INBRED OBSCURITY: IMPROVING INCEST LAWS IN THE SHADOW OF THE "SEXUAL FAMILY"[1]

I. INTRODUCTION

The prohibition of incest is often called a "universal" taboo.[2] Indeed, virtually all cultures throughout history have condemned at least some form of intrafamilial sexual relationships or marriage.[3] Rationales for the prohibition have been advanced by judges,[4] legislators,[5] anthropologists,[6] philosophers,[7] and legal commentators.[8] These most prominently and typically include genetic concerns flowing from the fact that consanguineous relationships can produce deformed offspring;[9] protection of children from sexual abuse at the hands of relatives;[10] protection of "the family" more generally by preventing intrafamilial sexual jealousies and rivalries;[11] and conformity with religious injunctions.[12] Anthropological and evolutionary rationales

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[1] The term "sexual family" is drawn from MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995): "The sexual family is the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core." *Id.* at 143–44.

[2] *See, e.g.*, 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 109 (Robert Hurley trans., Vintage Books 1990) (1976) (noting that the prohibition of incest "more or less by common accord . . . has been seen as a social universal").

[3] *See* Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free To Marry?*, 18 FAM. L.Q. 257, 258 & n.2 (1984) (describing the incest taboo as "present in almost every society" but noting ancient Persia as one exception).

[4] *See, e.g.*, State v. Kaiser, 663 P.2d 839, 843 (Wash. Ct. App. 1983).

[5] *See, e.g.*, ALA. CODE § 13A-13-3 cmt. (LexisNexis 2005).

[6] *See, e.g.*, CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 479 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949).

[7] *See, e.g.*, FOUCAULT, *supra* note 2, at 109.

[8] *See, e.g.*, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1577–88 (2005).

[9] *See* Bratt, *supra* note 3, at 259 ("[C]ommon knowledge continues to teach that incestuous unions cause mentally and/or physically defective offspring.").

[10] *See, e.g.*, Benton v. State, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring) (describing one purpose of the incest taboo as "maintaining the stability of the family hierarchy by protecting young family members from exploitation by older family members in positions of authority").

[11] *See* Calum Carmichael, *Incest in the Bible*, 71 CHI.-KENT L. REV. 123, 126 (1995) ("One major reason for the existence of some incest rules is to ensure that family life is as sexually unimpassioned as possible."); *see also Benton*, 461 S.E.2d at 205 (Sears, J., concurring) (describing another purpose of the incest taboo as "reducing competition and jealous friction among family members").

[12] *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.9, at 82 (2d ed. 1988) (noting that "[t]he prevailing influence upon incest prohibitions in Anglo-American law has been religion" and that Roman Catholic canon law "was the source of

also exist.[13] All of these explanations for the incest taboo have been attacked by commentators as inadequate to justify current prohibitions of incest.[14] Nevertheless, society's sometimes inarticulable revulsion toward incest has held fast, as have most laws prohibiting the behavior.

The word "incest," however, can denote two quite different forms of behavior. Some forms are nonconsensual: the acts overlap with rape, statutory rape, or child abuse, or they take place in situations that are presumptively coercive because of an abundance of authority embodied in one family member and a high level of dependency on the part of the other. These nonconsensual acts are what most people associate with the word "incest."[15] This is understandable, given that most modern incest convictions are for behavior involving minors.[16] However, consensual incest — when marriage or sexual relationships take place between consenting adults — does exist. The criminal incest laws in the vast majority of states apply to this type of incest as well by making the crime distinct from the crime of rape. Courts likewise treat the existence of a nonconsenting partner (victim) as an essential element of rape, but not an element of incest.[17] Moreover, laws prohibiting incestuous marriage, found in all fifty states, also target behavior that presumably takes place most often between consenting adults.

This Note encourages the law to focus more attention on the critical difference between consensual and nonconsensual incest. Incest laws currently ignore or obscure issues of consent: legislators and judges often focus their attention on powerful but imprecise norms

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all rules on the subject"); *see also* Carmichael, *supra* note 11 (discussing biblical prohibitions of incest). *But see id.* at 124–25 (noting some Old Testament examples that seem to condone incest).

