in *Tiffany Nicole M.*, the Wisconsin Court of Appeals stated that “the incestuous parent by his actions has demonstrated that the natural, moral constraint of blood

¹⁶³ See PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, & THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); see also Karthikeyan & Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1, 24 & n.130 (2002) (providing list of these state statutes).

¹⁶⁴ *Eggers v. Olson*, 104 Okla. 297, 231 P. 483, 1924 OK 856 (1924) (emphasis added).

¹⁶⁵ *Israel v. Allen*, 195 Colo. 263, 265, 577 P.2d 762, 764 (Colo. 1978).

relationship has failed to prevent deviant conduct and thus cannot be relied upon to constrain similar conduct in the future.”¹⁶⁶

That the two taboos were cast in terms of each other is striking in light of the fact that, whereas incest signified the unnatural mixing of the same, miscegenation signified the unnatural mixing of the dissimilar. In commenting on this strange conflation of blood crimes in the infamous denunciation of Henry Hughes, one scholar has noted that “Hughes transforms the hybrid or mulatto from someone who is considered ‘impure’ because he combines qualities that are too different to mix successfully, . . . to someone whose ‘impurity’ and transgressions lie in the blending of traits that are, by contrast, too much *alike*.”¹⁶⁷ In fact, it would appear that the incest prohibition, which functions in a positive way to ensure or compel marriage outside the family, would *itself* create the conditions that make miscegenation possible. More precisely, the more restrictive the intrafamilial prohibition, the more likely that one would go outside her family to find a marital (and/or sexual) partner. At the same time, the potent taboo against miscegenation – particularly in the rural South – made the threat of incest that much more real.¹⁶⁸

In this sense, then, the taboo against miscegenation logically followed from, and was

¹⁶⁶ *In re: Tiffany Nicole M., Interest of Tiffany Nicole M.* 214 Wisc. 2d 302, 318-19, 571 N.W.2d 872, 878 (Wisc. App. 1997). Similarly, in *State v. Scott*, the Georgia Supreme Court infamously declared that “[t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.” *Scott v. State*, 1869 WL 1667, at *3 (Ga. 1869). Likening the prohibition against miscegenous marriages to that against incestuous marriage and marriage between idiots, the court continued that “[t]he Legislature certainly had as much right to regulate the marriage relation by prohibiting it between persons of different races as they had to prohibit it between persons within the Levitical degrees, or between idiots. Both are necessary and proper regulations. And the regulation now under consideration is equally so.” *Id.* It should also be noted that while the majority of legal decisions invoked the incest taboo to shore up the miscegenation taboo, the incest – miscegenation analogy was not exclusively unidirectional; rather, the taboo against miscegenation was also used at times to support the taboo against incest. See, e.g., *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577, 117 A.L.R. 179 (Ala. 1938).

¹⁶⁷ Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39 (1988).

¹⁶⁸ Commenting on Hughes’ incest-miscegenation comparison, Werner Sollors states that “the [anti-miscegenation] hysteria that enveloped the discourse of slavery immediately before the Civil War” lead to the “illogical and eventually ironic position” of making incest the inescapable alternative to interracial marriage. Sollors describes how the “fantasy of purity” at the heart of anti-miscegenation laws and rhetoric involved “both the need for the violent purging of impurity and the regression to the incestuously toned realm of origins alone.” WERNER SOLLORS, NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE 310 (1997).

necessitated by, the taboo against incest, and vice versa; sexual and marriage partners could be neither too similar to the self (incest) nor too different from the self (miscegenation).¹⁶⁹

While the routine juxtaposition of these seemingly non-complementary taboos might be accounted for in a number of additional ways, including fears about miscegenation increasing the actual potential for incest,¹⁷⁰ I will focus here on concerns relating to the theory of disgust as boundary violation. First, linked to concerns over one's genetic inheritance, the incest-miscegenation analogy reflected an acute anxiety with respect to what was termed as one's "social inheritance." For instance, dissenting in *Perez v. Lippold*, Justice Schenk, while recognizing the potential benefits of "unrestricted racial intercrossing," nevertheless noted that "[r]ace crossings disturb social inheritance. That is one of its worst features."¹⁷¹ Similarly, in *Berea College v. Commonwealth*, the Kentucky Court of Appeals presaged the dangers of "social amalgamation" when considering whether a law prohibiting the mixing of African Americans and whites in a single school violated the state and federal constitutions. The court there declared that "[t]he natural separation of the races is . . . an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."¹⁷² In this sense, blood or biology functioned as a metaphor for social relations, as "social practices" were

¹⁶⁹ See e.g., S.J. Tambiah, *Animals Are Good to Think and Good to Prohibit*, 8 *ETHNOLOGY* 423 (1969) (pointing out that in some Thai villages animals cannot be eaten if they are too close to humans or too distant from humans, and that sexual partners cannot be too much like the self (same sex, same nuclear family) or too distant (animals, people of other races)).

¹⁷⁰ The secrecy surrounding miscegenation, and the frequent denial of one's paternity (or maternity) to a "mulatto" child, led to situations that supposedly raised the specter of incest, and particularly sibling incest. In his comprehensive review of the strategic placement of the two taboos in mid-nineteenth and early-twentieth century literature, Werner Sollors remarks that the "possibility of sibling incest in a younger generation," as frequent a theme in early-Modern American literature as it was in eighteenth-century British texts, often resulted "from the secrecy of miscegenation of [that generation's] elders." SOLLORS, *supra* note _____, at 310. Sollors provides a number of illuminating examples from the literature of the antebellum and postbellum periods in which "themes of interracial unions and of incestuous relationships are intertwined, ranging from projections and fantasies of the two taboos to representations of the transgressive acts, and from passing allusions to plot-constitutive centrality." *Id.*

¹⁷¹ *Perez v. Lippold*, 198 P.2d 17, 47 (Cal. 1948) (en banc) (Schenk, J., dissenting).

