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Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?

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The U.S. Supreme Court has found that the right to marry is a constitutionally protected right.[1] That right is restricted, however, by state incest statutes which impede marriage between adults by making some choices of a marriage partner illegal. The constitutional validity of modern state incest statutes is difficult to analyze because of shifting definitions, reflexive fears, ambivalent attitudes, and underlying facile generalizations.

The mere word "incest" triggers strong feelings of revulsion in most people. Therefore, any *a priori* labeling of a marriage as incestuous tends to preclude objective thought about the permissibility of the particular form of the marriage prohibition at issue. Such revulsion stems largely from the confusion of incest with sexual abuse of children. This confusion is not limited to the general public, but extends to the courts as well.

When criminal incest statutes are invoked, the overwhelming majority of prosecutions are for sexual intercourse between relatives within the statutory definition of incest, not for attempted marriages between such relatives. In a random sampling of 101 criminal appellate court decisions on cases alleging violation of criminal incest laws, all 101 cases involved prosecutions for sexual intercourse. More importantly, in 96 cases in which the ages of the incest participants were revealed, 94 involved an adult defendant and a minor child victim. Finally, 94 cases also involved father-daughter, father-adoptive daughter, or stepfather-stepdaughter sexual relationships. As these figures indicate, state incest statutes have

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1. Zablocki v. Redhail, 434 U.S. 374 (1978); Califano v. Jobst, 434 U.S. 47 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

been utilized primarily for prohibiting and for punishing sexual abuse of children.

Nothing in this article is to imply that sexual abuse of children by adults is not a legitimate and overriding concern of the state. Nevertheless, one must understand the distinction between state incest statutes as a vehicle for prohibiting and punishing sexual abuse of minors and state incest statutes as a marriage prohibition for adults. The rightful condemnation of the intrinsically abusive nature of adult-child sexual relationships must not be used to shield incest statutes prohibiting marriage between certain adults from an objective evaluation.

Another major obstacle to any attempt to analyze the constitutional validity of state incest statutes is the lack of a constant definition for the incest concept. Although the incest taboo is present in almost every society, the precise relationships within which marriage is prohibited vary not only state to state but also crossculturally and transhistorically.[2] The most common nucleus of forbidden relationships is parent-child and sibling-sibling marriage, but beyond that generalization, the content of the taboo lacks uniformity. A typical judicial condemnation of incest included emotion laden phrases: "[incest] violates the voice of nature, degrades the family, [and] offends decency and morals. . . ."[3] However, the marriage which was condemned by these phrases was that of a nephew marrying his uncle's widow.[4] Such a union certainly is not the type called to mind by the phrase "incestuous marriage." Moreover, in most states today, such a marriage does not meet the legal definition of incest.

This difficulty in defining the concept of incest is exacerbated by the considerable ambivalence surrounding the incest taboo. Such ambivalence is exemplified by the word "incest" itself, as it symbolizes conflicting images of "sacred" as well as "unclean" and "forbidden."[5] Numerous examples from a variety of cultural sources disclose instances where incest was unpunished, uncondemned, and even rewarded. In Sophocles' version of the Oedipus legend, when Oedipus discovers he has killed his father and married his mother, Jocasta, there is much suffering: he is blinded, his wife-mother commits suicide, and their four children

2. For example, sibling marriage was practiced in Egypt, aboriginal Hawaii, and Incan Peru. R. E. L. MASTERS, PATTERNS OF INCEST 235 (1963). Ancient Persia had no incest taboo and close relative marriages were approved. H. MAISCH, INCEST 22 (C. Bearne trans. 1972). During the Middle Ages in Europe, sixth cousins were forbidden to marry. MASTERS, *supra* at 27. In some preliterate societies, marriage to a parallel cousin (a child of the mother's sister or a child of the father's brother) is forbidden as incestuous, but marriage to a cross cousin (a child of the mother's brother or a child of the father's sister) is not forbidden and may be mandatory. *Id.* at 234. Today, Swedish law permits marriage between half-siblings, and French law permits aunt-nephew and uncle-niece marriages. M. GLENDON, STATE, LAW AND FAMILY 40 (1977).

3. Beggs v. State, 55 Ala. 108, 112 (1876).

4. Osinach v. Watkins, 180 So. 577, 580 (Ala. 1938).

5. H. MAISCH, *supra* note 2, at 57.

die. However, in the earlier Homeric version, neither Oedipus nor Jocasta are subject to any suffering or punishment from the gods or from their self-knowledge.[6] Similarly, in Biblical literature, the incest condemnation found in Leviticus is not visited upon Abraham's marriage to his half-sister, Sarah; to the contrary, the marriage was blessed.[7]

The incest motif itself persists as a tradition. Alleged public horror combined with obvious fascination for the theme extends in an unbroken line from the myths of preliterate peoples[8] to contemporary literature.[9] Any examination of contemporary incest statutes as a limitation on the right to marry must be sensitive to the historically ambivalent reactions to acts in contravention of the prohibition.

Finally, myths and half-truths about the genetic effects of incestuous matings on the offspring represent another impediment to an analysis of the constitutional validity of contemporary incest statutes as marriage prohibitions. Although directly contradicted by current scientific knowledge of genetic inheritance, common knowledge continues to teach that incestuous unions cause mentally and/or physically defective offspring.[10]

Once one recognizes these analytical difficulties—reflexive fears, shifting definitions of incest itself, ambivalent attitudes, and facile underlying generalizations—one can begin to rationally evaluate the validity of state incest statutes in the light of the constitutional right to marry. After making such an analysis, this author has concluded that neither the civil marriage bar nor the criminal bar against incestuous acts serves any valid purpose which cannot be better served by statutes which do not impinge on the constitutional right to marry.

I. The Fundamental Right to Marry

A right of "privacy" is guaranteed by the U.S. Constitution. It is, however, surrounded by a maelstrom of differing opinions as to its constitu-

6. R. E. L. MASTERS, *supra* note 2, at 11.

7. The story of Lot is another example of biblical incest which was not condemned. Lot fathered a child by both of his daughters. The child of the elder daughter was the ancestor of the Moabites while the younger daughter's son was the ancestor of the Ammonites. *Genesis* 20:1–38.

8. Greek mythology contains numerous examples of incestuous activity by the gods. Zeus raped his mother, Rhea, and married his sister, Hera. Zeus was born of the union between Rhea and her brother Chronus. According to Egyptian myths, Isis and Nephthys, two sisters, married their brothers, Osiris and Set. Nut, the goddess of the sky, married her twin brother Geb. In Vedic mythology Yama, King of the Dead, married his sister, Yami. According to Japanese mythology, the world creators, Izanagi and Izanami, were brother and sister and invented sexual intercourse. R. E. L. MASTERS, *supra* note 2, at 10–12.

9. The incest motif in literature appears in three forms. One form is the unconscious perpetration of incest as exemplified by Sophocles' *Oedipus*. The second form, conscious perpetration of incest, is rare, but is found in Marquis de Sade's *Eugenie de Franval*. Finally, the subconscious incest wish is frequently expressed in contemporary literature such as Tennessee Williams's *Cat on a Hot Tin Roof*, Eugene O'Neill's *Mourning Becomes Electra*, and D. H. Lawrence's *Sons and Lovers*. H. MAISCH, *supra* note 2, at 12–21.

10. Historical examples of close relative mating which did not produce defective offspring

tional source, its nature, and its extent.[11] This right of privacy encompasses much more than the explicit constitutional guarantees such as freedom from bodily restraints and freedom from unreasonable governmental searches and seizures. For example, in a long series of cases beginning in the 1920's, the U.S. Supreme Court extended constitutional protection to a right of parental decision making in the rearing of children.[12] Further, the right of privacy protected by the Constitution against unwarranted state intrusion also includes a right of privacy in matters of procreation. The Constitution limits the power of government to determine who may bear children[13] and to interfere with an individual's choice to have or not to have offspring.[14] Even the government's power to define what constitutes a family is circumscribed by the constitutionally protected right of privacy.[15]

At the heart of the right of privacy is the right of choice in marriage and family relationships.[16] In *Meyer v. Nebraska*[17] the Supreme Court upheld the parents' right to have their children instructed in the German language. The Court noted that the liberty guaranteed by the Fourteenth Amendment "denotes . . . the right of the individual to marry, establish a home and bring up children."[18] In *Skinner v. Oklahoma*[19] the Supreme

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are Cleopatra, the child of a brother-sister union, and Moses, the child of an aunt-nephew mating. Today, both unions are forbidden in most states.

11. Decisions by the U.S. Supreme Court recognizing a right of privacy in certain types of decision making are grounded in substantive due process notions emanating from the due process clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390 (1923); procedural due process notions embodied in the due process clause of the Fourteenth Amendment, Boddie v. Connecticut, 401 U.S. 371 (1971); the equal protection clause of the Fourteenth Amendment, Skinner v. Oklahoma, 316 U.S. 535 (1942); the First Amendment, Griswold v. Connecticut, 381 U.S. 479 (1965); and the Ninth Amendment, *id.* at 496 (Goldberg, J., concurring). Two recent examples of the debate over the nature and extent of the right of privacy are Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) and Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1979–80).

12. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (upheld parents' right to have their children taught German); Pierce v. Society of Sisters, 268 U.S. 510 (1925)(upheld parents' right to have their children attend nonpublic schools); Wisconsin v. Yoder, 406 U.S. 205 (1972)(upheld right of Amish parents to remove their children from state compulsory education after the eighth grade); Stanley v. Illinois, 414 U.S. 632 (1974)(protected unwed father's right to the custody, care, and nurture of his children).

13. Skinner v. Oklahoma, 316 U.S. 535 (1942)(invalidated a state statute which allowed sterilization of habitual criminals). *But see* Buck v. Bell, 274 U.S. 200 (1927)(upheld a statute which permitted sterilization of mentally retarded persons).

14. The Constitution protects the decision to use contraceptive devices to prevent pregnancy. Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). The decision to terminate a pregnancy by an abortion is also constitutionally protected. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). Conversely, the decision to bear a child cannot be subjected to unwarranted state intrusion. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

15. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

16. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 629 (1978).

17. 262 U.S. 390.

18. *Id.* at 399.

19. 316 U.S. 535.

Court invalidated a state statute which permitted sterilization of certain habitual criminals. The Court premised its decision on the fundamental nature of the right to marry and procreate.[20] In *Griswold v. Connecticut*[21] the Supreme Court struck down a state statute which forbade the use of contraceptive devices by married couples. The Court said that marital privacy is a "privacy older than the Bill of Rights. . . ."[22] It went on to describe the right to marry, to raise a family and to have marital privacy as being "of similar order and magnitude as the fundamental rights specifically protected [by the Constitution]."[23] In *Cleveland Board of Education v. LaFleur*,[24] a mandatory leave provision for pregnant school teachers was invalidated by the Supreme Court because of the "freedom of personal choice in matters of marriage and family life. . . ."[25]

Because of the "basic position of the marriage relationship in this society's hierarchy of values . . ." and the state monopolization of the means for dissolving the marriage relationship, the Supreme Court, in *Bodie v. Connecticut*,[26] held that a state may not deny access to its courts to indigents who seek a divorce. The Supreme Court in *Paul v. Davis*[27] characterized the privacy cases as involving the individual's independence in making certain kinds of important decisions—"matters relating to marriage, procreation, contraception, family relationships and child-rearing and education."[28] In *Moore v. City of East Cleveland*,[29] the Court invalidated a zoning ordinance which imposed criminal sanctions on a grandmother who was living with her son, the son's child, and another grandchild, the son of a deceased daughter. In recognizing that this non-nuclear "family" was entitled to protection from such unwarranted state intrusion, the Court reaffirmed its long-standing recognition of "freedom of personal choice in matters of marriage and family life."[30]

The institution of marriage and the marriage relationship played a central role in the Supreme Court's evolving notion of a right of privacy, constitutionally protected from unwarranted state intrusion. There are, however, only three contemporary cases—*Loving v. Virginia*,[31] *Califano v. Jobst*,[32] and *Zablocki v. Redhail*[33]—which specifically address the nature of the right to marry.

In *Loving*, the Supreme Court invalidated a state antimiscegenation

20. *Id.* at 541.
21. 381 U.S. 479.
22. *Id.* at 486.
23. *Id.* at 495 (Goldberg, J., concurring).
24. 414 U.S. 632.
25. *Id.* at 639–40.
26. 401 U.S. 371.
27. 424 U.S. 693 (1976).
28. *Id.* at 713.
29. 431 U.S. 494.
30. *Id.* at 499.
31. 388 U.S. 1.
32. 434 U.S. 47.
33. 434 U.S. 374.

statute which had been enacted to prohibit and punish interracial marriages. The Court found that the statute violated both the equal protection clause and the due process clause of the Fourteenth Amendment.[34] Because the statute was based on a racial classification, to satisfy the equal protection clause, the state was required but failed to establish a compelling purpose to justify the classifications. The statute also violated the due process clause of the Fourteenth Amendment, but the Court chose not to declare fundamental the right to marry. It characterized the freedom to marry as a "vital personal right,"[35] but held the due process violation to be the racial classification denying this freedom. Since this decision turned on the racial character of the classification, the Court's opinion sheds little, if any, light on the constitutional dimensions of the right to marry. The decision does make clear, however, that, although regulation of the marriage relation like other domestic relations regulation is an area long regarded as properly within the state's police power, the state's power to regulate marriage is not unlimited.[36]

Twelve years after the *Loving* decision, the U.S. Supreme Court decided two cases involving the right to marry. In *Califano v. Jobst*, a unanimous Court upheld certain provisions of the Social Security Act (SSA) against an attack based on the adverse impact the statutory provisions would have on the challenger's choice of a marriage partner.[37] However, in *Zablocki v. Redhail* an almost unanimous Court struck down a state statute which prohibited the challenger's decision to marry.[38]

Juxtaposition of these two cases clarifies the Court's view of the right to marry. The statute in *Redhail* forbade marriage without court approval to any resident of Wisconsin who had minor children not in the resident's custody whom the parent was obligated by court order or judgment to support. Moreover, court approval could not be granted absent a showing that the support obligation had been met and that the children covered by the support order were not then, and were not likely to become, public charges.[39] *Jobst* involved provisions in the SSA which terminated the secondary benefits paid to a disabled dependent child of a Social-Security-eligible wage earner when that child married an ineligible disabled person.[40]

The Court in *Redhail* reaffirmed the fundamental character of the right to marry. It specifically acknowledged that its earlier decisions protecting

34. 388 U.S. at 12.
35. *Id.*
36. *Id.* at 7.
37. 434 U.S. at 58.
38. 434 U.S. 374. There were six opinions in the case. Justice Marshall wrote the opinion of the Court and was joined by Chief Justice Burger, Justices Brennan, White, and Blackmun. The Chief Justice also separately concurred. *Id.* at 391. Justices Stewart, Powell, and Stephens wrote separate concurrences. *Id.* at 391, 396, 403. Only Justice Rehnquist dissented. He would have sustained the statute. *Id.* at 407.
39. *Id.* at 375.
40. 434 U.S. 47, 50–51.

the right of individual choice concerning procreation, childbirth, child rearing and family relationships logically required the recognition of a constitutionally protected right to marry. "It would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[41]