13 Most famously advanced by Claude Lévi-Strauss is the idea that incest prohibitions developed because of the social advantages of forming ties outside the family. *See* LÉVI-STRAUSS, *supra* note 6, at 479.

14 *See, e.g.*, Bratt, *supra* note 3, at 267–76 (minimizing the genetic justifications); *id.* at 285 (critiquing religious justifications as inadequate to support laws impinging on fundamental rights); *id.* at 285–89 (discussing why "public morality" is an inadequate rationale); *id.* at 289–96 (describing how incest laws are over- and underinclusive in protecting children and the "family unit"); *see also* Cahill, *supra* note 8, at 1569–72 (debunking the genetic and child sexual abuse rationales as insufficient to explain the taboo's persistence or the disgust incest elicits).

15 *See* E.J. GRAFF, WHAT IS MARRIAGE FOR? 160 (1999) ("Say the word 'incest' in conversation today, and — unless you hang out with anthropologists — most of your listeners' minds will skip to the sexual abuse of children.").

16 *See* Bratt, *supra* note 3, at 257 (describing how out of ninety-six randomly selected criminal incest appellate decisions in which ages were revealed, ninety-four involved an adult defendant and a minor victim).

17 *See, e.g.*, Cure v. State, 600 So. 2d 415, 419 (Ala. Crim. App. 1992) (holding that "lack of consent is an element of first degree rape . . . [but] not an element of incest," and thus because lack of consent was shown, the defendant "was properly charged with and convicted of first degree rape" rather than incest).

surrounding sex, marriage, and the family, rather than focusing on the characteristics of the individual relationship at issue. Moreover, lawmakers seem to reference these norms almost reflexively as part of a tautological or otherwise meaningless explanation for a given legal outcome; in fact, sometimes the motivating norms lag behind society's evolving mores. The effect of these laws — an effect that demands attention — is to trench on consensual, intimate relationships and marriage.

The rest of this Note proceeds as follows: Part II details why the consent/nonconsent distinction should be the operational fulcrum for incest laws and why other potential rationales are insufficient. Part III provides a brief background on current incest statutes and the family-centered norms that interfere with their application. Part IV explores how these norms can clash problematically at the site of incest statutes and cases, thereby distracting from the more important distinction between consensual and nonconsensual incest. Part V discusses how a conception of "family" centered on dependency relationships obviates some of the problems in the current law and points the way to how incest laws might be improved.

II. A Nonconsent Rationale for Incest Laws

Incest laws function in the shadow of three powerful norms: sexual behavior is acceptable only in marriage, marriage operates as the core of the "family," and marriage and marriage-based families are morally privileged and should be legally privileged as well. Incest laws represent a fourth, equally powerful norm: sex in the "family" — other than within a marriage — is strictly prohibited. When incest laws are invoked, these social and legal norms not only loom large, but also often clash, not least because they conceal a dormant conceptual tension: the family is at once sexualized, via the marriage relationship, and desexualized, via incest prohibitions.[18] Faced with cases of incest, judges and legislators often seem more interested in policing the conflicting norms involved than in focusing on the incestuous behavior itself.[19] These underlying norms, moreover, are often deeply out of step with the law's treatment of marriage and the family in other realms.

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[18] In the first volume of *The History of Sexuality*, Foucault explains this contradictory treatment of sex in the family as a focal point for a mechanism of power: the "deployment of sexuality." Foucault, *supra* note 2, at 103–14.

[19] Other driving factors that are similarly difficult to defend may also be at work. Professor Cahill calls for a reevaluation of the breadth and basis of incest laws given that incest taboos, on her analysis, trace largely to feelings of disgust that substitute for dispassionate evaluation of incest, as well as all deviant relationships to which incest is compared (such as same-sex marriage, miscegenation, and cloning). *See* Cahill, *supra* note 8.