¹⁷² *Berea College v. Com.*, 94 S.W. 623, 628 (Ky. App. 1906).

cast as “biological essences” and vice versa.¹⁷³ Eva Saks has provided a persuasive and comprehensive account of the constellation of issues surrounding the miscegenation hysteria, one that created and heavily relied on the metaphor of “blood” as a means of “consolidating social and economic boundaries.”¹⁷⁴ Eugenic or hereditary concerns thus reflected a much greater anxiety over the symbolic maintenance of social (marital, sexual) and economic (inheritance, property-related) boundaries between blacks and whites.

Second, the biological mixing of blood found its legal counterpart in the numerous conflict of laws cases in which questions of the validity of interracial and/or incestuous marriage often arose. The fear of interstate contamination was most viciously expressed in a dissenting opinion in *State v. Ross*.¹⁷⁵ In that case, the Supreme Court of North Carolina considered whether to recognize a marriage between an African-American man and a white woman that was validly contracted in South Carolina, but prohibited and subject to criminal penalties under North Carolina’s anti-miscegenation statute. While recognizing that “a marriage between persons of different races [might be] as unnatural and as revolting as an incestuous one, and is declared void by the law of North Carolina,” a majority of the court nevertheless quashed the indictment, reasoning that “it is desirable . . . that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.”¹⁷⁶

Dissenting in *Ross*, Justice Reade employed the language of border control to assert that “[n]o nation is bound to admit the laws and customs of another nation within its borders” and that “[i]f such a marriage solemnized here between our people is declared void, why should comity require the evil to be imported from another State? Why is not the relation severed the

¹⁷³ See Saks, *supra* note _____, at 62.

¹⁷⁴ *Id.* at 69.

¹⁷⁵ 76 N.C. 242 (1877).

¹⁷⁶ *Id.*

instant they set foot upon our soil?”¹⁷⁷ In addition, and more contemptuous still, the dissenting Justice invoked a series of animal and disease metaphors to convey the disgust elicited by this failure of boundary maintenance:

[The] provision in the Constitution of the United States, “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States,” does not mean that a citizen of South Carolina removing here may bring with him his South Carolina privileges and immunities; but that when he comes here he may have the same privileges and immunities which our citizens have. Nothing more and nothing less. It is courteous for neighbors to visit and it is handsome to allow the visitor family privileges and even to give him the favorite seat; but if he bring his pet rattlesnake or his bear or spitz dog famous for hydrophobia, he must leave them outside the door. And if he bring small pox the door may be shut against him.¹⁷⁸

Justice Reade’s vivid characterization of boundary control in the *Ross* dissent resonates with Miller’s cultural and sociological account of disgust, which, he suggests, builds moral and social community “by helping to define and locate the boundary separating our group from their group, purity from pollution, the violable from the inviolable.”¹⁷⁹ Indeed, it is likely no coincidence that metaphors signifying a failure of boundary maintenance, and the disgust it elicits, appear in an opinion that takes up the question of miscegenation – a paradigmatic form of blood mixing and biological contamination.¹⁸⁰

Third, the confusion of boundaries arising from blood mixing – be it incest or miscegenation – found a counterpart in the law of inheritance and property allocation. As legal

¹⁷⁷ *Id.* (Reade, J., dissenting).

¹⁷⁸ *Id.* (Reade, J., dissenting).

¹⁷⁹ MILLER, *supra* note ____, at 194.

¹⁸⁰ It should be noted that the infective potential of incest was equally feared. The very mention of incest was, in fact, so contaminating that in 1888 the New York Supreme Court refrained from even reciting the facts of an incest case that was before it: “The prisoner was convicted of incest. To linger over the facts, or repeat the details of the proof, would peril the calmness and cleanness which belong to a judicial record, and we should therefore touch the disgraceful history only at points where necessity compels.” *People v. Lake*, 110 N.Y. 61, 62, 17 N.E. 146 (N.Y. 1888). These same sentiments reappeared in an Alabama case more than one-hundred years later – dealing not with incest, but with homosexuality. Describing the history behind the revulsion surrounding that taboo, the Supreme Court of Alabama just two years ago reminded its readers that “[e]arlier courts refused even to describe the activity inherent in homosexuality, stating that ‘[the crime against nature] is characterized as abominable, detestable, unmentionable, and too disgusting and well known to require other definition or further details or description.’” *Ex parte H.H.*, 830 So.2d 21, 29 (Ala. 2002), quoting *Horn v. State*, 49 Ala. App. 489, 491, 273 So.2d 249, 250 (1973).

commentators have noted, “traditional incest statutes [were] designed to uphold a property-based kinship system based upon marriage.”¹⁸¹ Leigh Beinen maintains that the traditional laws against incest cannot be fully understood apart from the property system in which they arose. Explaining the ideological difference between traditional and modern incest statutes, she remarks that

[c]onsidered as a set of rules maintaining a social structure based upon marriage, rather than as laws regarding the sexual abuse of children, including descent and distribution and the ownership of land within the family, the incest prohibition makes sense. In the eighteenth century, divorce was rare or nonexistent. People who owned property stayed in one place for their entire lives. Maintaining clarity in the ownership of land and family relationships was the primary goal. In traditional statutes, the prohibited relationships focus upon close ties of affinity, marriage, or consanguinity.¹⁸²

In other words, traditional incest statutes represented a form of boundary maintenance with respect to the classification and ordering of proprietary relations. In a world where “[w]ealth and stature in the community was based upon ownership of land,” any marriage that “would confuse the lines of inheritance and ownership of land . . . had to be prohibited.”¹⁸³

In one such case involving inheritance that went before the Supreme Court of the United States, *Brewer’s Lessee v. Blougher*,¹⁸⁴ the plaintiff’s attorney envisioned a parade of horrors in which incest and miscegenation together figured as powerful solvents that could disrupt all lines and categories of inheritance. In that case, the Court considered the meaning of an 1852 Maryland statute that provided that “‘the illegitimate child or children of any female, and the issue of any such child or children,’ are declared to be capable in law ‘to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each

¹⁸¹ Leigh Beinen, *Defining Incest*, 92 NORTHWESTERN L. REV. 1501, 1529 (1998).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ 39 U.S. 178 (Mem) (1840).

other, as the case may be, in like manner as if born in lawful wedlock.”¹⁸⁵ In other words, under the statute, even “illegitimate” children – including children produced through incestuous unions – could inherit property from their mother.