Because the right to marry is similar to other individual choices falling within the constitutionally protected zone of privacy, this right does not protect against every kind of state intrusion into the individual's decision-making process.[42] The states have long had the power to regulate the incidents of, or prerequisites to, marriage as embodiments of a collective societal judgment. Consequently, one must carefully consider every challenge of a state statute for impermissibly infringing on an individual's right to marry. If a state regulation was meant to directly interfere with the exercise of an individual's choice to marry, the statute must be supported by a sufficiently important state interest and must be closely tailored to effectuate only that interest.[43] Whereas, if a statute, intended to accomplish some other purpose, only incidentally and insubstantially affects an individual's decision to marry, the Court will subject it to only minimal scrutiny as to its purpose and effect.[44]

The Wisconsin statute at issue on *Redhail* absolutely prohibited noncustodial parents from remarrying if they lacked the financial means to meet their support obligation to their noncustodial children and if they could not prove that their children would not become public charges. Moreover, the Court found that the statute was sufficiently burdensome so as to effectively coerce even those noncustodial parents who could satisfy the requirements of the statute to forego their right to marry.[45] In contrast, the statutory provisions at issue in *Jobst* were not intended to, and did not, directly impede a recipient's decision to marry. The recipient of these disability benefits was at all time free to marry. The provisions of the statute only incidentally affected the recipient's decision-making process by imposing an economic burden on the choice to marry another disabled person who was not receiving Social Security benefits. The Court determined that because of the availability of other federal benefits, the withdrawal of the Social Security benefits for this reason did not significantly discourage the recipient's decision to marry.[46] In *Jobst*, then,

41. 434 U.S. at 386.
42. *Id.*
43. *Id.* at 388.
44. *Id.* at 387 n.12.
45. *Id.* at 387.
46. *Redhail* and *Jobst* establish that significant interferences with the decision to marry trigger a more exacting scrutiny of the statute. The characterization of a statute as a significant interference with the right to marry turns on the directness and the substantiality of the interference. For a discussion of the difficulties in applying this test, *see Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1251–55 (1980).

the Court subjected the statutory provisions to only minimal scrutiny as to their purpose and fit, whereas in *Redhail* the Court invoked a higher standard of review and found the statute wanting.[47]

There is no ready method of analysis available to aid courts when a statute is challenged as an impermissible interference with the individual's decision to marry, and this comes as no surprise. The courts face similar problems when any new claim of constitutional protection for individual decision making is asserted as another facet of the right of privacy.[48] Nor should it be surprising that the courts reach different

47. The Court's application of a higher standard of review in *Redhail* meant the state had to show a legitimate and substantial state purpose was served by the statute. The state asserted that the permission-to-marry proceeding provided the state with an opportunity to counsel marriage applicants concerning the necessity of fulfilling their support obligation for out-of-custody children. Also, the state claimed that the statute was a device for safeguarding the welfare of out-of-custody children. The Court accepted both alleged purposes as legitimate and substantial but clearly indicated that such an infringement on the right to marry is impermissible absent a substantial, legitimate purpose.

The Court put aside the usual deference it gives to legislative judgments as to the means by which a particular purpose is achieved. Instead, the Court closely examined the fit between the two purposes of the statute. The Court determined that the state's interest in counseling marriage applicants was not served by the statute. The statute neither required nor provided any counseling of applicants. Moreover, even if counseling did take place, once the counseling was completed the state purpose had been fulfilled. Therefore, the denial of permission to marry after counseling was not justifiable.

The Court had difficulty finding any connection between the state interest in safeguarding the welfare of out-of-custody children and the requirements of the statute. If the statute was intended to be a "collection device" for support payments, it was impermissible as applied to those marriage applicants who were truly unable to pay. The applicant was forever refused permission to marry although the children's welfare would never be advanced because the marriage applicant had no funds to pay. Also, the state has devices for collecting child support payments, such as wage assignments and civil contempt proceedings, which are at least as effective as the statute, but do not infringe upon the right to marry.

Similarly, the state interest in compelling parents to provide sufficient support to keep their out-of-custody children from becoming public charges is accomplished more directly by adjusting the amount paid under child support orders. Therefore, this indirect method of compelling adequate support payments, impinging as it does on the applicant's right to marry, is impermissible.

Finally, the statute could not be sustained as a method of protecting the children's welfare by preventing the marriage applicant from incurring new financial obligations. The statute only prevented applicants from incurring new financial commitments arising out of marriage. As the applicant was not prevented from incurring additional financial obligations arising out of nonmarital contracts, it was fatally underinclusive. The statute was also overinclusive because it denied applicants the right to marry in those instances wherein the marriage would actually improve, but would not completely satisfy, the applicant's ability to fulfill prior support obligations. 434 U.S. at 388–90.

48. Justice Harlan recognized this problem in his dissent in *Poe v. Ullman:*

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come. [Citation omitted.] 367 U.S. 497, 544 (1961).

For an example of this process, Griswold v. Connecticut, 381 U.S. 479 (1965)(right of

conclusions as to the permissibility of state intrusions into the constitutionally protected area of individual decision making.[49] Any court decision involving a claim of an impermissible state intrusion into the protected area of choice requires a sensitive balancing of the competing individual and state interests.[50]

In the *Jobst* and *Redhail* cases the Supreme Court achieved this balance by manipulating the standard of review. The Court recognized that some state regulations "press more heavily" on marriage choices than do others.[51] The more burdensome the statute, the more the state must show to justify its restrictions.[52] This is especially true when the state makes the choice an illegal act or imposes significant deprivation on the choice.[53] Unexamined or reflexive generalizations, conclusory judgments or speculations unsupported by evidence have no place in this balancing to determine whether a particular individual's choice to marry is constitutionally protected. Just as the Supreme Court recognized that the logical

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married adults to purchase contraceptive devices); Eisenstadt v. Baird, 405 U.S. 438 (1972)(right of unmarried adults to purchase contraceptive devices).

49. In Prince v. Massachusetts, 321 U.S. 158 (1944), the state's power to regulate children's employment prevailed over parental assertions of a right to control their children. The Court held that forbidding street solicitation by children was a permissible state means of curtailing the crippling effects of child labor. *But, cf.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). There the Court recognized the state's legitimate and important interest in assuring the education of children. However, because of the intense convictions of Amish parents that secondary education was at odds with their religious faith and was an infringement on their parental prerogatives as to value transmission, it was impermissible for the state to require Amish children to attend school until age sixteen. *Id.*

50. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, that a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting).

51. Karst, *supra* note 11, at 628. The Court applied the minimal standard of review in *Jobst*, 434 U.S. at 54, 56, whereas in *Redhail*, 434 U.S. at 383, 386, it applied a heightened scrutiny to the statute in issue. The Court has achieved a sliding scale, or balancing test, by manipulating the standard-of-review in resolving other claims of state intrusion into areas of individual choice. *Compare* Roe v. Wade, 410 U.S. 113 (1973)(decision to have an abortion) *and* Moore v. City of East Cleveland, 431 U.S. 494 (1977)(decision to live with non-nuclear family) *with* Kelley v. Johnson, 425 U.S. 238 (1976)(decision to have a certain hair style).

52. It is unimportant that at different times the Court uses the rhetoric of the First and Ninth Amendments or the equal protection and due process clauses of the Fourteenth Amendment in deciding individual choice cases. An examination of what the Court has done reveals it has been balancing the interest of the state and the individual interest. When the individual interest at stake is deemed important and the state regulation significantly impacts on the individual's choice process, the Court requires a very important state interest and a close fit between the means and the purpose in order to sustain the statute. It is suggested that the Court is engaged in judicial evasion because it is unwilling to admit that substantive due process is alive and well when individual liberties are in issue. *See* Karst, *supra* note 11, at 664–66.

53. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 989 (1978).

extension of a right of privacy with respect to matters of family is a right to marry, logic requires that the individual's right to select a marriage partner is also protected by the right of privacy.[54]

Because they make certain choices as to a marriage partner illegal, incest statutes are a direct, substantial, and intentional intrusion into an individual's decision to marry. In most instances, if the partners fall within the statute's prohibited types of consanguineous or affineous relationships, the marriage is invalid and the participants may be subject to criminal penalties.[55] Thus, incest statutes should be subjected to the same rigorous scrutiny used by the Court in *Zablocki v. Redhail.*[56] One must critically and sensitively examine both the state's asserted interests in prohibiting certain marriages as incestuous as well as the relationship between those state interests and the means the state uses to effectuate them. Only a substantial, important state interest can justify such an intrusion into the individual's choice of marriage partner, and only a statute narrowly tailored to accomplish such a purpose is permissible.

To date, however, the courts' treatment of challenges to state incest statutes, and most references to these statutes in court decisions, are instructive only as examples of how a court should not examine the claim that an incest statute impermissibly intrudes on the individual's right to marry.[57] The remainder of this article examines the permissibility of state incest statutes within the analytical framework drawn from the force and rationale of the Supreme Court's decisions concerning the right of privacy and choice. The various state interests purportedly served by an incest statute are separately analyzed. Because of the balance which must be

54. In *Redhail*, 434 U.S. 374, the Court *sub silentio* recognized that, absent a very important reason, the state is not permitted to infringe upon the choice of a marriage partner. The marriage applicant could have selected another marriage partner who had the financial resources to enable the applicant to meet his financial obligations to his out-of-custody children. However, the Court treated the applicant as if he were barred completely from marrying because his chosen marriage partner did not have sufficient financial resources to permit the applicant to meet his support obligation.

55. Three states, Michigan, New Jersey and Ohio, have repealed their criminal incest statutes, but have retained civil sanctions for participants in an incestuous marriage.

56. 434 U.S. at 386.

57. Individual Supreme Court justices have stated, without any discussion, that incest statutes are permissible forms of state regulation of marriage. *Id.* at 399 (Powell, J., concurring); *id.* at 404 (Stevens, J., concurring). In one state court decision, the state's incest statute was judicially expanded to prohibit the marriage of adoptive siblings who had never lived in the same household. *In re* MEW, 4 Pa. D. & C. 3d 51 (C.P. Allegheny 1977). *But see* Israel v. Allen, 577 P.2d 762 (Colo. 1978). Judicial unwillingness to examine closely challenges to state incest statutes may have a pragmatic explanation. The courts have just so much political capital at any given time, and the judiciary is unwilling to expend it on the invalidation of incest statutes. Therefore, the issue of incest statutes as impermissible infringements of the right to marry may have to be raised again and again until the judiciary is ready to address it. *Accord* Karst, *supra* note 11, at 691 n.304 (discussing unwillingness of Supreme Court to review challenges to state sodomy laws).

struck between the individual's interest in marrying the partner of her or his choice and the asserted state interest at stake in forbidding that choice, each state interest is analyzed as to both its legitimacy and its importance. Each discussion, by necessity, draws heavily on material from other disciplines such as genetics, psychology, psychiatry, sociology, and philosophy. This methodology is required because the asserted state interests themselves involve these various disciplines. Within the discussion of each state purpose supposedly served by an incest statute, the fit between the purpose and the statute as a means of achieving that purpose is carefully scrutinized. Particular attention is given to whether a less burdensome means is available to the state to accomplish the purpose as well as to whether the statute is overbroad or underinclusive in light of the asserted governmental purpose.

II. The Hereditary Biological Function and Negative Eugenics

A commonly articulated state purpose for incest statutes is that they serve a hereditary-biological function in which the state has a legitimate interest. This function is based upon certain misconceptions of the hereditary process and unexamined attitudes reflecting negative eugenics theory[58] entertained by legislators, jurists, and the public. This section is in two parts: the first is an overview of genetics and the second is a critique of the philosophical underpinnings of the negative eugenics justification for incest statutes.

A. *Genetics*

The primary misconception underlaying the asserted hereditary-biological function of incest statutes is the belief that consanguineous matings[59] cause genetically defective offspring. A cursory examination of

58. Eugenics, from the Greek, meaning "well-born," was coined by Sir Francis Galton, the father of the modern-day eugenics movement. Comment, *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. L. 280, 281 n.6 (1975). Eugenics ideas did not originate with Galton, nor are incest statutes the only contemporary manifestations of eugenics theories. The concept of selective breeding to improve the human race was proposed in Plato's *Republic*. Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead*: Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 977 (1977). State statutes authorizing involuntary sterilization of certain people are contemporary examples of eugenics programs. *See, e.g.*, MINN. STAT. ANN. § 252A.13 (West 1982).

59. Technically, a consanguineous mating is any mating between two individuals who share at least one common ancestor. However, for the purposes of this article, a consanguineous mating is defined as a mating between two individuals who have at least one common ancestor within the preceding four generations. *See* A.C. STEVENSON, B.C. DAVISON & M.W. OAKES, GENETIC COUNSELLING 107 (1970) [hereinafter cited as A.C. STEVENSON].

Mendelian,[60] autosomal[61] dominant and recessive inheritance[62] reveals that such a belief is simply inaccurate.[63]

The nucleus of each cell in the human body, except for gametes (i.e., sperm and ova), contains twenty-two pairs of autosomal chromosomes and two sex chromosomes for a normal complement of forty-six chromosomes. Each chromosome is composed of a linear succession of genes[64] positioned along a backbone of deoxyribonucleic acid (DNA).[65] The number of genes present on a set of forty-six chromosomes is not known, although estimates range from 10,000 to 100,000.[66] A given gene (e.g., the gene that controls eye color), occupies a specific position on a particular chromosome.[67] Both members of the chromosome pair will contain that gene at that particular locus. Therefore, each gene can have two possible representations[68] on a chromosome pair—one on each chromosome member. If the gene is of the same form on both chromosomes on the pair (e.g., both genes are for brown eyes), the individual is characterized as homozygous for that gene.[69] If the genes at that particular place on

60. A Mendelian, or unilocal, disorder results from an anomaly attributable to a single base pair substitution at one locus on one pair of chromosomes. In addition to this type of heritable genetic disorder, there are multilocal and aneuploid disorders. Multilocal disorders are under the control of several different loci of one or more pairs of chromosomes. Any disorder attributable to a departure from the normal number of sets of genes is classified as an aneuploid disorder. E. MURPHY & G. CHASE, PRINCIPLES OF GENETIC COUNSELLING 21 (1975) [hereinafter cited as E. MURPHY].

61. There are two types of chromosomes—autosomal and sex chromosomes. Autosomal chromosomes appear in twenty-two pairs in the nucleus of each somatic cell. The two remaining chromosomes in the nucleus are called sex chromosomes. In a female the two sex chromosomes are the same and are designated as X-chromosomes. In a male one of the sex chromosomes is an X-chromosome and the other is a Y-chromosome. Epstein, *Medical Genetics: Recent Advances with Legal Implications*, 21 HASTINGS L.J. 35 (1969–70).

62. In autosomal dominant inheritance, a single gene in a gene pair of an autosomal chromosome pair causes the trait associated with that gene to be manifested clinically. Traits characterized by recessive autosomal inheritance are manifested only when both genes in the relevant gene pair are mutants. Motulsky & Hecht, *Genetic Prognosis and Counselling*, 90 AM. J. OBST. & GYNEC. 1227, 1227–30 (1964).