That this legal confusion obscures the distinction between consensual and nonconsensual behavior is not merely academic. In a post–*Lawrence v. Texas*[20] world, it is at least highly problematic to retain laws that can criminalize consensual intimate relationships on the basis of nothing more than unexplained references to "morality" or "family."[21] And although it is contestable whether *Lawrence*'s rationale extends perforce to a correlative noninterference with marriage, other legal precedents, such as *Zablocki v. Redhail*,[22] do reveal a constitutional presumption in favor of freedom of marriage, at least to the extent that restrictions of that freedom call for some meaningful explanation.[23] Indeed, participants in other legal battles have accepted the need to explain or defend even a "moral" or "traditional" position: the same-sex marriage debate, for instance, has prompted extensive justifications on both sides that go beyond cursory references to morality.[24] By contrast, incest laws are replete with such cursory references.

Nonconsent would provide a legally consistent and normatively defensible rationale for incest prohibitions. Laws based on this rationale would be consistent not only with *Lawrence*[25] and *Zablocki*, but also with laws protecting victims of nonconsensual sex. Even outside rape and statutory rape, the authority-dependency dynamic likely to inhere among certain family members can make consent in those relationships presumptively unlikely, and prohibiting the sexualization of those relationships is therefore a legitimate state endeavor.[26] Incest prohibi-

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[20] 539 U.S. 558 (2003).

[21] *See id.* at 599 (Scalia, J., dissenting) (arguing that *Lawrence* "decrees the end of all morals legislation"); *cf. id.* at 585 (O'Connor, J., concurring in the judgment) (distinguishing the prohibition of same-sex sodomy, which is not allowed, from the prohibition of same-sex marriage, which is allowed, by noting that "*other reasons* exist to promote the institution of marriage beyond mere moral disapproval of an excluded group" — but failing to list any such reasons (emphasis added)).

[22] 434 U.S. 374 (1978).

[23] *See id.* at 383, 386–88.

[24] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003); *id.* at 995–1003 (Cordy, J., dissenting).

[25] This is not to say that *Lawrence*, on its own, *compels* protection for adult consensual incest, but rather that incest prohibitions based on nonconsent would be *more consistent* with *Lawrence* than are current prohibitions. That *Lawrence* at least raises the likelihood of protection for consensual incest has been given as a reason to denounce the case, *see, e.g.*, *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting), and has also been explored by some commentators, *see, e.g.*, Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004).

[26] This Note does not attempt to define the precise contours of how strong an authority-dependency relationship has to be for the law to prohibit sexual relationships on the basis of presumed nonconsent. Neither does it set out to determine whether these concerns should extend beyond the realm of family to other authority-dependency relationships, nor whether the law should be potentially overinclusive by basing the inquiry on objective factors only, or whether instead "actual" consent should also be a defense. The point is that incest law should use as its lodestar *some* consistent definition of nonconsent and should not simply operate via reference to norms regarding sex and the family. A handful of states do have incest laws that seem to operate

tions could directly target such dependency relationships if legislators and judges adopted — for purposes of incest prohibitions — Professor Martha Fineman's definition of "family," which centers on dependency relationships rather than on marriage.[27] Giving the law this focus may even *better* protect vulnerable family members than the current law: whereas the current incest law often treats nonconsent as secondary to policing various norms, prohibiting incest on the basis of nonconsent would send an undiluted message that dependent family members are strictly "off limits" *because* they are dependent and thus presumed to be nonconsenting.[28]

Organizing the incest laws on the basis of nonconsent would thus maximize the freedom of intimacy for nondependent family members and maximize the protection of dependent family members in a way consistent with other areas of the law. By exposing the legal confusion that is imbedded — or "inbred" — in incest law, this Note attempts to pave the way for reforming that law in favor of a scheme based on nonconsent.

Moreover, other posited rationales for incest laws that could, when the dust clears, provide a fresh conceptual scheme either are not legally plausible or reveal an anachronistic solicitude for the marriage relationship. For instance, the "family harmony" rationale is premised largely on outdated notions regarding marriage.[29] The rationale based on genetics is also suspect under current law: even setting aside nonprocreative intimate relationships, in no other legal realm does the government criminally prohibit two people from having children because their offspring are more likely to inherit genetic defects.[30] Even though the risks of birth defects among the most closely related family members are significant,[31] eugenics on the basis of physical or mental deformity has long been repudiated.[32]

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on this basis and provide examples of how it can be done. *See, e.g.*, OHIO REV. CODE ANN. § 2907.03 (West 1997 & Supp. 2005).