Although the Court upheld the statute on the ground that “[t]he expediency and moral tendency of this new law of inheritance, is a question for the legislature of Maryland, and not for this Court,”¹⁸⁶ the plaintiff’s lawyer attempted to convince it otherwise. Specifically, the attorney argued that the act in question threatened to undermine the integrity and continuity of the family tree:

From the careless manner of its enactment, the legislature has rendered itself liable to be misunderstood, and its true intention frustrated. It has, indeed, if the letter be adhered to, made a general act to direct descents for the benefit of all illegitimate children of any female who is the *propositus* in the law, and who is to be the *stirps* whence these relations are to branch out, from fathers and mothers without marriage; and this too, embracing bastards issuing from adultery, and from incest of father and daughter [*sic*], and even son and mother; if the depravity of the human heart shall ever let loose such unbridled passions: and also embracing in its confusion, bastards lineal and collateral, running into the same incest and adultery, and bastards of colour mingled with whites, and all too in like manner as if born in lawful wedlock. But in such a state of illegitimacy, how could persons and families proceeding from such female, as the root, establish their right to inherit any estate from each other?¹⁸⁷

This notion of a world in chaos because of incest and miscegenation, as well as adultery, reveals a world lacking cognizable boundaries, categories, and lines of descent. The metaphor of the family tree nicely captures the extent to which incest and miscegenation posed a threat to the coherence of domestic relations – in this case, a coherence conferred by the law of inheritance. Indeed, it is no coincidence that in Ovid’s story of father-daughter incest, Myrrha is redeemed in a sense through her transformation or metamorphosis into a tree: A symbol of the familial

¹⁸⁵ *Id.* at 197.

¹⁸⁶ *Id.* at 198.

¹⁸⁷ *Id.*

integrity that she not only compromised, but threatened to undermine through her incestuous relationship with her father.

This look at the analogy between the incest taboo and the taboo against interracial relations in legal and non-legal sources helps to bring to light how, and why, incest has functioned as a potent symbol of boundary violation – and, by extension, of disgust. During periods of enormous social and political change, particularly in the postwar South, intra-familial and interracial sexual relations and marriage – collectively referred to as intermarriage – represented not simply a biological threat, unions that ostensibly produced degraded offspring or “deplorable results.” In addition, the unnatural mixing that these relations entailed signified other, more symbolic or abstract forms of mixing and boundary confusion, including challenges to state sovereignty (and related fears of interstate contamination) as well as challenges to stable lines of inheritance. The constellation of boundary issues (and images of boundary violation) surrounding both miscegenation and incest helps to clarify not only the extent to which incest came to symbolize boundary violation, but also the extent to which incest was used to shore up a normative vision of the family – one that assumed that marriage (and sexuality) was marked by just enough (racial) similarity and just enough (familial) difference.

2. Incest – Cloning Analogy

The incest taboo has surfaced more recently as a point of comparison to yet another boundary violation involving the family, namely, cloning. Like incest and miscegenation, cloning is said to represent a threat because it upsets the laws of evolutionary biology, for, like incest, cloning involves a mode of reproduction that does not contribute to the diversification of

the overall gene pool. While cloning might ensure the replication of the strongest genes, it might also entail the duplication of so-called weaker traits.¹⁸⁸

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

[C]loning, if successful, would create serious issues of identity and individuality. The clone may experience concerns about his distinctive identity not only because he will be in genotype and appearance identical to another human being, but, in this case, he may also be twin to the person who is his “father” or “mother” – if one can still call them that. Unaccountably, people treat as innocent the homey case of intrafamilial cloning—cloning of husband or wife (or single mother); they forget about the unique dangers of mixing the twin relation with the parent-child relation Virtually no parent is going to be able to treat a clone of himself or herself as one does a child generated by the lottery of sex. What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with? In case of divorce, will Mommy still love the clone of Daddy, even though she can no longer stand the sign of Daddy himself?¹⁸⁹

It is precisely because cloning could blur the boundary separating parents from children that Kass has opined that cloning belongs in the same category as incest: “Can anyone really give an argument fully adequate to the horror which is father-daughter incest (even with consent) . . . ? The repugnance at human cloning belongs in that category.”¹⁹⁰ Indeed, for at least one legal commentator, cloning represents orders of magnitude *beyond* incest in its dangerous ability to

¹⁸⁸ See, e.g., Posner & Posner, *The Demand for Human Cloning*, in NUSSBAUM & SUNSTEIN, *supra* note _____, at 236 (stating that “[t]he likely reason that [cloning] did not evolve is that the reshuffling of the genes with every generation, which we get with sexual reproduction, provides protection against co-evolving parasites”).

¹⁸⁹ Leon Kass, Cong. Test. (May 2, 2001); see also Kass (Jan. 29, 2003).

¹⁹⁰ Kass, *supra* note _____, at 5; see also Lori Andrews, *Is There A Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J. LAW & TECH. 643 (1998) (making incest-cloning analogy).

violate boundaries: “If incest crosses the boundaries defining the human way of coming into being, cloning twists and breaks them.”¹⁹¹

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

Like Kass, bioethicist James Nelson has similarly remarked that a female child who is cloned from her mother might develop a desire for her father, and thereby threaten to usurp the position of her mother – who is, in the end, her twin sister. Whereas Kass situates the incestuous potential of cloning within the traditional Oedipal complex (“In case of divorce, will Mommy still love the clone of Daddy, even though she can no longer stand the sign of Daddy himself”), both Kass and Nelson also transform the classic Oedipal triangle into one where the daughter threatens to destabilize the position of the mother (“What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with?”).

The identity confusion and boundary violation that will ostensibly result from cloning is not limited to the more conventional Oedipal situations involving parents and children. Rather, the destructive potential of cloning branches out into the larger family tree. Kass has elsewhere presaged a range of uncanny¹⁹² incest scenarios, remarking that

¹⁹¹ E.V. Kontorovich, *Hubris and Disastrous Attempts to Change Human Nature Are Not New. Cloning Is*. NAT’L REV. (Mar. 9, 1998).