63. This article relies on the Mendelian autosomal inheritance construct because it is the simplest type of inheritance. Moreover, if commonly held generalizations concerning the hereditary-biological function of incest statutes are incorrect when measured against the least complicated type of inheritance, they are also incorrect in the context of the more complex inheritance mechanisms.

64. Developments in molecular genetics establish that it is not technically correct to characterize a gene as the basic, indivisible unit of genetic inheritance. However, treating it as such an entity does not effect the integrity of this article. *See* A.C. STEVENSON, *supra* note 59, at 24–25.

65. *Id.* at 337.

66. Lederberg, *State Channeling of Gene Flow by Regulation of Marriage and Procreation* in GENETICS AND THE LAW 247 (A. Milunsky & G. Annus eds. 1976).

67. A.C. STEVENSON, *supra* note 59, at 26–27, 339.

68. The normal gene is referred to as "wild type" from the French "type sauvage." This is the gene type which causes no detrimental effects. It probably represents a range of forms, all of which have no detrimental effect, rather than one gene. Significant evidence exists that harmful genes, variant or mutant genes, also exist in a range of forms which are all detrimental. *Id.* at 27.

69. *Id.* at 338.

the chromosomes of the pair are different (e.g., one is for brown eyes and one is for blue eyes), then the individual is heterozygous for that trait.[70]

Various traits are either dominant or recessive. A recessive gene trait is only clinically manifested when the particular gene is in the same form on both chromosomes of the pair. Blue eyes is a recessive trait; therefore an individual can only have blue eyes if she or he has the gene for blue eyes on both chromosomes of the pair. Dominant genetic traits, e.g., brown eyes, are clinically manifested even though one of the two genes for that trait is in that form. Consequently, a person who has one gene for blue eyes and one gene for brown eyes will actually have brown eyes.[71]

Each gamete, either sperm or ovum, contains twenty-three chromosomes—one half of the normal set. Gametes are formed by a process called meiosis[72] by which the twenty-three pairs of chromosomes in a body cell are separated, with one chromosome of each pair going to a separate gamete. The process of fertilization produces a zygote by joining one gamete from each parent. Therefore, each chromosome pair contained in the zygote has one chromosome member from each parent. The zygote is the precursor of a new being whose genetic makeup is partially determined by each parent.[73]

If a person carries two genes for brown eye color, when meiosis occurs each gamete contains one gene for brown eye color. Similarly, if the genes are both for blue eye color, each gamete contains one gene for blue eye color. However, if the chromosome pair contains one gene for brown eye color and one gene for blue eye color, upon meiosis, one gamete contains the "brown" gene and the other gamete contains the "blue" gene.[74] Depending upon which gene is contributed by the mother's gamete and which is contributed by the father's gamete during the fertilization process, the illustration in Table 1 represents the possible genetic compositions for eye color of the resulting zygote.

A dominant trait is clinically manifested whenever the dominant gene is present. Therefore, any offspring in Table 1 with the genetic composition "brown-brown" or "brown-blue" has brown eyes.[75] Since a recessive

70. *Id.* Because a female has two X-chromosomes, she will be homozygous or heterozygous for a particular gene on the X-chromosomes. However, the terms are inapplicable to genes appearing on the X-chromosome of a male. The other sex chromosome is a Y-chromosome which is not identical to an X-chromosome in genetic structure. Therefore, males are hemizygous for genes on the X-chromosome. E. MURPHY, *supra* note 60, at 33.

71. A. C. STEVENSON, *supra* note 59, at 28. In their strict meaning, "dominant" and "recessive" apply to traits that are determined by genes and not to the genes themselves. However, it is a common practice, which will be employed in this article for the sake of brevity, to refer to genes as recessive and dominant. *See id.* at 29.

72. E. MURPHY, *supra* note 60, at 33.

73. A. C. STEVENSON, *supra* note 59, at 9–15.

74. *See id.* at 25.

75. In this article, the discussion is limited to gene traits which, as predicted by the Mendelian inheritance construct, are invariably manifested. Geneticists, however, have identified the phenomena of nonpenetrance and incomplete display of Mendelian traits. E. MURPHY, *supra* note 60, at 270–89.

TABLE 1

	BROWN	BROWN
BROWN	BROWN-BROWN	BROWN-BROWN
BROWN	BROWN-BROWN	BROWN-BROWN

Figure 1

	BROWN	BROWN
BROWN	BROWN-BROWN	BROWN-BROWN
BLUE	BROWN-BLUE	BROWN-BLUE

Figure 2

	BROWN	BROWN
BROWN	BROWN-BLUE	BROWN-BLUE
BLUE	BROWN-BLUE	BROWN-BLUE

Figure 3

	BROWN	BLUE
BROWN	BROWN-BROWN	BROWN-BLUE
BLUE	BROWN-BLUE	BROWN-BLUE

Figure 4

	BROWN	BLUE
BLUE	BROWN-BLUE	BLUE-BLUE
BLUE	BROWN-BLUE	BLUE-BLUE

Figure 5

	BLUE	BLUE
BLUE	BLUE-BLUE	BLUE BLUE
BLUE	BLUE-BLUE	BLUE-BLUE

Figure 6

trait is manifested only when both genes associated with that trait are present in the same form, only the offspring in Table 1 with the genetic composition "blue-blue" have blue eyes. There is a difference in the genetic makeup of "brown-brown" and "brown-blue" offspring, but the difference is only important when the offspring reproduce. The "brown-brown" offspring must pass a "brown" gene to all of its gametes, whereas the "brown-blue" offspring passes a "brown" gene to half of its gametes and a "blue" gene to the other half.

The offspring of two homozygous parents ("brown-brown") for the "brown" gene must all be homozygous for the "brown" gene. (Table 1, Figure 1.) Similarly, the offspring of two homozygous parents ("blue-blue") for the "blue" gene must all be homozygous for the "blue" gene. (Table 1, Figure 6.) If both parents are heterozygous ("brown-blue") for the trait, one in four of the offspring will be homozygous ("brown-brown") for the "brown" gene; one in four will be homozygous ("blue-blue") for the "blue" gene; and two in four will be heterozygous ("brown-blue"). (Table 1, Figure 4.) Three of the four offspring

("brown-brown" and "brown-blue") will have brown eyes, because "brown" is a dominant gene trait. Only one in four of the offspring ("blue-blue") will have blue eyes because it is a recessive gene trait.

This Mendelian construct of gene expression applies to literally thousands of gene pairs within a somatic cell. Although expectant parents may be interested in the probability of their child having blue or brown eyes, whether the dominant brown or the recessive blue trait is ultimately expressed is of no significance to the offspring's well-being. The probability of gene expression is crucial, however, if the dominant or recessive trait has a deleterious effect when expressed in the offspring.

Genetic research has identified many genetically linked disorders and has determined the probability of their occurrence.[76] Research has also established that recessive autosomal traits are more severe in their manifestation than are dominant autosomal traits.[77] On the average each human carries between one and five deleterious recessive genes.[78] However, these deleterious genes usually do not result in offspring who exhibit the trait associated with the gene because there is only a very small likelihood of mating with a person who carries the same recessive gene at the same locus on the same chromosome in the same pair.[79] The danger in consanguineous matings is not, as commonly believed, that such unions cause or increase the number of deleterious recessive genes in the offspring. Rather, such matings increase the probability that the spouses both carry an identical recessive gene which will be passed to the offspring in the double dose necessary for the expression of the trait associated with that recessive gene.[80]

For example, if a particular individual is heterozygous for a recessive gene trait, there is a 0.5 probability that the individual's parent, child or sibling is also heterozygous for the trait.[81] If the heterozygous individual

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76. Identified autosomal disorders include Huntington's chorea, Von Recklinghausen's disease, facio-scapulo-humeral muscular dystrophy and Marfan's syndrome. A.C. STEVENSON, *supra* note 59, at 147, 149, 203, 211. Autosomal recessive disorders include Cyclops, limb girdle muscular dystrophy, fibrocystic disease, and Hurler's syndrome. *Id.* at 168, 201, 220, 259.

77. The severity of sex-linked genetic traits falls between the severity of recessive and dominant autosomal traits. An X-linked trait acts like a dominant trait in males because males do not have another X-chromosome to disguise the gene. However, in females an X-linked trait behaves as a recessive trait because females do have another X-chromosome which can contain a normal dominant gene. McKusick, *The Nosology of Genetic Disease*, in MEDICAL GENETICS 214 (V. McKusick & R. Clairborne eds. 1973).

78. An average of five deleterious recessive genes means that less than 1 percent of the population is free of all deleterious recessive genes. Lederberg, *supra* note 66, at 258. Presently, there is no satisfactory method for determining the average number of deleterious recessive genes carried by each person. E. MURPHY, *supra* note 60, at 232.

79. Although there are hundreds of different recessive gene traits, probably not more than 1/1000 children born will be effected by a harmful recessive gene trait. A.C. STEVENSON, *supra* note 59, at 117.

80. E. MURPHY, *supra* note 60, at 215.

81. The proportion of genes two blood relatives have in common is expressed by the coefficient of relatedness. The coefficient of relatedness between lineals (parent, child,

has offspring by her or his parent, child, or sibling, the probability that the offspring will be homozygous for the recessive gene trait is 0.125.[82] Assuming the mean number of harmful recessive gene traits carried per person is one and there is no history of deleterious gene traits in the pedigree, the risk of homozygosity, i.e., expression of the recessive gene trait, in the offspring of selected consanguineous matings is summarized in Table 2.[83]

The probabilities of offspring who are homozygous for a deleterious recessive gene appear low, but they are higher than the 0.001 probability of homozygosity for a deleterious recessive gene in nonconsanguineous matings when there is no family history of such recessive gene traits.[84] Some empirical data suggest that consanguineous matings lead to an increase in infant mortality, congenital birth defects and anthropometric changes.[85]

Neither the theoretical increased probability of homozygosity in offspring of consanguineous matings nor the empirical evidence of a decrease in fitness of such offspring is sufficient to justify an incest statute. The available empirical information often comes from a sample which is too small to yield statistically meaningful results.[86] Moreover, the results of studies on inbred populations (e.g., the Amish) are limited to popula-

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grandparent, grandchild) is $[1/2]^K$. *K* is the degree of relationship between the two lineals, which is obtained by counting the generations in the direct link between them. The degree of relationship between a parent and child is 1°. Therefore, the coefficient of relatedness is $[1/2]^1$ or 0.500.

The coefficient of relatedness for collateral relatives is found by using the formula $2[1/2]^K$ because there are two common ancestors. The civil law method of counting the degree of relationship is used. For example, siblings stand in 2° of relationship. Therefore, the coefficient of relatedness is $2[1/2]^2$ or one half or 0.500. Farrow & Juberg, *Genetics and Laws Prohibiting Marriage in the United States*, 209 J.A.M.A. 534, 535–36 (1969).

82. This probability is arrived at by first determining the coefficient of inbreeding (F). F = ½ (coefficient of relatedness). Thus, in the example of a person having offspring with that individual's parent, child, or sibling, the coefficient of relatedness is (½)(½) = ¼. The expected frequency of recessive gene traits in offspring is $\frac{Fn}{2}$ where *n* is the mean number of harmful recessive genes carried per person. If $n = 1$, then the expected frequency of recessive gene traits in the offspring is (½)(¼)(1), or (⅛) or 0.125. If $n = 2$, the expected frequency is (½)(¼)(2), or (¼), or 0.250. *Id.* at 536; A.C. STEVENSON, *supra* note 59, at 118; E. MURPHY, *supra* note 60, at 230–31.

83. If there is a known recessive gene trait in the pedigree, the determination of the risk to the offspring of manifesting the trait is determined by the same methodology employed when unrelated mates have a known recessive trait. *See infra* Table 3.

84. A.C. STEVENSON, *supra* note 59, at 118.

85. Congenital means that a particular disease or abnormality is present at birth. Such a condition may be caused by environmental factors (e.g., injury during the birthing process or maternal rubella infection during pregnancy), genetic factors, or an interaction of genetic and environmental factors. Fraser, *Genetic Counselling* in MEDICAL GENETICS 221 (V. McKusick & R. Clairborne eds. 1973). Anthropometric changes refers to weight, height, and head circumference. *See* W.J. SCHULL & J.V. NEEL, THE EFFECTS OF INBREEDING ON JAPANESE CHILDREN (1965); Fried & Davies, *Some Effects on the Offspring of Uncle-Niece Marriage in the Moroccan Jewish Community in Jerusalem*, 26 AM. J. HUM. GENET. 65 (1975).

86. The Fried-Davies study of uncle-niece marriages is based on twenty-seven such marriages. *Id.*

TABLE 2

1° Lineals (parent, child) 2° Collaterals (siblings)	0.1250
2° Lineals (grandparent, grandchild) 3° Collaterals (niece/nephew, aunt, uncles) One-half-siblings, double first cousins	0.0625
3° Lineals (greatgrandparent, greatgrandchild) 4° Collaterals (grandniece/nephew, grandaunt/uncle, first cousins) One-half-niece/nephew, one-half aunt/uncle	0.03125
4° Lineals (greatgreatgrandparent, greatgreatgrandchild) 5° Collaterals (greatgrandniece/nephew, greatgrand-aunt/uncle, first cousins once removed) One-half-grandniece/nephew, one-half grand aunt/uncle, one-half-first cousins	0.015625
5° Lineals (greatgreatgreatgrand-parent, greatgreatgreatgrandchild) 6° Collaterals (greatgrandniece/nephew, greatgrandaunt/uncle, first cousins once removed, second cousins) One-half-greatgrandniece/nephew, one-half-great-grandaunt/uncle, one-half-first cousins	0.0078125

tions with a comparable degree of inbreeding for the same amount of time[87] and are therefore not very useful in predicting the risk of disorders in consanguineous matings in other communities or between particular individuals. Even the results of large-scale studies are subject to different scientific interpretation[88] and should not be the basis for an incest prohibition.

Similarly, the increased expectation that a recessive gene trait will occur in the offspring of incestuous unions is not proof of the adequacy or permissibility of a genetic justification for incest statutes. The same

87. "[A]n inbreeding coefficient of 0.05 in . . . a town in Wyoming recently settled from many sources would not have the same impact as in an Indian village where the same degree of inbreeding had been practiced for 3,000 years; and this statement would be true even if the environments were identical." E. MURPHY, *supra* note 60, at 232.

88. "So far as we can judge from these data the effects are small and should provide considerable grounds for reassurance in marriages no closer than first cousins [4°]. The preliminary data on closer relationships suggest somewhat more substantial effects but nothing like the horrendous kinds of increases that are commonly imagined." *Id.* at 235. *See also* G. MURDOCK, SOCIAL STRUCTURE 240 (1949). *Contra* A. C. STEVENSON, *supra* note 59, at 117–18.

construct or model is applicable for any recessive gene trait, whether it is a "good" or "bad" trait. If a person possesses a "good" recessive gene trait, then, consanguineous matings increase the probability of the manifestation of that trait in the offspring, and incest statutes impede their manifestations. More importantly, forbidding consanguineous matings to prevent the manifestation of deleterious recessive gene traits is, at best, incremental in effect and may impede the achievement of that objective. For example, it would take the sterilization of 200 generations of all albinos (those who are homozygous for the recessive trait causing albinoism) to reduce the proportion of albinos in the population to half the present frequency.[89] As incest statutes forbid only matings within the prescribed classes, the elimination of any recessive trait carried in the heterozygous state would take even longer.

Incest statutes may actually increase the likelihood of deleterious recessive gene traits appearing in future generations. The gene trait, if severe enough, will eliminate itself from the gene pool when it is manifested in the homozygote by killing the homozygote or rendering her or him sterile. If incest statutes prevent the coming together of two recessive genes in the present generation, the gene will be dispersed throughout the population in general. This increases the frequency for that trait in the population as a whole in succeeding generations and, in turn, increases the probability that two unrelated persons carrying the same recessive gene in the heterozygous state will mate and produce homozygous, or affected, offspring.[90]

Geneticists can presently compute the probability of offspring manifesting a deleterious genetic trait outside the context of consanguineous matings. If the parental genotypes[91] are known, risk estimates can be made with respect to both autosomal dominant and recessive gene traits. Within the context of brown and blue eye colors, Table 3 summarizes the proportion of offspring affected and unaffected by the dominant and recessive gene traits.

The majority of matings involving dominant deleterious genes are those represented in Table 3, Figure 5.[92] The risk that an offspring of such a mating will be affected by the dominant gene trait is 0.50. The most common mating involving recessive deleterious gene traits is analogous to Table 3, Figure 4.[93] The risk that the offspring of such a mating will be affected by the deleterious recessive gene is 0.25. The risk in both of these instances is higher than the expectation (0.125) that the offspring of the closest consanguineous mating (parent, child, sibling) will be an affected

89. Golding, *Ethical Issues in Biological Engineering*, 15 UCLA L. REV. 443, 473 (1968).
90. Lederberg, *supra* note 66, at 252.
91. Genotype is the genetic makeup of a person whereas phenotype is the appearance a person presents on examination. E. MURPHY, supra note 60, at 34.
92. A.C. STEVENSON, *supra* note 59, at 62.
93. *Id.* at 102.

TABLE 3

	Parent #1	Parent #2	Brown Eyes Homozygote [Brown-Brown]	Brown Eyes Heterozygote [Brown-Blue]	Blue Eyes Homozygote [Blue-Blue]
#1	Brown-Brown [Homozygote]	Brown-Brown [Homozygote]	1.00	0	0
#2	Brown-Brown [Homozygote]	Brown-Blue [Heterozygote]	0.50	0.50	0
#3	Brown-Brown [Homozygote]	Blue-Blue [Homozygote]	0	1.00	0
#4	Brown-Blue [Heterozygote]	Brown-Blue [Heterozygote]	0.25	0.50	0.25
#5	Brown-Blue [Heterozygote]	Blue-Blue [Homozygote]	0	0.50	0.50
#6	Blue-Blue [Homozygote]	Blue-Blue [Homozygote]	0	0	1.00

homozygote for a deleterious recessive gene trait. There are, however, no legal impediments to a marriage between individuals who are known to be affected by a deleterious dominant or recessive gene trait or for those individuals who are known carriers of deleterious recessive gene traits.

Genetic prediction has progressed to the point that it can even estimate genetic risks when the parents' genotypes are not known but there has been a lineal or collateral relative or an offspring of the parents who

manifested a deleterious gene trait.[94] Some state statutes require marriage license applicants to undergo genetic screening for certain traits.[95] They do not, however, forbid the marriage of those found to be affected by the trait or those who are unaffected carriers of the trait. No state forbids any marriages, except consanguineous marriages, on the basis of the genetic probability of producing affected offspring.

Clearly, then, the scientific genetic justification for incest statutes does not withstand analysis. The genetic dangers of consanguineous matings are not only fairly minimal but are exceeded by the genetic dangers involved in the matings of other social populations. As these more dangerous matings are not prohibited on genetic grounds, neither should incestuous marriages. The next section examines the sociological component of the genetic argument for incest statutes, eugenics.

B. *Eugenics*

Eugenics purports to be the study of agencies under social control that impair or improve the physical and mental qualities of the race. Encouraging the procreation of biologically and socially desirable populations (positive eugenics) and discouraging the procreation of inferior populations (negative eugenics) are the goals of this social movement.[96] The favored mechanism for attaining these eugenics goals is the use of the coercive power of the state.[97] Statutory limitations on reproduction by and between certain people through restrictions on the right to marry are one example of the exercise of the state's coercive powers in furtherance of eugenics goals.[98] Another example is the total elimination of reproductive capacity through involuntary sterilization statutes.[99]

In the context of incest statutes, the legislative enactments partially restrain an individual's ability to procreate by limiting the pool of potential mates. To the extent this limitation of procreational choice is

94. E. MURPHY, *supra* note 60, at 106–70.

95. *E.g.*, ALASKA STAT. §§ 25.05.101–.181 (1977) (premarital screening for heritable disease); ARIZ. REV. STAT. ANN. §§ 36–797.40 to .44 (1974 & Supp. 1975–1983) (state may provide premarital screening); ILL. ANN. STAT. ch. 40, §§ 204–05 (Smith-Hurd 1984–85 Cum. Supp.) (premarital testing may be given when deemed appropriate by a physician); IND. CODE ANN. § 31–1–1–7 (Burns 1980) (premarital screening test in conjunction with premarital exam); KY. REV. STAT. § 402.310–.340 (Cum. Supp. 1982) (premarital screening in conjunction with premarital exam).

96. Comment, *supra* note 58.

97. At least one commentator has suggested that the state's interest in diminishing the cost and suffering caused by genetic diseases through negative eugenics programs is more compelling than the state's interest in propagating superior qualities in the population. Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 222.

98. *E.g.*, N.D. CENT. CODE § 14–03–07 (1981): "Marriage by a woman under the age of forty-five years or by a man any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is institutionalized as severely retarded."

99. Fourteen states have statutes permitting sterilization for the mentally ill or mentally retarded. *See* Damme, *Controlling Genetic Disease Through Law*, 15 U.C.D. L. REV. 801, 830 n. 140 (1982) and statutes cited therein.

grounded in concerns for the genetic quality of the offspring of certain marriages, incest statutes are an exercise in negative eugenics legislation and must be examined as such.

The exercise of state power initially appears permissible because theories of natural selection and genetic inheritance, as understood by the public, seem to confirm the objective, scientific nature of the goal of eliminating genetically defective or undesirable offspring.[100] Upon closer scrutiny, however, this patina of legitimacy disappears. Using the state's power to guard the integrity of the gene pool for future generations is a philosophical choice which is not dictated by contemporary scientific understandings of genetic inheritance in humans. Moreover, science does not purport to supply a social definition of which persons are socially or biologically desirable or those who are defective or inferior. Finally, even if one accepts the legitimacy of the philosophical principles upon which eugenics is based, one must doubt the efficacy of incest statutes as the chosen method of state intervention.

Initially, there is a question whether it is a proper governmental function to protect the gene pool of the future at the expense of the procreational rights of its presently existing citizens.[101] Any type of state-sponsored negative eugenics program requires the community of the present to bear that burden, while the benefit, if any, is reaped in the future. Eugenics laws generally raise a question of our moral relationship to those who may come into being in the future. The significant amount of disagreement among contemporary writers shows that this relationship is not at all clear, and certainly it is less clear than our understanding of our moral obligations to the present community.[102] Moreover, the contemporary concepts of individual rights, as reflected in increasing judicial sensitivity to procreational choice, are at odds with eugenics concerns of strengthening the physical and mental qualities of the race.[103]

Acceptance of the proposition that incest statutes are a legitimate legislative infringement on individual procreational choice because of concerns about the genetic makeup of the offspring of such unions

100. *See* A. DEUTSCH, THE MENTALLY ILL IN AMERICA; A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES (2d ed. 1949); L. CAVILLI-STORZA & W. BODMER, THE GENETICS OF HUMAN POPULATION (1971). For examples on views on the laws of heredity in the early twentieth century, *see* C. DAVENPORT, HEREDITY IN RELATION TO EUGENICS (1911); W. CASTLE, GENETICS AND EUGENICS (1921).

101. *See* Golding, *supra* note 89. In Buck v. Bell, 274 U.S. 200, 207 (1927), the Court dismissed any consideration of this fundamental question by stating that "three generations of imbeciles are enough." However, at least one state court recognized very early that negative eugenics legislation raises the question of "whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws. . . ." Smith v. Board of Examiners, 88 A. 963, 965 (N.J. 1913).

102. *See* Golding, *supra* note 89; O'Hara and Sanks, *Eugenic Sterilization*, 45 GEO. L. J. 20 (1956); Vukowich, *supra* note 97.

103. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

logically creates a wide and difficult-to-limit area of legislative activity. Incest statutes impair procreational choice based on at most a 0.125 risk of defective offspring. If this is the accepted degree of intrusion, arguably, the state has the power to forbid procreation in all those matings which have an equal or higher risk of producing genetically affected offspring.[104] It is presently possible to ascertain the probability of producing offspring with deleterious genetic traits from matings other than incestuous ones.[105] As genetic knowledge increases, the ability to detect carriers of deleterious genes as well as the ability to estimate the probability of adversely affected offspring will increase.[106] A logical corollary of using the state as the guardian of the gene pool is that the state would have the power to require compulsory genetic screening[107] of all would-be matings, and to prohibit those matings which carry at least a 0.125 risk or higher risk of producing offspring with deleterious genetic traits. As each person has between one and five deleterious recessive genetic traits, this kind of intrusion would be felt by everyone.

Before the power of the state could be used in this way to control individual mating decisions, definitions of "genetically defective" and "socially undesirable" offspring must be formulated. Past negative eugenics legislation shows that there is nothing "scientific" or "objective" in the definitions of these terms as used by various legislative bodies. At one time or another, involuntary sterilization statutes applied to such classes as confirmed criminals, epileptics, moral degenerates, two-time sex criminals with moral depravity, three-time sex criminals with moral depravity, syphilitics, drug fiends, prostitutes, twice-convicted felons, and many other classes defined by characteristics which are not genetically transmissible.[108] Indeed, the concepts of "genetically defective" and "socially undesirable" when used in the context of negative eugenics legislation are value-laden terms without any objective content. Proponents of eugenics legislation historically have been more concerned with the outward physical appearance of the offspring (phenotypes) than with the offspring's genetic makeup (genotype).[109] Those whose deleterious recessive trait is masked in the heterzygote create no demands for the legislature to prevent their procreation. Only the obviously physically

104. Lederberg, *supra* note 66, at 252.

105. E. MURPHY, *supra* note 60, at 106–70.

106. The progress of genetic nosology is demonstrated by the steady increase in the number of identified genetic traits. Between 1958 and 1973, the number increased from something over 400 to more than 1,000. McKusick, *supra* note 77, at 217.

107. Genetic screening is the process of surveying target populations for genetic disease or for the presence of abnormal genes in the carrier (heterozygous) state. Over eighty tests are now available for prenatal screening by amniocentesis. Shaw, *Legal Issues in Medical Genetics* in PSYCHIATRY AND GENETICS—PSYCHOSOCIAL, ETHICAL AND LEGAL CONSIDERATIONS 188 (M. Sperber & L. Jarvik eds. 1976).

108. Comment, *supra* note 58, at 285 n.20.

109. Golding, *supra* note 89, at 466 n.5.

impaired offspring cause concern. Also, the choice of an ideal phenotype depends heavily on ideological perspectives.[110]

Putting aside the ideological considerations involved in selecting a definition of "defective" and "undesirable" offspring, an acceptable objective definition is still extremely difficult if not impossible to formulate. For example, are offspring "genetically defective" if medical knowledge exists which can eliminate or compensate for the deleterious trait? Phenylketonuria (PKU),[111] left untreated in infants, causes irreversible brain damage. However, the timely application of a low phenylalanine diet ameliorates this "defect." The same is true for errors of refraction in the eye;[112] corrective lenses can compensate for many such monofactorial inheritance disorders. Genetically caused abnormalities in phenotype such as a harelip or a cleft palate can be corrected surgically. Are individuals displaying such correctable defects truly "defective"? In addition, some genetic traits are "bad" in one environment and "good" in another, as is the case of genes that determine susceptibility to sickle-cell anemia.[113]

It has been suggested that, since the conditions of life in the future are not known, there is something to be said for "genetic waste." It may be important to preserve genetic diversity even though it means that various "defectives" will transmit their genes into the future.[114] Any attempt to use the power of the state to control genetic channeling by regulating marriage eliminates "good" genetic traits with the "bad."[115]

Another possible argument that the state has a legitimate interest in preventing the procreation of genetically defective offspring is the idea that the state has a legitimate interest in insuring that the responsibilities

110. *Id.* at 465.

111. PKU is an autosomal recessive trait. The disease results from a deficiency of liver phenylalanine hydroxylase. This results in an excess of phenylalanine in the blood and spinal fluid. Once a baby with PKU is delivered and exposed to protein, central nervous system damage occurs. A ferric chloride urine screening test done at about the age of one month may detect the presence of PKU. However, a blood test using a drop of blood from the infant's heel is a more reliable test for PKU. The test can be done immediately after delivery. Hsia & Holtzman, *A Critical Evaluation of PKU Screening* in MEDICAL GENETICS 237–38 (V. McKusick and R. Clairborne eds., 1973).

112. A.C. STEVENSON, *supra* note 59, at 172–73.

113. Golding, *supra* note 89, at 473. Sickle-cell anemia is a genetically induced disease of the hemoglobin. The trait is prevalent in the moist areas of west and central Africa. Heterozygous sickle trait is a positive advantage in these regions because it partially protects the heterozygote against the malignant falciparum form of malaria. Sickle-cell trait does not reduce the incidence or severity of malaria in adults, but it appears to give some protection to infants. The trait improves an infant's chance of surviving the first malaria attack and developing antibodies which partially protect the infant against further infections of the disease. This protective effect of the sickle-cell trait explains the persistence of this otherwise disadvantageous mutation that in malaria-free regions would have been eliminated quite rapidly by natural selection. Conley & Charache, *Inherited Hemoglobinopathics* in MEDICAL GENETICS 57–59 (V. McKusick and R. Clairborne eds. 1973).

114. Golding, *supra* note 89, at 476.

115. *Id.* at 475.

of parenthood can be fulfilled by the potential parents.[116] The argument is that genetically defective individuals cannot be adequate parents to their own offspring, that procreation by such people produces offspring who will be social and economic burdens on society because they will not be cared for properly. However, many recessive as well as dominant gene traits are lethal.[117] That is, the trait either prevents the affected individual from reproducing or it causes the death of the affected person. Obviously, such "genetically defective" people pose no risk of becoming inadequate parents. Moreover, once it is logically and morally permissible to single out a group as theoretically inadequate parents and to forbid their procreation, other high-risk groups, such as alcoholics or drug addicts, may become subject to the same strictures.[118] The state already has a direct mechanism expressly to protect children who are the victims of unfit parents. Neglect and abuse statutes protect children without impinging on the procreational choice of only theoretically defective parents.

Even if the state did have a legitimate interest in preventing an increase in the number of mutations in the future by presently restricting the transmission of harmful genes, incest statutes do not achieve that goal and are, in reality, dysgenic in effect.[119] Forbidding consanguineous matings in the present generation does reduce the probability that a deleterious recessive gene trait will be expressed in its homozygous form. However, the recessive gene is not thereby eliminated from the gene pool. It simply will not be expressed in a union between the heterozygote carrier and the noncarrier mate. This dispersion of the gene in the population as a whole will itself give rise to an increase in the gene frequency in future generations.