¹⁹² I use this word deliberately, as the “uncanny” is a constitutive feature of disgust. See Miller, *Sheep, Joking, Cloning and the Uncanny*, in NUSSBAUM & SUNSTEIN, *supra* note ____, at 130. While never explicit, Kass has

[i]n the case of self-cloning, the offspring is, in addition, one's twin: The dreaded result of incest—to be parent to one's sibling—is here brought about deliberately, albeit without any act of coitus. Moreover, all other relationships will be confounded: what will *father*, *grandfather*, *aunt*, *cousin*, or *sister* mean, and who will bear what ties and burdens? To this it is no answer to say that our society, with its high incidence of broken families and non-marital childbearing, already confuses kinship and responsibility for children, unless one also wants to argue that this, for children, is a preferable state of affairs.¹⁹³

Similarly, in suggesting that “we may see in cloning the resurgence of our fascination with an archaic form of incest with the original twin, and the grave psychotic consequences of such a primitive fantasy (Cronenberg's film *Dead Ringers* is a dramatic illustration of this),”¹⁹⁴ Jean Baudrillard has called attention to the possible – albeit otherwise fantastical– causal relationship between cloning and sibling incest, a scenario that recalls Byblis' fantasy of incest with her twin brother, Caunus, in Ovid's *Metamorphoses*.

In one sense, the cloning-incest analogy reflects the hysteria that often surrounds any “new” technology, a panic that is particularly acute in the face of alternative reproductive technologies. For instance, similar kinds of arguments have been made with respect to the incestuous potential of in-vitro fertilization. In 2001, a 62-year-old French woman became one of the world's oldest mothers after giving birth to a baby following fertility treatment. While the woman carried the baby to term and was therefore the gestational parent, she was not the biological or genetic parent. Rather, the baby was conceived by her brother's sperm and a donor

alluded to the uncanny nature of cloning when stating that “[e]ven in the absence of unusual parental expectations for the clone—say, to live the same life, only without its errors—the child is likely to be ever a curiosity, ever a *potential source of déjà vu*.” Kass, *supra* note _____, at 84 (emphasis added).

¹⁹³ Kass, *supra* note _____. Kass' cataloguing of terms here – father, grandfather, aunt, cousin, etc. – recalls the proliferation of language that often appears in slippery slope rhetoric, as discussed in Part I, *supra*. In addition, Kass' ‘parade of horrors’ scenario once again points to the nominal basis of familial relationships – as part of the problem with cloning is what the natural familial terms (father, grandfather, etc.) will “mean” in a post-cloning world.

¹⁹⁴ JEAN BAUDRILLARD, *THE VITAL ILLUSION* 12 (2000).

egg. Although technically not a case of incest, a French prosecutor who was investigating the case commented that it represented an instance of “social incest.”¹⁹⁵

In another sense, however, the incest-cloning analogy speaks to much more deep-seated fears about the reconstitution of the family in an age where boundaries and lines of demarcation are neither fixed nor stable. Just as the incest-miscegenation analogy – one that appeared with greater frequency after the Civil War – reflected an anxiety over the shifting social landscape of the postbellum South, so, too, does the incest-cloning analogy reflect an anxiety over the so-called ‘de-naturalization’ of the modern family. Considering the threat to our “cherished classifications” and categories that cloning poses, it is no wonder that it has been linked to incest, an exemplary form of boundary violation.

Part V Incest as Symbol and its Legal Implications

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

¹⁹⁵ http://news.bbc.co.uk/1/hi/english/world/europe/newid_1401000/1401070.stm. The brother-sister pair supposedly “tricked” doctors in California, where the woman underwent the procedure, into thinking that they were married (and, of course, non-related).

and will suggest that the law adopt alternative, or at least more expansive, discourses in which to talk about kinship relations.

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

What has this analysis shown us about the manner in which the incest taboo has been used to articulate a normative vision of the family? First, and most basically, this analysis has brought into focus the particular threat that incest signifies (or symbolizes), namely, a boundary violation that is tied to the way in which sexual desire is expressed in the family as well as the way in which a family reproduces itself. As I have shown, the incest taboo is a guard against the confusion of names and roles within the family, one that results from a failure to recognize that certain family members should not be sexual partners. I have argued that it is for this reason that incest has been linked to other forms of boundary violation – miscegenation, cloning, and same-sex relations – that similarly represent perversions of an ideal form of familial desire and reproduction. While beyond the scope of this Article, it is telling that in some societies, adultery and incest are grouped under the same rubric defining that which is incestuous.¹⁹⁶ The taboo thus reinforces not only a particular vision of the family – heterosexual parents having children through ‘natural’ sexual means – but also the reproductive imperative behind having a family and what it means to be a family.

The claim, advanced by some legal commentators, that “incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage,”¹⁹⁷ thus overlooks the extent to which the taboo continues to signify a serious risk to the constitution of the family. Indeed, it is for precisely this reason – the link between marriage and children –

¹⁹⁶ HÉRITIER, *supra* note _____, at 212.

¹⁹⁷ Grossberg, *supra* note _____, at 292.

that the taboo against same-sex relations has been linked to the taboo against incest so frequently on the slippery slope. Like incest (and now cloning), one of the reasons why same-sex marriage is perceived as threatening to the ‘institution’ of marriage is because it would inevitably lead to a confusion of familial roles. Anxiety over this so-called role confusion is evident in statements such as “[c]hildren raised by homosexual couples do not have both a father and a mother. If Heather is being raised by two mommies only, she is being deprived of the experience of being raised by a daddy. Both the common experience of humanity and recent research suggest that a daddy and a mommy together provide by far the best environment in which a child may be reared.”¹⁹⁸ Or, as the Supreme Court of Alabama remarked in 2002, “[t]he family unit does consist, and always has consisted, of a ‘father, mother and their children, [and] immediate kindred, constituting [the] fundamental social unit in civilized society.’”¹⁹⁹

Judith Butler has argued that one of the reasons why same-sex relationships have been compared to incest is because they both represent a “departure” from the symbolic norm – namely, a deviation from the prototypical way in which sexual identity is created, and maintained, in the family. She has observed that

the law that would secure the incest taboo as the foundation of symbolic family structure states the universality of the incest taboo as well as its necessary symbolic consequences. One of the symbolic consequences of the law so formulated is precisely the derealization of lesbian and gay forms of parenting, single-mother households, and blended family arrangements in which there may be more than one mother or father, where the symbolic position is itself dispersed and rearticulated in new social formations.²⁰⁰

¹⁹⁸ Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 857. Drawing on international data, Wardle points out while Denmark, Norway, Sweden, and Iceland all permit some form of same-sex partnership, *none* of these states permit same-sex adoption. Wardle concludes that “[t]hese nations take great care to prevent adults from subjecting children to some potentially detrimental effects and consequences of adult sexual preferences.” *Id.* at 891.

¹⁹⁹ *Ex parte H.H.*, 830 So.2d 21 (2002).

²⁰⁰ BUTLER, *supra* note ____.

In other words, incest has become a way of describing what is troubling about those new formations. Butler maintains that the incest taboo assumes or presupposes a certain kind of family structure – mother, father, and children whose sexual desire is allocated in well-defined ways according to biological sex – that is simply not present in alternative family arrangements. In her estimation, it is for this reason that the “horror of incest,” and the moral revulsion it compels in some,

is not that far afield from the same horror and revulsion felt toward lesbian and gay sex, and is not unrelated to the intense moral condemnation of voluntary single parenting, or gay parenting, or parenting arrangements with more than two adults involved (practices that can be used as evidence to support a claim to remove a child from the custody of the parent in several states in the United States). *These various modes in which the oedipal mandate fails to produce normative family all risk entering into the metonymy of that moralized sexual horror that is associated perhaps most fundamentally with incest.*²⁰¹

In other words, part of the reason why incest has persisted on the slippery slope as a point of comparison to any non-normative kinship arrangement, is because it functions as a metaphor (or metonymy) of sexual deviance. It is in this sense that David Schneider has observed that “[i]ncest’ is symbolic of the special way in which the pattern of social relationships, as they are normatively defined, can be broken. ‘Incest’ stands for the transgression of certain major cultural values, the values of a particular pattern of relations among persons.”²⁰² Just as the slippery slope is itself a metaphor, so, too, do the objects of comparison *on* the slippery slope stand in a metaphoric relationship with one another.

²⁰¹ *Id.* at 65 (emphasis added); see also Judith Butler, *The Quandary of the Incest Taboo*, *supra* note _____, at 101 (“there are probably forms of incest that are not necessarily traumatic or that gain their traumatic character by virtue of the consciousness of social shame they produce. But what concerns me most is that the term *incest* is overinclusive, that the departure from sexual normalcy it signifies blurs too easily with other kinds of departures. Incest is considered shameful, which is one reason it is so difficult to articulate, but to what extent does it become stigmatized as a sexual irregularity that is terrifying, repulsive, unthinkable in the ways that other departures from normative exogamic heterosexuality are?”).

²⁰² Schneider, *supra* note _____.

It is important to note that this idea that incest signifies a threat to the way in which the family expresses desire and/or reproduces itself is not limited to the genetic threat that incest poses. While incest is often conceptualized as a crime of blood, the genetic argument fails to capture the full range of boundary confusion that incest signifies. Incest is a powerful symbol of disgust not simply because it confuses lines of genetic inheritance that should be kept separate. Even worse, incest throws into confusion nominal differences (brother, sister) and the relationships that those names signify. The incest taboo thus represents a social practice over and above an innate biological response – or, in the words of the *Israel* court, a “natural repugnance.” Indeed, the strength behind the historical analogy between incest and miscegenation derives less from the fact that these are two crimes of blood – for, as I have suggested, they represent opposite fears – and more from the fact that they signified confusion over one’s social and proprietary inheritance.

Second, this analysis of incest as boundary violation shows that the incest taboo has created an additional space in which to talk about sexual deviance. The cloning-incest analogy provides a good example of the way in which comparisons between non-normative family arrangements and incest (on the slippery slope) provide an opportunity to talk in negative ways about any unconventional relationship and to reinforce the norm. For instance, Laurence Tribe and others have suggested that the debate over cloning has provided a platform for critics to inveigh against *any* non-normative relationship.²⁰³ Tribe has remarked that “the arguments

²⁰³ Laurence Tribe, *New York Times*; Section A; Page 31; Column 1 (“my concern is that the very decision to use the law to condemn, and then outlaw, patterns of human reproduction – especially by invoking vague notions of what is “natural” – is at least as dangerous as the technologies such a decision might be used to control”); (“Human cloning has been condemned by some of its most articulate detractors as the ultimate embodiment of the sexual revolution, severing sex from the creation of babies and treating gender and sexuality as socially constructed. But to ban cloning the technological apotheosis of what some see as culturally distressing trends may, in the end, lend credence to strikingly similar objections to surrogate motherhood or gay marriage and gay adoption”); (“Equally scary, when appeals to the natural, or to the divinely ordained, lead to the criminalization of some method for creating human babies, we must come to terms with the inevitable: the prohibition will not be airtight.”); (“And even

supporting an ironclad prohibition of cloning are most likely to rest on, and reinforce, the notion that it is unnatural and intrinsically wrong to sever the conventional links between heterosexual unions sanctified by tradition and the creation and upbringing of new life.”²⁰⁴ Similarly, Professors Eskridge and Stein have pointed out that “antigay sentiments probably contribute to anticloning sentiments . . . some of the same impulses that form intense homophobic reactions would generate reactions to the possibility of cloning.”²⁰⁵ Kass’ cloning-incest analogy represents a good case in point, for the analogy has allowed Kass not only to articulate what is disturbing about cloning but also to express his views on same-sex parenting and single-parenting as well. Although Kass insists that his repugnance for cloning derives from a pre-rational intuition (or wisdom) to which we should give heed, he nevertheless grounds his arguments against cloning within the larger social context of the family, and, more specifically, non-traditional families.