Even if a eugenics perspective is acceptable on some basis, the method chosen to achieve that goal is inadequate. Incest statutes are both under- and over-inclusive. State incest statutes do not include all consanguineous matings with equivalent genetic risks. Double first cousin matings carry a 0.0625 risk, as do matings between second degree lineals (grandparent-grandchild) and third degree collateral relatives (aunt-nephew, uncle-niece). Only a minority of the states forbids any cousin marriages, but all states forbid marriages between second-degree lineals and third-degree collaterals.[120] On the other hand, incest statutes pro-

116. Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. FAM. L. 463, 478 (1976–77).

117. Any condition which produces complete sterility regardless of how long the person with it survives is a genetic lethal. The same is true for genotypes such as Tay-Sachs disease, which leads to death at an early age before the individual can reproduce. MURPHY, *supra* note 60, at 55.

118. Note, *supra* note 116, at 478 n.20.

119. Lederberg, *supra* note 66, at 252.

120. Rhode Island permits uncle-niece marriages for members of the Jewish faith. R.I. GEN. LAWS §§ 11–6–4, 15–1–4 (1981).

hibiting certain affineous matings (mother-in-law and son-in-law, or father-in-law and daughter-in-law) are overbroad, as such matings have no genetic implications at all. Finally, the overbreadth of incest statutes shows most clearly when the statutes are cast as a marriage prohibition because all that is needed to further eugenics concerns is a prohibition on reproduction between certain classes of individuals within and without marriage.[121]

Current knowledge of genetic inheritance does not justify the persistence of incest statutes in contemporary society. Present scientific knowledge does show that the process of genetic inheritance is much more complicated than the simplistic, nonscientific model on which incest statutes are predicated. Since there is much dispute as to the conclusions which may be drawn from presently accepted scientific data, courts should be cautious in accepting legislation on the basis of supposed data or under the guise that "scientists agree."[122]

Any legitimate social interest in the production of offspring who are emotionally, physically, socially, and economically healthy is better served through other exercises of state power than through incest statutes. For example, noncompulsory genetic screening programs alerting potential marriage partners of associated genetic risks to their offspring would reach more of the at-risk couples than do incest statutes. Programs aimed at regulating known environmental factors (mutagens) which cause congenital birth defects would protect more offspring than do incest statutes.[123] Nutritional programs for pregnant women and infant children as well as pre- and postnatal medical care would have a far greater positive impact on the physical and mental health of offspring than do incest statutes. Similarly, state intervention on behalf of abused or neglected children has a greater likelihood of preventing inadequate parenting than do incest statutes. Consequently, the rationale for incest statutes today must rest on other than genetic and eugenic concerns for their legitimacy.

The incest taboo is closely related to religious beliefs and societal concepts of public morality. The next section examines the religious roots of contemporary incest statutes as well as incest statutes as embodiments of notions of public morality.

III. Religion and the Public Morality Function

Although religious tenets condemning incest and definitions of public morality characterizing incest as immoral are not coterminous, they are sufficiently related to warrant being discussed together.[124] For many

121. Vukowich, *supra* note 97, at 216.
122. Cook, *Eugenics or Euthenics*, 37 ILL. L. REV. 287, 289, 297 (1943).
123. Lederberg, *supra* note 66, at 262.
124. The condemnation of incest as an immoral act presupposes the existence of a more

people, religion shapes their understanding of what constitutes incest and their willingness to forbid such behavior by statute. Concepts of public morality, apart from particular religious beliefs, are also asserted as justifications for the use of state laws to enforce the incest taboo.

A. *Religion*

American incest laws have been shaped particularly by the religious beliefs of Judaism and Christianity. If state incest statutes are merely examples of secular enforcement of particular religious tenets, then the statutes violate the constitutional prohibition against the establishment of religion since preservation of divine law is not a permissible basis for state legislation. Religious influence on American civil and criminal incest statutes appears in the definitions of incestuous relationships. The proscriptions in the statutes derive largely from the religious history of incest in Europe generally and in England specifically.

In Europe, marriage was originally only an ecclesiastical concern;[125] indeed, incest did not become a secular offense in England until 1908.[126] The canon law of the Church of Rome defined the relationships within which marriage was forbidden. Initially, the admonishments found in the book of Leviticus formed the basis of the canon law prohibitions. Levitical laws forbidding sexual contact with the clan included consanguineous relationships (son and mother; father and daughter; father and granddaughter; brother and sister of the full or half blood; and nephew and aunt) and certain relationships by affinity (son and stepmother; father-in-law and daughter-in-law; nephew and aunt by marriage; and brother-in-law and sister-in-law).[127] These canon law prohibitions did not remain static. The Church of Rome expanded the forbidden list of relationships until the marriage ban extended to persons related by consanguinity in any degree.[128] Moreover, because marriage was conceptualized as the union of the husband and wife resulting in a metaphysical oneness, the

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generalized moral theory. Otherwise, the condemnation is nothing more than a position based on prejudice, rationalization, matters of personal aversion or taste, arbitrary stands, or the like. Although a moral theory may rest on the teachings of a particular religious belief, it is not a requirement that it does. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 994–1002 (1965–66).

125. Hughes, *The Crime of Incest*, 55 J. CRIM. L. CORREC. & POLICE SCI. 322, 323 (1964); Moore, *A Defense of First-Cousin Marriage*, 10 CLEV.-MAR. L. REV. 136, 137 (1961).

126. Punishment of Incest Act, 1908, 8 Edw. 7, ch. 45. The statute criminalized sexual intercourse by a man who knew the female was his granddaughter, daughter, sister, or mother. It contained a similar prohibition for females sixteen-years-old or older. M. GLENDON, *supra* note 2, at 43. There was a brief time during the Interregnum in England when incest was a capital felony. However, upon the Restoration the law expired. MODEL PENAL CODE § 230.2 (1980).

127. Leviticus 18:6–18. These laws for sexual conduct also forbade union or marriage with the daughter or granddaughter of a woman with whom a man had had sexual relations as well as simultaneous marriage with two sisters. THE JEROME BIBLICAL COMMENTARY 78–79 (R. Brown, J. Fitzmyer & R. Murphy eds. 1968).

128. This occured in A.D. 505 by the Council of Agde. Storke, *The Incestuous Marriage—Relic of the Past*, 36 U. COLO. L. REV. 473, 474 (1963–64).

blood relatives of each party to the union were treated as if they were the blood relatives of the other.[129] In its broadest form, the incest prohibition encompassed all persons related by consanguinity and affinity in any degree.[130]

This incest prohibition proved to be unworkable,[131] and it was replaced by a canon law forbidding marriages between those related by consanguinity and affinity in the fourth canonical degree.[132] During the reign of Henry VIII, marriage became secularized and a statute was enacted in an attempt to restrict the incest prohibitions.[133] The statute empowered the secular courts to interfere with the ecclesiastical courts whenever the latter attempted to invalidate a marriage contracted outside the Levitical degrees that was not forbidden by "God's law."[134] "God's laws" were those degrees of relationship which were in accord with contemporaneous opinions of the Church of England and which were expressed in the Church of England's Table of Kindred and Affinity, promulgated in 1563. The prohibitions were more extensive than those contained in Leviticus, but less broad than the previous canon law of the Church of Rome. Generally, all marriages between those related by consanguinity or affinity in the third civil degree or closer were forbidden.[135] The Church of England's definition of prohibited marriages served as the basis for American incest statutes.[136]

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129. M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW CASES AND MATERIALS 198 (1972) [hereinafter cited as M. PLOSCOWE].

130. Matters were worse than they appear. Canonists determined that affinity existed between any woman and man who had lawful or unlawful sexual intercourse. Storke, *supra* note 128, at 474.

131. Europe was ruled by families who intermarried for political reasons. The Church of Rome largely ignored the canonical defects in these marriages unless they were drawn to the Church's attention. Usually, annulments and attempted annulments were politically motivated. Eleanor of Aquitaine had her marriage to a distant cousin, Louis VII of France, annulled. However, she was unsuccessful in obtaining an annulment of her marriage to Henry II of England, who was a more closely related cousin. Henry VIII of England married his brother's widow, Catherine of Aragon, because he received special dispensation from Pope Julius II. Henry was unsuccessful in obtaining an annulment of the marriage in order to marry Ann Boleyn even though there was no authority for the original papal dispensation. M. PLOSCOWE, *supra* note 129, at 199–200.

132. The Lateran Council of 1215 established this prohibition. MODEL PENAL CODE § 230.2 (1980).

133. 32 Hen. 8, ch. 38 (1540). Martin Luther supported this limitation, but it was opposed by John Calvin. Calvin wanted to extend the affinity bar to include sister or brother of a deceased spouse. M. PLOSCOWE, *supra* note 129, at 207.

134. J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 274 (1881).

135. A man could not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, wife's father's sister, wife's mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, wife's sister, brother's wife, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter, brother's son's wife, sister's son's wife, wife's brother's daughter and wife's sister's daughter. Analogous prohibitions applied to a woman. *Id.* at 275 n.1.

136. In his commentary on the laws of marriage in the United States, Joel Bishop asserted that this statute was received as part of the common law of this country. *Id.* at 98 n.4.

The history of incest laws in the United States is one of gradual, but uneven, contraction of the types of forbidden relationships. By the latter part of the nineteenth century, civil prohibitions continued to parallel the English canon law categories with the exception that most states did not restrict marriages between a husband and his wife's sister,[137] but did have civil prohibitions against first cousin marriages.[138] Every state had criminal sanctions to enforce the civil limitations on marriage.[139] By the mid-1950s, only eighteen states prohibited first cousin marriages, and at least half the states had eliminated the affinity bar from their criminal incest statutes.[140] As only consanguineous bars remained in those states' criminal incest statutes, they did not cover adoptive, step- and in-law relationships. A survey of state criminal incest statutes in 1983 revealed that three states had repealed all criminal sanctions against incestuous matings and marriages.[141] Only eight states continued to have criminal sanctions for first cousin marriages[142] and only Georgia continued to have criminal sanctions against affinity relationships similar to those affinity relationships established by English canon law.[143]

The history of categories of prohibited relationships, even as modified today, illustrates the influence of Christian religious doctrines on the law of incest. The religious character of the incest prohibitions is still highly visible in Rhode Island where the criminal and civil statutes explicitly exclude marriages between persons of the Jewish faith within the degrees of affinity and consanguinity permitted by their religion.[144] Thus, uncle-niece marriages between non-Jews is forbidden, but permitted between Jews.[145] Obviously, this general uncle-niece prohibition and the exception to it are secular codifications of religious tenets of particular faiths.

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137. *Id.* at 276. In England there was a long legislative battle over the prohibition of marriage between a brother and sister-in-law. In 1907 Parliament adopted the Deceased Wife's Sister's Marriage Act, 1907, 7 Edw. 7, ch. 4. It permitted a widower to contract such a marriage. In 1920 Parliament adopted the Deceased Brother's Widow's Marriage Act, which permitted such marriages. 11 & 12 Geo. 5, ch. 24. Finally, in 1960, the Marriage (Enabling) Act permitted a man to marry the sister, aunt, or niece of his former spouse during the former spouse's lifetime as well as after her death. Similarly, it permitted a man to marry the former wife of his own brother, uncle, or nephew during the lifetime of the former husband so related to him as well as after his death. 8 & 9 Eliz. 2, ch. 29. However, some affinity bars remain. A man may not marry his wife's mother, grandmother, daughter, or granddaughter during his former wife's lifetime or after her death. Comment, 23 MOD. L. REV. 538, 539 (1960).

138. Moore, *supra* note 125, at 138.

139. MODEL PENAL CODE § 230.2.

140. *Id.* at 401.

141. Michigan, New Jersey, and Ohio have repealed their criminal incest statutes. *See infra* appendixes A and B.

142. The states are Arizona, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin. *Id.* at Appendix B.

143. Georgia's criminal sanctions apply to parent-in-law and child-in-law; stepparent-stepchild; grandparent-in-law and grandchild-in-law; aunt and nephew-in-law; uncle and niece-in-law; and sister-in-law or brother-in-law. *Id.*

144. R.I. GEN. LAWS §§ 11–6–4, 15–1–4 (1981).

145. However, Judaism forbids aunt-nephew marriages. Leviticus 18:12–13.

American incest statutes are not necessarily outmoded or impermissible simply because their prohibitions originate in very old Judaic and Christian ideas. Certainly, if the statutes continued to serve a socially useful purpose, their survival might be warranted. Even though a statute appears to codify a religious idea it may be constitutionally valid if it serves some permissible secular goal.

In *McGowan v. Maryland*[146] the U.S. Supreme Court upheld "Sunday closing laws" against an establishment clause challenge.[147] These laws, which prohibit most forms of commercial activity on Sunday, are similar to the classification scheme in state incest statutes in several ways. First, both incest statutes and "blue laws" have a religious origin and both existed in virtually all of the original states, thereby detracting from the idea that the establishment clause was incompatible with such statutes.[148] In addition, Sunday closing laws make attendance at religious services easier for those workers whose religion treats Sunday as the Sabbath, and incest prohibitions coincide with the religious beliefs of many Americans.

The Supreme Court upheld the Sunday closing laws because it determined that, although the laws were initially predicated on religious beliefs, their present purpose and effect was to promote a secular goal—providing workers with a uniform day of rest and noncommercial activity.[149] Unlike the laws at issue in *McGowan*, modern incest statutes are not a means of valid state regulation of working conditions and, therefore, must have some other independent, nonreligious purpose and effect to sustain their validity. Since these statutes also infringe upon the fundamental right to marry, one must carefully scrutinize any alleged nonreligious purpose and effect.

Rhode Island's incest statute is vulnerable under this analysis. The statute exempts Jews from the prohibitions against uncle-niece marriages while criminalizing such a marriage between non-Jews. No valid nonreligious purpose can be advanced in support of an incest prohibition applied in such a fashion. Any truly permissible, contemporary, secular reason for an uncle-niece marriage prohibition must, by definition, apply to all the state's citizens without regard to their religious affiliation. A claim of "God's will" or "divine law" is not sufficient to justify any state incest statute.

B. *Public Morality*

Yet another common rationale for state incest statutes is that they preserve the public morality.[150] The general societal aversion associated with

146. 366 U.S. 420 (1961).

147. The challenge to the validity of "Sunday closing laws" was predicated on the free exercise clause of the First Amendment as well as the due process and equal protection clauses of the Fourteenth Amendment. However, the Court's analysis focused primarily on the alleged establishment clause violation. *Id.*

148. *See* 366 U.S. at 433.

149. *Id.* at 445.