For instance, it is not repugnance at cloning *per se* that drives most of Kass’ arguments, but rather revulsion at the *kinds* of non-traditional families and “unnatural” modes of reproduction that cloning not only signifies, but, even worse, facilitates and encourages. In his estimation, cloning represents the absurd extension of the “sexual revolution” that has undermined the naturally-conceived, two-parent, heterosexual family. He says:

if one could enforce a ban on cloning or at least insure that clones would not be a marginalized caste, the social costs of prohibition could still be high. For the arguments supporting an ironclad prohibition of cloning are most likely to rest on, and reinforce, the notion that it is unnatural and intrinsically wrong to sever the conventional links between heterosexual unions sanctified by tradition and the creation and upbringing of new life”); (“The entrenchment of that notion cannot be a welcome thing for lesbians, gay men and perhaps others with unconventional ways of linking erotic attachment, romantic commitment, genetic replication, gestational mothering and the joys and responsibilities of child rearing”).

²⁰⁴ *Id.*

²⁰⁵ William N. Eskridge, Jr. & Edward Stein, *Queer Clones*, in NUSSBAUM & SUNSTEIN, *supra* note _____, at 108 (“Under some circumstances, it is also conceivable that queer cloning would contribute to a more general antigay backlash. Conversely, antigay sentiments probably contribute to anticloning sentiments . . . some of the same impulses that form intense homophobic reactions would generate reactions to the possibility of cloning”).

Cloning turns out to be the perfect embodiment of the ruling opinions of our new age. Thanks to the sexual revolution, we are able to deny in practice, and increasingly in thought, the inherent procreative teleology of sexuality itself. But, if sex has no intrinsic connection to generating babies, babies need have no necessary connection to sex. Thanks to feminism and the gay rights movement, we are increasingly encouraged to treat the natural heterosexual difference and its preeminence as a matter of “cultural construction.” But if male and female are not normatively complementary and generatively significant, babies need not come from male and female complementarity. Thanks to the prominence and the acceptability of divorce and out-of-wedlock births, stable, monogamous marriage as the ideal home for procreation is no longer the agreed-upon cultural norm. For that new dispensation, the clone is the ideal emblem: the ultimate “single-parent child.”²⁰⁶

James Wilson has similarly argued that “[t]he major threat cloning produces is a further weakening of the two-parent family,”²⁰⁷ and, worse yet, the “possibility that a lesbian couple will use cloning to produce a child.”²⁰⁸ Wilson in fact questions whether “we wish to make it easy for a homosexual pair to have children?”²⁰⁹ Even Baudrillard has tacitly expressed disdain for the likelihood that cloning and lesbian parenting will go hand-in-hand:

This matter of the clones, in fact, could call a number of things into question—and that is the irony of the situation. The clone, after all, could also appear as a grotesque parody of the original. It is not hard to imagine a whole range of potential problems and new conflicts issuing from cloning that would turn oedipal psychology upside down. Consider, for instance, a clone of the future overthrowing his father, not in order to sleep with his mother – which would be impossible, anyway, since she is nothing but a matrix of cells, *and besides, the “father” could very well be a woman* – but in order to secure his status as the Original.²¹⁰

Lesbian and single mothers figure prominently in these ‘parade of horrible’ scenarios – explicit in Kass and Wilson, implicit in Baudrillard – and appear to bear the largest brunt of the debate surrounding cloning. In this sense, antigay rhetoric and anti-cloning rhetoric are mutually

²⁰⁶ Kass, *supra* note _____, at 9.

²⁰⁷ Wilson, *supra* note _____, at 72.

²⁰⁸ *Id.* at 68.

²⁰⁹ *Id.*

²¹⁰ BAUDRILLARD, *supra* note _____, at 26 (emphasis added).

constitutive and reinforcing – the former leading to, and doubling back on, the latter, and vice versa.

By placing incest in the same category as cloning, and cloning in the same category as same-sex and single parenting, critics have thus managed to use the cloning debate as a platform from which to denounce any kind of non-traditional family marked by ‘Oedipal confusion.’ It is in precisely this sense that the taboo against incest has been “mobilized to *establish* certain forms of kinship as the only intelligible and livable ones,”²¹¹ and that the discussion surrounding cloning has cast all non-traditional forms of desire and reproduction as “some version of original sin.”²¹² As Tribe reminds us, any prohibition, be it the taboo against incest or the related taboo against cloning, carries with it enormous residual social costs – particularly when that prohibition applies to a method of human creation or bears on the constitution of the family.²¹³

Third, this analysis of incest as boundary violation has demonstrated the extent to which nature, or the notion of what is ‘natural,’ continues to shape the ideal conception of kinship in the context of family law. That is, same-sex relations and cloning are often grouped together with incest in slippery slope arguments because all three represent a perversion of what is considered to be a natural form of the family and a natural form of sexual reproduction. Hadley Arkes expressed these sentiments when testifying before the House Judiciary Committee on behalf of DOMA, stating that “one thing can be attributed to the gay activists quite fairly and accurately:

²¹¹ BUTLER, *supra* note _____, at 70.

²¹² Tribe, *supra* note _____, at 229.

²¹³ *Id.* at 230. Responding to the essentialist arguments and the appeals to nature that are part and parcel of the cloning debate, Tribe states that

the entrenchment of that essentialist notion, its deeper embedding in our culture and our law, is in turn anything but costless. It is most assuredly not costless for lesbians, gay men, persons gay or straight with genetically transmittable diseases, and others whose sexual or other orientations or capacities draw them into unconventional patterns of intimate relationship—and unconventional modes of linking erotic attachment, romantic commitment, genetic replication, gestational mothering, and the joys and responsibilities of parenting. *Id.*

and that is that they do have the most profound interest, rooted in the logic of their doctrine, in discrediting the notion that marriage finds its defining ground in ‘nature.’”²¹⁴ A number of other critics of same-sex marriage, as well as cloning, have similarly adverted to the paradigm of nature to support their position against these alternative kinship arrangements.