150. Incest prohibitions as applied to adults are similar to other victimless crimes such as

incest is often advanced as a reason to permit, as well as to require, its official condemnation by statute. The argument is that conduct which strikes the majority as repulsive, unnatural, and immoral must be prohibited by the state if the state's laws are to be accepted and respected by those they govern.[151] Although our nontheocratic government is required to use its power in pursuit of secular goals, enforcement of public morality and preservation of community norms by the state are not always an impermissible, nonsecular purpose and therefore cannot be lightly dismissed.[152]

The conundrum posed by the use of legal sanctions for violations of moral principles is neither new[153] nor limited to incest statutes as applied to adults.[154] The argument favoring the use of the law for enforcement of morality begins with the proposition that law is unintelligible without reference to the morality it enforces.[155] Because society is more than its political and economic institutions, a shared morality is an essential condition of society.[156] The argument continues that just as society has the right to use its laws to protect its political institutions, society has the right

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prostitution, homosexuality, and pornography. The usual justification for secular sanctions, preservation of the public security, is absent. *See* Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 668 (1963).

151. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 105–10 (G. Simpson trans. 1964); K. ERIKSON, WAYWARD PURITANS 3–5 (1966).

152. The major premise of the address given in 1975 by the incoming president of the American Psychological Association was that psychology and psychiatry should be less hostile to the inhibitory messages of traditional moralizing. Arguably, such messages represent "recipes for living" that have been evolved, tested and winnowed through hundreds of generations of human society. However, this "respect-for-tradition" idea was qualified by the explicit recognition that this is wisdom about past worlds. If relevant aspects of past worlds have changed, past adaptations may be maladaptive now. Campbell, *On Conflicts Between Biological and Social Evolution and Between Psychology and Moral Tradition*, 30 AM. PSYCHOLOGIST at 1103 (Dec. 1975).

This article pursues a somewhat analogous approach. Public morality is not rejected out-of-hand as a permissible basis for state laws. However, such a basis must be closely scrutinized in light of reasonable, impartial and objective criteria. *See* J. FEINBERG, SOCIAL PHILOSOPHY 36–54 (1973); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); Dworkin, *supra* note 124, at 987; Lyons, *Human Rights and the General Welfare* in RIGHTS 174 (D. Lyons ed. 1979).

153. *See, e.g.*, J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 135–78 (R. White ed. 1967); J.S. MILL, ON LIBERTY 91–113 (C. Shields ed. 1956). *See also* P. DEVLIN, THE ENFORCEMENT OF MORALS 1–25 (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

154. For example the Devlin-Hart debate, *id.*, arose out of the permissibility of criminal penalties for consensual adult homosexual acts. Similarly, laws against obscenity have been the focal point of debate. RICHARDS, *supra* note 152, at 56–77; Dworkin, *supra* note 124, at 1002–05.

155. D. RICHARDS, *supra* note 152, at 104. The classic modern restatement of the jurisprudential theory that supports the use of law to enforce morality is Lord Devlin's 1958 Second Maccabaean Lecture to the British Academy. This address was made in response to the Wolfenden Report which recommended the decriminalization of private consensual sex between adult homosexual persons. *Reprinted* in P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). Although it may not be apparent from the explication of Lord Devlin's theory, he actually supported the recommendation of the Wolfenden Report.

156. D. RICHARDS, *supra* note 152, at 104.

to preserve its existence through enforcement of its morality.[157] There are supposedly restraining principles to this societal right of self-preservation.[158] However, if public feeling rises to "intolerance, indignation and disgust," the restraining principles no longer apply.[159] Society has the right to eradicate the vice without justifying the morality which holds it together. A corollary to this argument is that the law must be used to bolster deep-seated moral condemnation because moral principles alone do not sufficiently reduce the incidents of immoral behavior.[160]

These generalizations concerning the law and its relationship to the enforcement of morality may seem cogent, but they do not address the central question of which moral principles the law ought to embody and enforce. The public morality argument equates morality with the social views of the majority.[161] Such a definition eliminates reason, impartiality, and objectivity from the identification of legally enforceable moral views and is fundamentally incompatible with accepted theories of American constitutional law.

The empirical determination of the moral views of the majority does not define the public morality on which law may permissibly rest. While a view may be held passionately and deeply, passion is not determinative of which moral views the law may enforce.[162] Moral convictions, when enshrined in legislation, cannot be accepted as self-certifying, but must be able to withstand an examination of their underlying justifications.[163] If it were otherwise, the mere social views of the majority, including all forms of prejudice, ignorance, and irrationality could become a valid basis for laws. Using this framework, an incest statute is a legitimate legislation of morality only if society's judgment of the immorality of the act is based on rational, objective, and ascertainable criteria. Without this kind of showing, the majority's perceptions of the act as immoral cannot sustain such restrictions on the exercise of the right to marry.

The most frequently articulated justification for characterizing incest as immoral is the "unnaturalness" of the act. That is, incest is not in accord with human nature or consistent with normal human sexuality.[164] The absence of a universal definition of the relationships which constitute incest undermines the "unnaturalness" justification of state incest pro-

157. DEVLIN, *supra* note 155, at 11.

158. "[T]oleration of the maximum individual freedom that is consistent with the integrity of society" is the most important restraining principle. *Id.* at 16.

159. *Id.* at 17.

160. This is not part of Lord Devlin's theory. However, others frequently assert it in discussions of legal enforcement of morality. *See* Hughes, *supra* note 125, at 329; Manchester, *Incest: Time for a Change in the Law*, 131 NEW L.J. 1278, 1279; Royce & Waits, *The Crime of Incest*, 5 N. KY. L. REV. 191, 194 (1978).

161. D. RICHARDS, *supra* note 152, at 104.

162. *Id.* at 105.

163. Lyons, *supra* note 152, at 177. Otherwise, there is an unavoidable circularity. The act is immoral, and therefore, the statute is moral.

164. WEBSTER'S NEW COLLEGIATE DICTIONARY 1272 (1981).

hibitions. Nuclear incest—parent and child or sister and brother—is the most commonly forbidden form of incest, although there are exceptions to even this limited meaning of incest.[165] Crossculturally and transhistorically, the prohibited relations have varied widely.[166] Surely, an act against nature should not be so dependent on time and place for its definition.[167]

Another proffered justification for legislation based on the immorality of incest is that it protects an individual from choices that result in self-inflicted harm.[168] All too often, however, society is merely trying to save the individual from conduct that society finds repulsive. State intervention into adult decision making must be restricted to those instances where the danger of imminent bodily harm is readily demonstrable,[169] and marriage between adults related by consanguinity or affinity does not meet this requirement.[170]

Society's purported right to protect its citizens from public exposure to revolting behavior is another justification for incest statutes.[171] This argument presupposes that there is something about the conduct which, when viewed by the public, is understood to be revolting. The advertising and sale of pornographic material as well as street solicitation by prostitutes may fall into the category of behavior that, when observed by the public, is instantly seen as repulsive. However, marriage between two adult persons related by consanguinity or affinity is not so readily perceived in this way, since the relationship of the parties must be known before the conduct can be repulsive. An objective, reasonable person, not the reasonable person possessing particularized knowledge, is the standard for determining when the state can legislate to protect the sensibilities of

165. A number of primitive cultures and groups from various societies allowed or tolerated incest or had no concept of incest. *See* W.G. SUMMER, FOLKWAYS (1960). The hill tribes of Cambodia permit marriage between brother and sister. Among the Indian Kuki, only mother-son incest is forbidden. During the nineteenth century the Eskimos of Kodiak, an island south of the Alaskan peninsula, practiced all forms of incest without restriction. Similarly, the Dyaks of Borneo have no concept of incest. H. MAISCH, *supra* note 2, at 35–36.

166. Presently, England, France, Sweden, and Germany prohibit marriage between siblings of the full or half blood. However, Sweden permits dispensation of the marriage prohibition for half-brother and half-sister marriages. M. GLENDON, *supra* note 2, at 40. *See also supra* text accompanying notes 125–43, discussing the history of incest prohibitions in Europe and the United States.

167. Moreover, Sigmund Freud and others postulate that the earliest human sexual impulse is an incestuous one.

168. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 619 (1977) [hereinafter cited as Wilkinson].

169. Legal paternalism is a liberty-limiting principle. Therefore, if the state is given the right to prevent a person from risking harm to her or himself, the risk must be extreme and manifestly unreasonable. J. FEINBERG, *supra* note 152, at 45–52.

170. Empirical studies of incest are concerned with nuclear incest and particularly with parent-child incest. The recent studies conclude that nuclear incest is a symptom or result of family disorder, not the cause of it. H. MAISCH, *supra* note 2, at 208. However, the studies do not shed any light on the effect of adult consensual incest.

171. Wilkinson, *supra* note 168, at 620–21.

the public.[172] Finally, if the state can prohibit conduct simply because the public, when viewing it, is repulsed, then antimiscegenation laws would still be a permissible exercise in the legal enforcement of morality. After all, an interracial marriage is certainly more apparent to the public than an incestuous one, and at one time excited the same sort of repulsion in the majority of the public.[173]

IV. Protection of the Family Unit and Children Functions

Another justification for incest prohibitions is that they are permissible and necessary to protect the family as a unit, and children individually, from the harm caused by sexual relationships or marriage between family members. These interrelated rationales are intuitively appealing but do not withstand analysis. Incest statutes are both too narrow and too broad to serve their supposed functions of protecting the family unit from the destructive effect of intrafamily sexual competition. Alone, they are also inadequate to protect children from sexual abuse because they do not reach to all the various forms of sexual abuse. There are other kinds of statutory provisions which are specifically designed to reach this problem and which provide better protection than do incest statutes. Because of these special sexual abuse statutes, incest laws are superfluous in this context. As applied to adults, incest statutes have no protective function and merely infringe upon matters of choice in marriage.

A. *Protection of the Family Unit*

The definition of a family is far from self-evident.[174] One salient characteristic of contemporary families is the absence of collateral and ascending relatives, by blood or marriage, from the household. In contrast to the extended family of the past, the contemporary conjugal family is composed of only parents and children residing separately and apart from other relatives.

There are a number of factors that contribute to the formation of a definition of the modern family. Serial monogamy is one important factor in identifying what constitutes a family and in determining the ability of incest statutes to facilitate the successful functioning of the family.[175]

172. The constitutional test for obscenity reflects this idea. The average person, applying community standards, is the touchstone for determining if the work appeals to the prurient interest. Miller v. California, 413 U.S. 15, 24 (1973).

173. R.E.L. MASTERS, *supra* note 2, at 6; Wilkinson, *supra* note 168, at 624.

174. *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upheld municipal zoning of residential areas for traditional family-persons related by blood or marriage) *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidated a zoning plan which would have defined a family as the traditional nuclear family).

175. The physical mobility of Americans contributes to the phenomenon. Also, psychological mobility, the aspiration for change induced by the mass media, is another separation-inducing phenomenon. B. YORBURG, THE CHANGING FAMILY 98–101, 106–14 (1973).

Divorce and remarriage are so commonplace in contemporary society, that the family of origin is not, for many children, the only family of residence during childhood.[176] Frequently, divorced adults find new mates and remarry, thus forming families in which the adults and children are not all related by blood. The law defines these as "step" relationships.[177] The effect of adoption is also a factor for consideration in attempting a definition of the family.[178] Finally, there are an increasing number of "family" units which contain children although the adult couple is not married. Since state incest statutes almost never take these changes in modern family structure into account, individually and in combination, all of these factors result in incest statutes being both overbroad and underinclusive.

A primary justification given for incest statutes is that they maintain family peace[179] and encourage intrafamily trust[180] by prohibiting competition for sexual companionship among family members. They are also claimed to discourage sexual exploitation of the young. The argument is that incest statutes are justifiable as a means of protecting the family in these ways so that it can perform its essential function as the primary agency for the socialization of the personality of the young.[181] If this is so, then sexual relationships between members of the *same household* unit ought to be proscribed regardless of the precise legal nomenclature describing the relationships. For example, if the above goals are to be met, it is irrelevent that the adult who has a sexual relationship with a child in the same household is the child's biological, adoptive, step- or

176. Forty percent of the marriages begun in the 1980s are expected to end in divorce. By 1990, it is predicted that only 50 percent of the children in the United States will spend their entire childhood and adolescence with both natural parents. NOW LEGAL DEFENSE AND EDUCATION FUND, MYTH OF EQUALITY (1979).

177. The definition of "step"-relationships is not easily articulated. Must the stepchild be a minor in order to create a legal "step"-relationship or is the stepchild's age immaterial? Does the steprelationship terminate upon the divorce of a step and natural parent? Must one of the child's natural parents be dead in order for a steprelationship to exist between the child and the new spouse of the other natural parent? Does a stepparent-stepchild relationship arise when the child is born out of wedlock and the natural mother marries someone other than the natural father? If both natural parents remarry, does the child form a steprelationship with both of the new spouses or only with the new spouse of the natural parent with whom the child resides? *See* Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209 (1970).

178. *See* Wadlington, *The Adopted Child and Intrafamily Marriage Prohibitions*, 49 VA. L. REV. 478 (1963); Comment, *Adoptive Sibling Marriage in Colorado:* Israel v. Allen, 51 U. COLO. L. REV. 135 (1979).

179. W. LABARRE, THE HUMAN ANIMAL 122 (1954); B. MALINOWSKI, A SCIENTIFIC THEORY OF CULTURE 208 (1944); R. E. L. MASTERS, *supra* note 2, at 60; W. O'DONNELL & D. JONES, THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES 50 (1982); Tomes, *Child Victims of Incest*, AM. HUMANE ASS'N, CHILDREN'S DIVISION 5 (1977); Wilkinson, *supra* note 168, at 570.

180. Mead, *Anomalies in American Postdivorce Relationships* in DIVORCE AND AFTER 106–12 (P. Bohannon ed. 1970).

181. Parsons, *The Incest Taboo in Relation to Social Structure and the Socialization of the Child*, 5 BRIT. J. OF SOC. 101 (1954).

live-in parent. The potential for the disruption of family tranquillity and harmony through competition for sexual companionship is the same. Such behavior also disrupts the qualities of trust and nonexploitation necessary for the successful fulfillment of the family's primary functions.

Whatever detrimental effect sibling incest has on the family is present whether the children residing in the same household are related by the full or half blood, or are step-, adoptive or live-in siblings. Therefore, those state incest statutes that do not reach to sexual intercourse between all adults and all children who live in the same household are underinclusive and fail in their essential purpose of protecting the family unit from the harm caused by intrafamilial sexual intercourse. A majority of the states has criminal sanctions for parent–adoptive-child incest and incest between half-blood children. However, only a minority of the states imposes criminal sanctions for incest with stepchildren, and a minority imposes civil sanctions for parent–adopted-child incest and stepparent-stepchild incest.[182]

Conversely, the inclusion of consanguineous relatives beyond parent and child is overbroad in light of the family protection justification. At an earlier time, when extended family households were more common, including remote consanguineous relatives might have legitimately furthered such an objective. Contemporary living arrangements indicate that including such relatives serves no such function today, because consanguineous relatives, collateral and lineal, beyond the conjugal family no longer live in the same household. The danger of sexual rivalries and sexually induced tension and discord involving such relatives is thus minimized, if not completely eliminated. There is, of course, the danger of older relatives taking advantage of their power to dominate younger, more vulnerable relatives, but that danger is the same whether the adult is a relative or a neighbor. In either case, that situation can best be handled by laws other than incest statutes.

Some states continue to include affinity bars in their statutory definitions of incest.[183] Such impediments to marriage may have arisen because at an earlier time in-laws were likely to be included in the family household. Another suggested reason for the inclusion of in-law relationships is the tendency to expand the forbidden classes of relationships by the accident of language.[184] If, for example, sexual intercourse and marriage were forbidden with the "daughter," it would be a natural extension to include "daughter-in-law" within the prohibition. If this accidental expansion does account for the inclusion of an affinity bar in some states, it is not a legitimate reason to continue the prohibition. Even if the same-household concept explains the affinity prohibitions, contemporary living

182. *See infra* appendixes A and B.
183. *Id.*
184. *Model Penal Code* § 207.3 (1980).

patterns have obviated the need for them. Family units today do not usually include persons related by affinity except the spouses. Therefore, there is little danger any in-law competition for affection of the spouse or child would disrupt the conjugal family unit. In reality, the affinity bar does little to deter family romances between adults.[185] Finally, the large number of divorces in this country causes statutes incorporating affinity prohibitions to be much more far-reaching than is immediately apparent.[186] Most states have recognized the inappropriateness of affinity bars and only a minority of the states continues to include them within the statutory definition of incest.[187]

If the primary justification for incest statutes today is that they protect the family and its ability to socialize the child, that need dissolves once the children are grown.[188] Therefore, incest prohibitions which forbid marriage between adults who happen to stand in a particular relationship to each other cannot be supported by this rationale.[189] Because such prohibitions infringe upon the right of adults to marry the partners of their choice, the state must establish more than a speculative relationship between a lifetime prohibition and the goal of facilitating the family's functions in order for them to withstand judicial scrutiny.

Protection of the family is certainly a legitimate concern of the state, but criminal and civil sanctions are of only minimal usefulness in achieving this goal, as both provide only indirect and negative protection. A more direct effect could be achieved by protecting the family with affirmative programs to assist in its various functions. This is especially important because researchers see incestuous behavior within a family as a symptom, not a cause, of a disorganized and nonfunctioning family.[190] Although the symptom is abhorrent when it results in sexual abuse of children, official discovery and punishment of the symptom usually

185. Proposed Marriage and Divorce Codes for Pennsylvania, Pennsylvania General Assembly, Joint State Government Commission 18–21 (1961). *But see* the comments of the Archbishop of Canterbury in 1960 concerning his opposition to removing the affinity bar in English law: "I regard the whole idea as revolting . . . [I]f it is possible to look forward to the fulfillment of a still hesitant desire to an actual remarriage to a sister-in-law, that desire is more likely to grow unchecked and even to be subconsciously encouraged . . ." TIME, Feb. 8, 1960, at 32.

186. Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, 371 (1968).

187. *See infra* appendixes A and B.

188. R.E.L. MASTERS, *supra* note 2, at 70.

189. A lack of protection for children from incest after the age of majority is similar to the lack of criminal sanctions for sexual relations in situations of partial dependency. That is, the law does not impose sanctions on nonrelative adults who are in a position to exert subtle and relentless pressure on a young person over the age of majority to have sexual relations with the adult. If this is a sufficiently widespread problem, a general provision can be enacted aimed at those, regardless of exact relationships, who take advantage of positions of supervision and authority. Hughes, *supra* note 125, at 330.

190. H. MAISCH, *supra* note 2, at 208; K. MEISELMAN, INCEST, A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS 183 (1978).

guarantees that the family will fail to fulfill its functions.[191] Further, if official discovery results in incarceration of one or both of the parents or the removal of the child-victim from the family, the family unit is irretrievably broken. The stigma associated with the labeling of the act as "incestuous" affects the victim, if not the perpetrator, far into the future.[192] These considerations are not an argument against criminal sanctions for sexual abuse of children, but labeling and punishing conduct as incestuous do not further the state's interest in preserving the family unit so as to facilitate the fulfillment of the family's function. Furthermore, when incest sanctions are applied to private conduct of consenting adults, there is no legitimate state interest at stake and, therefore, no legitimate state interest is furthered.

B. *Protection of Children*

The state has a legitimate and important interest in protecting children from harm.[193] Psychoanalytic theories and clinical studies of personality development as well as studies of childhood victims of overt sexual abuse establish that such sexual abuse causes identifiable psychological and physical harm.[194]

Because of this extensive harm to the victim, the prevention of sexual abuse and the punishment of abusers are important and permissible governmental objectives. Incest statutes, however, are ill-suited to the attainment of these goals. Criminal incest statutes attempt to prevent marriage between adults within certain degrees or types of relationships

191. Some writers believe that effects of official discovery and punishment of incest are more serious than the effects which might arise during the course of incest. H. MAISCH, *supra* note 2, at 208. A study of childhood incest victims drawn from a sample of adult psychotherapy patients rather than from a sample of families who came to the attention of legal or social agencies has been done. It revealed that although incest disclosure within the family was often associated with disintegration of the family unit, frequently no action was taken by any family member. The family simply drifted along. Many of the incestuous families broke up, yet divorce was not the direct result of the incest disclosure. Moreover, in some cases the parents remained together, and the daughter simply left home as soon as she was able to leave. But the daughter was not specifically expelled. K. MEISELMAN, *supra* note 190, at 183–84.

192. R.E.L. Masters postulates that the damage resulting from a violation of the incest prohibition is not a direct and inevitable consequence of the act. There is nothing "essentially" harmful about adult-adult sexual intercourse with a close relative. The behavior is damaging because it is so strongly prohibited. Sexual exploitation of children is traumatic regardless of the relationship of the child and the perpetrator. However, Masters believes that such exploitation is made worse by loading on it the guilt over "incest." R.E.L. MASTERS, *supra* note 2, at 175–99.

193. Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

194. *See, e.g.*, K. MEISELMAN, *supra* note 190; S. WEINBERG, INCEST BEHAVIOR (1955); MacFarlane, *Sexual Abuse of Children* in THE VICTIMIZATION OF WOMEN 81 (J. Chapman & M. Gates eds. 1978). A study by the Children's Division of the American Humane Association of sexual abuse of children found that two-thirds of the victims suffer some type of identifiable emotional disturbance and 14 percent became severely disturbed. S. BROWNMILLER, AGAINST OUR WILL 279 (1975).

as well as sexual abuse of children. The former purpose is not constitutionally permissible and the latter purpose, although not unconstitutional, is better accomplished through the adoption of separate statutes specifically aimed at preventing the sexual abuse of minors by *both* relatives and strangers.

Current incest statutes, as applied to adult-child sexual abuse, are not broad enough to prevent and punish sexual abuse of children. For example, in twenty-five states, sexual intercourse between stepparent and minor stepchild is not within the statutory definition of incest.[195] Yet, such behavior does constitute sexual abuse.

Similarly, even if the abuser-victim relationship falls within the proscribed classes of relationships, the definition of the act of incest contained in the statute is usually not broad enough to punish the abuser. State criminal incest statutes forbid sexual intercourse and/or marriage between members of the proscribed classes. Typically, sexual abuse of children does not involve attempted marriage, and sexual abuse is certainly more than just intercourse. The National Center on Child Abuse and Neglect defines child sexual abuse as "contacts or interactions between a child and an adult when the child is being used for sexual stimulation of that adult or another person."[196] Sexual abuse of children can involve anything from indecent exposure to full intercourse including fondling, finger insertion, oral sex, and sodomy.[197] Therefore, incest statutes prohibiting only sexual intercourse fail to offer adequate protection against the many forms taken by sexual child abuse. A meaningful definition of sexual abuse must include not only sexual intercourse but also obscene or pornographic photographing, filmings, or depiction of children for commercial purposes, or the rape, molestation, prostitution, or other forms of sexual exploitation of children under circumstances which indicate that the child's health or welfare is harmed or threatened.

Even if the abuser-victim relationship and the particular type of sexual abuse come within the definitions of the incest statute, criminal incest statutes are still inadequate to deal with the problem. Usually, the statutes do not differentiate between sexual abuse by a person who is responsible for the child's welfare and other abusers who are merely related to the child by blood or marriage. Sexual abuse of children by any adult is abhorrent, but in caretaker-child sexual abuse, the caretaker's culpability is greater than that of the noncaretaker abuser. Sexual abuse by a person who is responsible for the child's welfare is violative of the caretaker's essential duty to nurture and safeguard the child.[198] Because of the victim's psychological and financial dependency on the caretaker,

195. *See infra* appendixes A and B.

196. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PUB. NO. (OHDS) 81-30166, CHILD SEXUAL ABUSE: INCEST, ASSAULT AND SEXUAL EXPLOITATION 1 (1981).

197. Note, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79).

198. *Id.* at 99-101.

the victim of caretaker sexual abuse is relatively more helpless. Moreover, caretaker sexual abuse causes greater psychological harm to the child and is more likely to reoccur because of the access the caretaker has to the child. Caretaker sexual abuse of children and noncaretaker, but relative, sexual abuse of children are two very different crimes. Yet most criminal incest statutes impose only one type of punishment. Also, incest sanctions fail to differentiate sexual abuse in accordance with the amount of coercion used by the abuser.

Studies show that minor sibling sexual interaction is very different from adult-child sexual relations. Although there is some evidence to suggest that minor sibling sexual interaction causes negative effects in the participants,[199] one should not equate the harm of sibling sexual involvement with the harm from adult-child sexual abuse. Yet criminal incest statutes criminalize and punish minor sibling incest in the same manner as they punish the far more harmful adult-child incest.

The states have developed statutes and procedures to deal specifically with sexual abuse of children. All states have criminal statutes of general applicability which forbid such acts as assaults, battery, homicide, contributing to the delinquency of a minor, as well as criminal prohibitions against sex offenses such as rape and sodomy.[200] Therefore, in every state, most aspects of sexual abuse of children by a relative or stranger are criminalized apart from the provisions of criminal incest statutes. Some states have created a separate crime of child abuse which includes sexual as well as physical abuse. All states have civil child protective proceedings by virtue of child abuse and neglect statutes.[201] At least twenty-one states specifically include sexual abuse in the definition of abuse and neglect, although most of those states do not state what acts constitute sexual abuse.[202] By statute, all fifty states mandate reporting of suspected or known cases of child abuse and neglect.[203] In forty-eight states, the definition of abuse and neglect in the reporting law specifically includes sexual abuse.[204] Finally, all states have statutory age of consent for marriage provisions which are applicable if one or both of the parties have not

199. Sibling incest usually does not involve either dependency relationship or an abuse of trust situation as does caretaker-child sexual abuse. The taboo surrounding sibling sexual contact is much less intense, too. Therefore, there is less likelihood of guilt in the participants in sibling incest. K. MEISELMAN, *supra* note 190, at 263.

200. I. SLOAN, CHILD ABUSE: GOVERNING LAW AND LEGISLATION 79 (1983).

201. *Id.* at 107.

202. *Id.* at 108. The states are Alaska, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Virginia, Washington, West Virginia, and Wisconsin.

203. *Id.* at 15. Domestic violence statutes enacted in thirty-four states provide the new civil remedy. Although these laws were designed primarily to help battered spouses, many state statutes permit the use of a civil protective order to protect sexually abused children, too. *Id.* at 110–11.

204. *Id.* at 66. The two states which do not include sexual abuse in their reporting law definition of child abuse and neglect are South Dakota and Tennessee.

yet attained a prescribed age.[205] These statutes are of general applicability, regardless of blood or affinity relationships of the parties, and apply to all attempted marriages. Consequently, incest statutes as applied to adult-child sexual abuse or adult-child marriage are at best redundant. To the extent that state law does not adequately address the criminalization of sexual abuse of children, the state's legitimate and important interest in preventing the harm of sexual abuse is better addressed by a statute specifically aimed at and carefully tuned to the problem than by an incest statute.[206] To the extent that the state has a legitimate interest in preventing adult-child marriages, that interest is already protected by statutes apart from an incest statute.

V. Conclusions

Because incest statutes make certain adult choices of a marriage partner illegal, they are direct, substantial, and intentional state intrusions upon the individual's constitutionally protected right to marry. The Supreme Court's marriage cases mandate close scrutiny of such statutes in order to determine if they serve a substantial and important state interest and whether they are discriminately tailored to accomplish such a purpose.

Because the purported genetic justification for incest statutes rests on inaccurate understandings of genetic inheritance, incest statutes are both overinclusive and underinclusive. Matings between consanguineous relatives do not cause genetic defects in the offspring. Such matings merely increase the probability of homozygosity for a recessive gene trait in the offspring. Only if the recessive trait is "bad" will the homozygous offspring suffer deleterious effects. Moreover, the increased genetic dangers in consanguineous matings are fairly minimal and are exceeded by the genetic dangers involved in the matings of other social populations. The failure to prohibit these matings with the same or higher genetic risks as consanguineous ones makes incest statutes fatally underinclusive. On the other hand, incest statutes are overbroad as a mechanism to protect offspring from increased risks of genetic disorders because all that is needed to accomplish that goal is a prohibition on reproduction by at-risk mates and not a marriage prohibition. In terms of the genetic rationale, the inclusion of affineous relationships in some state incest statutes also makes them impermissibly overinclusive.

The permissibility as well as the wisdom of annointing the state as the guardian of the integrity of the gene pool is problematic. Incest statutes do not further negative eugenics goals, rather they are dysgenic in effect because they increase the frequency of deleterious recessive genes in the population as a whole instead of eliminating such genes. Furthermore,

205. M. PLOSCOWE, *supra* note 129, at 185–86.

206. For recommendations and commentary on the development of model rules and procedures for legal reforms in intrafamily child sexual abuse *see* NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, YOUNG LAWYERS DIVISION OF THE AMERICAN BAR ASSOCIATION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRA-FAMILY CHILD SEXUAL ABUSE (1982).

any legitimate and permissible state interest in facilitating the production of offspring who are emotionally, physically, socially, and economically healthy is better served through positive exercises of the state's power through programs of noncompulsory genetic screening, regulation of environmental mutagens, and nutritional and medical programs.

The preservation of public morality apart from particular religious beliefs may serve as a permissible basis for state legislation. However, the lack of a constant definition for incest belies any claim of its immorality predicated on the "unnaturalness" of the act, and unless the relationship between the marriage participants is known, there is nothing intrinsically revolting about it. Finally, incestuous marriages do not cause any danger of imminent and readily demonstrable harm to the participants from which they need state protection. Therefore, as society's judgment of the immorality of incestuous marriages is not based on principled, rational, objective, and ascertainable criteria, that judgment can not be enshrined in legislation.

The state has a substantial and important interest in facilitating the fulfillment of the family's role in the socialization of children by protecting the family unit from the destructive effects of intrafamily sexual competition. However, because incest statutes are not discriminately tailored to accomplish that purpose and intrude on adults' rights to marry, the statutes are an impermissible means of achieving that legitimate goal. Incest statutes are too narrow to serve the state's interest in maintaining family peace and encouraging intrafamily trust because they are predicated on a traditional concept of the family. To preserve the family unit, relationships between all adults and all children living in the same household should be forbidden, regardless of the precise legal relationship of the household members. The inclusion of consanguineous and affineous relatives beyond those living in the same household with the child makes incest statutes overbroad. Moreover, if incest statutes are justified on the basis of protecting the family in its socialization of the child, the need for the protection dissolves once the child is grown.