That nature has continued to remain an organizing principle of kinship relations in the family law context is a large part of the reason why the law in many states does not permit same-sex adoption as well as the reason why the incest taboo *itself* does not apply in some states to step- and adoptive families. While many are disgusted when confronted with sibling incest between non-related individuals – recall, for instance, the respondents in Haidt’s study or the public reaction to the Woody Allen scandal – the law (in many states) continues to rely on the paradigm of nature to determine whether sexual relationships between certain family members are a source of disgust (the *Israel* court’s “natural repugnance”) and therefore constitute a form of incest that warrants legal prohibition. The impulse that leads to comparisons between incest and same-sex relationships – because each is unnatural – is part of the same impulse that has led to the uneven application of the incest taboo in families with an ‘artificial’ basis, for it is only in those states where adoptive and step-relatives are fully naturalized into the family that the incest taboo applies. In either case, the law relies on the incest taboo to define the contours of the natural family unit. While it would appear that our understanding of what is natural has changed and shifted over time, the incest taboo has remained a relatively constant symbol of the ‘unnatural’ in legal discourse. In other words, even as the taboo has expanded to cover other familial arrangements – such as stepfamilies and adoptive families – it continues to rely on the paradigm of nature to determine what deserves legal recognition.

²¹⁴ Arkes, *supra* note ____.

Fourth and last, this analysis has revealed the discomfort that society experiences with relationships based on too much similarity or too much difference, as well as the degree to which notions of similarity and difference are deeply entrenched in law and culture. Related to its symbolic importance as an exemplary form of boundary violation, incest represents an unnatural mixing of the same and for this reason has functioned as a point of comparison to other so-called unnatural forms of sameness, same-sex relations and cloning. While the incest-miscegenation analogy would appear to represent a variation on this theme, anthropologists have suggested that forms of excessive similarity (incest) and excessive difference (miscegenation) are equally forbidden and thus constitute analogous, companion taboos. For instance, Hérítier has found that the incest taboo works in an expansive way to forbid the mixing of the too identical as well as the mixing of the too different. She maintains that “if combination of the identical is thought to produce harmful results, it will be prohibited, and the juxtaposition or combination of different elements will be sought. Inversely, if combination of the identical is thought to produce good effects, it will be sought out and the combining of different things will be avoided.”²¹⁵ Others have similarly observed that in some cultures, animals cannot be eaten if they are too close to humans or too distant from humans, and that sexual partners cannot be too much like the self (same sex, same nuclear family) or too distant (animals, people of other races).²¹⁶

The fact that the incest taboo has been used to construct identities based on similarity and difference taps into a key feature of human thought and representation, namely, the notion of similarity and difference that lies “at the origin of our most profound mental categories.”²¹⁷

²¹⁵ HÉRITIER, *supra* note _____, at 208.

²¹⁶ See Tambiah, *supra* note _____, *passim*.

²¹⁷ HÉRITIER at 202; *see also id.* (“The identical and the different appear . . . to be the principal categories of thought, anchored in primordial observations of the human body . . . Indeed, these are not the abstract categories of modern scientific thought, but the categories of thought in genera. All human societies function on the basis of these implicit categories, even if they have not developed ‘scientific’ discourses”).

Héritier's analysis is once again instructive. She notes that "a grammar is founded on the opposition between the identical and the different, on the classification of objects in one or the other category, and on the movements that affect these objects because of their attributed character in a classificatory category."²¹⁸ It is in this sense that the incest taboo, which generates a range of social organizations and social categories, is both symbolic and constitutive of human thought itself. Thus, we have come full circle. If the incest taboo is the language or "grammar" that ensures the replication of the categories that society uses to structure acceptable and unacceptable forms of sameness and difference, then incest is symbolic of those ungrammatical human relations – intrafamilial sexuality, same-sex relations, miscegenation, cloning – that give rise to our collective disgust.

B. Law and the Persistence of the Incest Taboo

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

²¹⁸ *Id.*

Certain objects of disgust, like incest, can provide a convenient focal point for inciting public opinion around certain morally charged issues. Douglas explains that “when moral principles come into conflict, a pollution rule can reduce confusion by giving a simple focus for concern,” and that “when action that is held to be morally wrong does not provoke moral indignation, belief in the harmful consequences of a pollution can have the effect of aggravating the seriousness of the offense, and so of marshalling public opinion on the side of the right.”²¹⁹ Applying Douglas’ analysis to the taboo under consideration, we might say that the incest taboo has been deployed in part to magnify the seriousness of certain acts, such as same-sex sodomy and/or marriage, that have not universally provoked moral indignation. As discussed above, one of the reasons why incest has been such a durable and effective player on the slippery slope is because everyone is repulsed by it, regardless of political affiliation. Those who are undecided over the issue of same-sex marriage might be easily swayed by the invocation to incest.

In addition, at the same time that disgust helps to maintain physical, social, and moral boundaries, it also relies on what lies outside those boundaries as a means of defining and sustaining that which lies within. For instance, in offering a structural explanation for the pollution taboos catalogued in Leviticus, Douglas states that “a rule of avoiding anomalous things affirms and strengthens the definitions to which they do not conform. So where Leviticus abhors crawling things, we should see the abomination as the negative side of the pattern of things approved.”²²⁰ In other words, objects of disgust – consensual incest, same-sex relations, cloning – reflect and thereby reinforce the norm from which they depart. It is in this sense that the incest taboo, and anything that becomes indelibly associated with it, work to reify the existing social order and familial structure. As Miller observes, “[l]ike those we hate, those who

²¹⁹ DOUGLAS, *supra* note ____, at 55.

²²⁰ DOUGLAS, *supra* note ____, at 55.

disgust us define who we are and whom we are connected with. We need them too – downwind.”²²¹

Similarly, we might approach the incest taboo as a convenient symbol in structuring what Jonathan Dollimore has referred to as the system of “binary oppositions” that lie at the root of Western thought. Dollimore has argued that “similarity” between what lies within (the “inlaw”) and what lies without (the “outlaw”) creates an anxiety whereby “the outlaw . . . as inlaw, and the other as proximate [prove] more disturbing than the other as absolute difference.” At the same time, he points to the fact that the most effective way to maintain this system of polar opposition is to figure its collapse – that is, to depict the outlaw as proximate and similar to the inlaw.²²² In the same vein, Butler has suggested that the incest prohibition needs “to sustain and manage a specter of its non-working in order to proceed,” that is, that the incest prohibition is effective only when it produces “the specter of its transgression.”²²³ It would thus appear that the incest taboo is an indispensable part of all slippery slope arguments presaging the collapse of sexual prohibitions and a world of sexual abandon, as the taboo maintains its power and efficacy by remaining a constant threat.