Similarly, incest statutes as a means of protecting children from sexual abuse do not justify the statutes' lifetime marriage prohibitions. From a practical and realistic viewpoint, incest statutes provide grossly inadequate protection for children from sexual abuse by adults. Incest statutes do not reach to all adults who may abuse children sexually, and they do not reach to all the various forms of sexual abuse. Although incest statutes are permissible as applied to sexual abuse of children, the state's interests and the child's interests are better served by the enactment of statutory provisions specifically designed to prevent all forms of sexual abuse of children by any adult.

The state interests supposedly served by prohibiting certain marriages as incestuous are either not legitimate state objectives or if they are valid state objectives, incest statutes are an impermissible means of effectuating those interests. Therefore, as applied to adults, incest statutes fail to pass constitutional scrutiny.

APPENDIX A

Forbidden Affinity Relationships

	Civil Sanctions								
	All Affinity Descendants	All Affinity Ascendants	Parent-in-law Child-in-law	Stepparent Stepchild	Grandparent-in-law Grandchild-in-law	Stepgrandparent Stepgrandchild	Aunt-Uncle/Niece-Nephew-in-law	Sister or Brother-in-law	Stepsiblings
Alabama				REPEALED					
Alaska				NONE					
Arizona				NONE					
Arkansas				NONE					
California				NONE					
Colorado				NONE					
Connecticut				•					
Delaware				NONE					
D.C.			•	•	•	•			
Florida				NONE					
Georgia			•	•	•		•	•	
Hawaii				NONE					
Idaho				NONE					
Illinois				NONE					
Indiana				NONE					
Iowa			•	•	•				
Kansas				NONE					
Kentucky				NONE					
Louisiana				NONE					
Maine				NONE					
Maryland			•	•	•	•			
Massachusetts			•	•	•	•			
Michigan			•	•	•	•			
Minnesota				NONE					
Mississippi			•	•	•	•			

1. While the marriage creating the relationship exists.
2. Does not apply to Native Americans.

CRIMINAL SANCTIONS

All Affinity Descendants	All Affinity Ascendants	Parent-in-law Child-in-law	Stepparent Stepchild	Grandparent-in-law Grandchild-in-law	Stepgrandparent Stepgrandchild	Aunt-Uncle/Niece-Nephew-in-law	Sister or Brother-in-law	Stepsiblings	
			•						1
			NONE						
			NONE						
			•						
			NONE						
			•						2
			•						
		•	•		•				
			NONE						
			NONE						
		•	•	•		•	•		
			NONE						
			NONE						
			•						3
			•						
			NONE						
			•						3
			NONE						
			NONE						
			NONE						
			NONE						
			NONE						
			REPEALED						
			NONE						
		•	•	•	•				

3. While the stepchild is under the age of eighteen.
4. Relationships by affinity terminate on death; criminalizes the impregnation of the wife's sister.

APPENDIX A (*Continued*)

Forbidden Affinity Relationships

	Civil Sanctions								
	All Affinity Descendants	All Affinity Ascendants	Parent-in-law Child-in-law	Stepparent Stepchild	Grandparent-in-law Grandchild-in-law	Stepgrandparent Stepgrandchild	Aunt-Uncle/Niece-Nephew-in-law	Sister or Brother-in-law	Stepsiblings
Missouri				NONE					
Montana				NONE					
Nebraska				NONE					
Nevada				NONE					
New Hampshire			•	•	•				
New Jersey				NONE					
New Mexico				NONE					
New York				NONE					
N. Carolina				NONE					
N. Dakota				NONE					
Ohio				NONE					
Oklahoma				•					
Oregon				NONE					
Pennsylvania			•	•		•			
Rhode Island			•	•	•	•			
S. Carolina			•	•	•	•			
S. Dakota				•					
Tennessee				•		•			•
Texas				NONE					
Utah				NONE					
Vermont				NONE					
Virginia				NONE					
Washington				NONE					
W. Virginia				NONE					
Wisconsin				NONE					
Wyoming				NONE					

CRIMINAL SANCTIONS

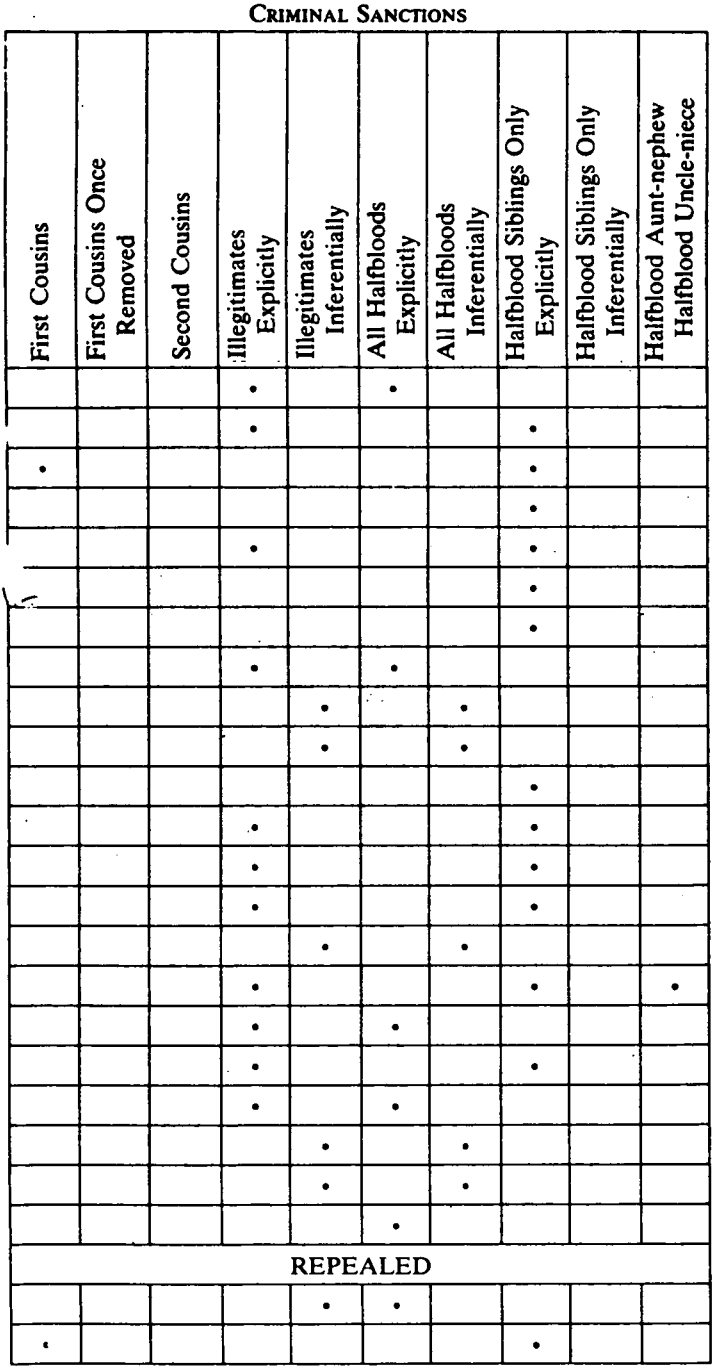
All Affinity Descendants	All Affinity Ascendants	Parent-in-law Child-in-law	Stepparent Stepchild	Grandparent-in-law Grandchild-in-law	Stepgrandparent Stepgrandchild	Aunt-Uncle/Niece-Nephew-in-law	Sister or Brother-in-law	Stepsiblings	
			NONE						
			NONE						
			NONE						
			NONE						
			•						
			REPEALED						
			NONE						
			NONE						
			•						
			NONE						
			REPEALED						
			•						
			•						
			NONE						
			NONE						
		•	•	•	•				
			•						
		•	•		•		•		4
			•						1
			•						1
			NONE						
			NONE						
			•						3
			NONE						
			NONE						
			•						

APPENDIX B

Forbidden Consanguineous Relationships

	Criminal Sanctions								
	All Ascendants	All Descendants	Parent-Child	Grandparent-Grandchild	Greatgrandparent-Greatgrandchild	Siblings	Aunt-Nephew, Uncle-Niece	Grandaunt-Grandnephew, Granduncle-Grandniece	Greatgrandaunt-Great Grandnephew, Greatgrand uncle-Greatgrandniece
Alabama	•	•	•	•	•	•	•		
Alaska	•	•	•	•	•	•	•		
Arizona	•	•	•	•	•	•	•		
Arkansas	•	•	•	•	•	•	•		
California	•	•	•	•	•	•	•		
Colorado	•	•	•	•	•	•	•		
Connecticut			•	•		•	•		
Delaware			•	•		•	•		
D.C.			•	•	•	•	•		
Florida	•	•	•	•	•	•	•		
Georgia			•	•		•	•		
Hawaii	•	•	•	•	•	•	•		
Idaho	•	•	•	•	•	•	•		
Illinois			•			•			
Indiana			•	•		•	•		
Iowa	•	•	•	•	•	•	•		
Kansas			•	•		•	•		
Kentucky	•	•	•	•	•	•			
Louisiana	•	•	•	•	•	•	•		
Maine			•	•		•	•		
Maryland			•	•		•	•		
Massachusetts			•	•		•	•		
Michigan	REPEALED								
Minnesota			•	•	•	•	•		
Mississippi			•	•		•	•		

1. Exception for Jews; uncles may marry nieces, but aunts may not marry nephews.



2. Marriages between relatives in the fifth degree are not prohibited if the female is over 55 years of age or older, or either party is sterile.

APPENDIX B (*Continued*)

Forbidden Consanguineous Relationships

	Criminal Sanctions								
	All Ascendants	All Descendants	Parent-Child	Grandparent-Grandchild	Greatgrandparent-Greatgrandchild	Siblings	Aunt-Nephew, Uncle-Niece	Grandaunt-Grandnephew, Granduncle-Grandniece	Greatgrandaunt-Great Grandnephew, Greatgrand uncle-Greatgrandniece
Missouri	•	•	•	•	•	•	•		
Montana	•	•	•	•	•	•	•		
Nebraska	•	•	•	•	•	•	•		
Nevada	•	•	•	•	•	•	•	•	•
New Hampshire	•	•	•	•	•	•	•		
New Jersey	REPEALED								
New Mexico	•	•	•	•	•	•	•		
New York	•	•	•	•	•	•	•		
N. Carolina			•	•		•	•		
N. Dakota	•	•	•	•	•	•	•		
Ohio	REPEALED								
Oklahoma	•	•	•	•	•	•	•		
Oregon	•	•	•	•	•	•	•		
Pennsylvania	•	•	•	•	•	•	•		
Rhode Island			•	•		•	•		
S. Carolina			•	•		•	•		
S. Dakota	•	•	•	•	•	•	•		
Tennessee			•	•		•	•		
Texas	•	•	•	•	•	•	•		
Utah	•	•	•	•	•	•	•		
Vermont			•	•		•	•		
Virginia	•	•	•	•	•	•	•		
Washington	•	•	•	•	•	•	•		
W. Virginia			•			•	•		
Wisconsin	•	•	•	•	•	•	•	•	•
Wyoming			•			•			

CRIMINAL SANCTIONS

First Cousins	First Cousins Once Removed	Second Cousins	Illegitimates Explicitly	Illegitimates Inferentially	All Halfbloods Explicitly	All Halfbloods Inferentially	Halfblood Siblings Only Explicitly	Halfblood Siblings Only Inferentially	Halfblood Aunt-nephew, Halfblood Uncle-niece	
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APPENDIX C

Forbidden Consanguineous Relationships

	Civil Sanctions								
	All Ascendants	All Descendants	Parent-Child	Grandparent-Grandchild	Greatgrandparent-Greatgrandchild	Siblings	Aunt-Nephew, Uncle-Niece	Grandaunt-Grandnephew, Granduncle-Grandniece	Greatgrandaunt-Great Grandnephew, Greatgrand uncle-Greatgrandniece
Alabama									
Alaska	•	•	•	•	•	•	•		
Arizona	•	•	•	•	•	•	•		
Arkansas	•	•	•	•	•	•	•		
California	•	•	•	•	•	•	•		
Colorado	•	•	•	•	•	•	•		
Connecticut			•	•		•	•		
Delaware	•	•	•	•	•	•	•		
D.C.			•	•		•	•		
Florida	•	•	•	•	•	•	•		
Georgia			•	•		•	•		
Hawaii	•	•	•	•	•	•	•		
Idaho	•	•	•	•	•	•	•		
Illinois	•	•	•	•	•	•	•		
Indiana	•	•	•	•	•	•	•	•	•
Iowa			•	•		•	•		
Kansas	•	•	•	•	•	•	•		
Kentucky	•	•	•	•	•	•	•	•	•
Louisiana	•	•	•	•	•	•	•		
Maine			•	•		•	•		
Maryland			•	•		•	•		
Massachusetts			•	•		•	•		
Michigan			•	•		•	•		
Minnesota	•	•	•	•	•	•	•		
Mississippi			•	•		•	•		

1. Does not apply to Native Americans.
2. Double first cousin marriages prohibited.

CIVIL SANCTIONS

First Cousins	First Cousins Once Removed	Second Cousins	Illegitimates Explicitly	Illegitimates Inferentially	All Halfbloods Explicitly	All Halfbloods Inferentially	Halfblood Siblings Only Explicitly	Halfblood Siblings Only Inferentially	Halfblood Aunt-nephew Halfblood Uncle-niece	
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3. Exception for Jews; uncles may marry nieces, but aunts may not marry nephews.

APPENDIX C (*Continued*)

Forbidden Consanguineous Relationships

	Civil Sanctions								
	All Ascendants	All Descendants	Parent-Child	Grandparent-Grandchild	Greatgrandparent-Greatgrandchild	Siblings	Aunt-Nephew, Uncle-Niece	Grandaunt-Grandnephew, Granduncle-Grandniece	Greatgrandaunt-Great Grandnephew, Greatgrand uncle-Greatgrandniece
Missouri	•	•	•	•	•	•	•		
Montana	•	•	•	•	•	•	•		
Nebraska			•	•		•	•		
Nevada	•	•	•	•	•	•	•	•	•
New Hampshire			•	•		•	•		
New Jersey	•	•	•	•	•	•	•		
New Mexico	•	•	•	•	•	•	•		
New York	•	•	•	•	•	•	•		
N. Carolina		•	•	•	•	•	•		
N. Dakota	•	•	•	•	•	•	•		
Ohio	•	•	•	•	•	•	•	•	•
Oklahoma	•	•	•	•	•	•	•		
Oregon	•	•	•	•	•	•	•	•	
Pennsylvania			•	•		•	•		
Rhode Island			•	•		•	•		
S. Carolina			•	•		•	•		
S. Dakota	•	•	•	•	•	•	•		
Tennessee	•	•	•	•	•	•	•		
Texas	•	•	•	•	•	•	•		
Utah	•	•	•	•	•	•	•	•	
Vermont			•	•		•	•		
Virginia	•	•	•	•	•	•	•		
Washington	•	•	•	•	•	•	•	•	•
W. Virginia			•	•		•	•		
Wisconsin	•	•	•	•	•	•	•	•	•
Wyoming			•	•		•	•		

Civil Sanctions

First Cousins	First Cousins Once Removed	Second Cousins	Illegitimates Explicitly	Illegitimates Inferentially	All Halfbloods Explicitly	All Halfbloods Inferentially	Halfblood Siblings Only Explicitly	Halfblood Siblings Only Inferentially	Halfblood Aunt-nephew, Halfblood Uncle-niece	
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