Given the need to structure relationships according to a system of binary oppositions and the manner in which the incest taboo satisfies this need, the question remains as to whether the incest taboo is a permanent feature of the law. As I have suggested, disgust and the taboos in which it finds expression are constitutive features of the law, which relies on metaphors of lines, grids, slopes, and other varieties of boundary maintenance and boundary control. In this sense, one might argue that positive or enacted law merely reflects and re-enacts the rituals of taboo and disgust that have shaped and informed societies from time immemorial. Adding to this difficulty

²²¹ MILLER, *supra* note _____, at 251.

²²² JONATHAN DOLLIMORE, *SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT* 131(1991).

²²³ BUTLER, *supra* note _____, at 17.

is the increasingly more recognized assumption that moral judgment derives from intuitive disgust reflexes rather than from a more calculated process of ratiocination and moral reasoning. When viewed in this light, it would seem that the eradication of disgust from human decision-making is unlikely if not futile – for to require individuals to become cognizant of their prejudices and biases is no small task.

One way to challenge the extent to which ‘incest-revulsion’ has substituted for rational evaluation of the incest taboo (and anything to which incest has been compared) is to recognize the taboo’s (or, for that matter, any taboo’s) distinctly historical and social character. Specifically, it is important to recognize the way in which the incest taboo has surfaced and resurfaced over time in particular social contexts as one of the many vehicles through which the state has controlled sexuality and the constitution of the family. Professor Beinen has remarked that “[t]he multiplicity of laws governing incestuous behavior” and the fact that the meaning of incest has varied “markedly” over time, reveal the extent to which the legal definition of incest often reduces to an “ideological” or “philosophical” question.²²⁴ At least one court – the Supreme Court of Georgia in *Benton v. State* – has recognized the cultural origin of the incest taboo when stating that “[b]eing primarily cultural in origin, the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties.” By placing the taboo squarely within a cultural context, the *Benton* court was able to turn away from binary oppositions and the paradigm of “nature” to find that “Georgia’s decision to include step-parents in its statutory proscription against incest is neither unreasonable nor out of keeping with the historical purpose and meaning of the taboo.”²²⁵ When considered in this broader socio-historical context, the incest taboo would become less monolithic and comparisons between incest and other non-

²²⁴ Beinen, *supra* note _____,

²²⁵ *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

normative kinship structures less frequent. Indeed, as some scholars have argued, it is no longer possible to think about those “core symbols” of American kinship, like the incest taboo, in the “abstracted framework in which they were first conceived or to neglect the ways in which Americans understand them as ‘naturally’ gendered configurations.”²²⁶

In addition, it is necessary for the law to turn to other models or archetypes of the family rather than to rely exclusively on the Oedipal mandate and the model of the family that it presupposes. Other disciplines, most notably anthropology, have more recently deemphasized the role that the incest taboo has played in structuring kinship relations across a range of cultures. What is now referred to as the “new kinship studies” relies less on the symbolic importance of the incest taboo and more on the “diffuse” forms of “relatedness” that do not adhere to the essentialist or naturalist paradigm that the incest taboo perpetuates.²²⁷ These studies have demonstrated the extent to which the taboo has been used to structure kinship relations according to this paradigm, and, in the process, to denigrate alternative kinship arrangements (same-sex parenting) and to preserve gender hierarchy. Reacting to the traditional, structuralist accounts of the taboo, Susan McKinnon, echoing Gayle Rubin, has remarked that “[t]he incest taboo . . . [has been] framed as the paternal and fraternal rights to regulate the market of scarce products [*i.e.*, women] to ensure the equal distribution and consumption of women.”²²⁸ In other words, the incest taboo, at least as it has been theoretically conceived, supports a gender hierarchy whereby

²²⁶ Susan McKinnon, *American Kinship/American Incest: Asymmetries in a Scientific Discourse*, in *NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS* 25, 30 (C. Delaney & S. Yanagisako, eds.) (1994) *see also id.* (“an examination of the cultural discourse on incest reveals much about the manner in which ideas about American kinship and the symbols of sexual intercourse, love, and enduring diffuse solidarity are structured in terms of a hierarchy of cultural values and along the power lines of gender”).

²²⁷ *See, e.g.*, *RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES* (Susan McKinnon & Sarah Franklin, eds, 2001).

²²⁸ McKinnon, *supra* note _____, at 32; *see also* Gayle Rubin, *The Traffic in Women: Notes on the ‘Political Economy’ of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* (1975).

women are “traded out” of families in order to satisfy the exogamic imperative of marrying outside one’s immediate clan or tribe.

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

Part VI **CONCLUSION**

This Article has offered a theory that explains why the incest taboo has been a persistent player on the slippery slope of sexual deviance, even though incest is, for the reasons detailed above, a bad fit for slippery slope arguments. Although it has not offered reasons why incest laws should be repealed, it has suggested that legal actors and policymakers look more closely at the connections they make between incest and other sexual relationships – most notably, same-sex relations – and that the law reappraise the extent to which disgust motivates legal and political decision-making.

The boundary violation theory that I have put forth serves both a descriptive and a prescriptive function. The descriptive claim that incest, as a mechanism of disgust, represents a

prototypical or archetypal form of boundary violation, helps to clarify what has been for political conservatives and liberals alike a strange conflation of otherwise distinct social, sexual, and reproductive practices – be it incest and same-sex relations or incest and cloning. For instance, groups from both ends of the political spectrum have commented on the unfortunate comparison between incestuous and same-sex relations – some conservatives remarking that it does not help their cause and many liberals remarking that it hurts theirs.²²⁹ And yet, the social science literature suggests that incest is perhaps the one taboo that unites both political groups, insofar as everyone is equally repulsed by it. Incest thus has an enormous power to disgust, and thereby to unite otherwise divergent camps.

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

²²⁹ See *supra* note ____.