27 *See* FINEMAN, *supra* note 1, at 8.

28 *Cf. Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting) (applying similar reasoning to conclude that "[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor").

29 *See infra* pp. 2480–81.

30 *See* Bratt, *supra* note 3, at 276.

31 The likelihood that offspring of very closely related partners (parent-child and siblings) will have a genetic disease is about 13%, which is much greater than the likelihood that two strangers, with no family history of the disease, will have a child with such defects, which is 0.1%. *See id.* at 273 tbl.2. Two less closely related partners, such as first cousins, have a slightly greater than 3% chance of having a child with a genetic defect. *Id.*

32 *See* Tennessee v. Lane, 124 S. Ct. 1978, 1995 (2004) (Souter, J., concurring) (describing, in the context of discrimination against the disabled, how laws "enacted to implement the quondam science of eugenics . . . sat on the books long after eugenics lapsed into discredit").

Religion also does not provide a viable rationale for incest prohibitions. Based on current Establishment Clause doctrine, a predominant religious purpose would render incest prohibitions constitutionally invalid,[33] especially because those prohibitions trench on constitutionally protected activities such as marriage and sexual intimacy.[34] Finally, the anthropological rationale put forward most famously by Professor Claude Lévi-Strauss — that incest prohibitions are a necessary mechanism for building society by forcing people to create alliances outside of narrow family groups — seems entirely inadequate as a reason to prohibit consensual relationships in a modern world whose social integration is not plausibly threatened by the few people who might choose to align themselves with family members.

III. INCEST LAWS AND NORMS REGARDING SEX AND THE FAMILY

This Part presents a brief background on incest laws. It also describes other legally enshrined values surrounding sex and the family with which these laws sometimes uneasily coexist: marriage should be sexual, marriage is the core of the family, and this type of family is highly deserving of legal and moral protection.

A. Incest Prohibitions

Incest is a statutory rather than common law prohibition.[35] All fifty states and the District of Columbia have some variation of a prohibition of incest on the books; these include both criminal proscriptions (punishing either sexual behavior or marriage between persons too closely related) and marriage proscriptions (voiding marriages between persons too closely related or prohibiting clerks from issuing such persons marriage licenses).[36]

The criminal statutes vary widely; indeed, a few states impose no criminal penalties whatsoever on incestuous behavior. Rhode Island repealed its criminal incest statute in 1989,[37] Ohio's criminal statute

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[33] *See, e.g.*, McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2735 (2005). Although *McGowan v. Maryland*, 366 U.S. 420 (1961), upheld Sunday closing laws that were originally premised on religious reasons, this was because over time they had developed rational secular backing as well. *See id.* at 442, 444.

[34] *See supra* p. 2467.

[35] *See, e.g.*, State v. Scion Barefoot, 31 S.C.L. (2 Rich.) 209, 228–29 (Ct. App. 1845) (refusing to enforce an incest prohibition because it had not yet been codified).

[36] A brief overview reveals the oft-recognized diversity of these statutes. *See, e.g.*, Bratt, *supra* note 3, at 258; Cahill, *supra* note 8, at 1562–65.

[37] *See* Act of July 5, 1989, ch. 214, 1989 R.I. Acts & Resolves 563; *see also* Cahill, *supra* note 8, at 1564.

targets only parental figures,[38] and New Jersey does not punish acts committed when both parties are over eighteen years old.[39] Other states, however, have a wide variety of criminal penalties for an assortment of behaviors and relationships. Massachusetts threatens up to twenty years in prison for engaging in "sexual activities" with relatives nearer than first cousins,[40] Hawaii up to five years for "sexual penetration" with certain blood relatives or in-laws (such as a mother-in-law),[41] and Utah up to five years for "sexual intercourse" with a first cousin — even a "half"-first cousin.[42] Some states have begun to merge incest with family-neutral rape or statutory rape laws,[43] which accounts for at least some of the current variety of sanctions.

The marital prohibitions vary only slightly less than the criminal penalties, as all fifty states and the District of Columbia still have some prohibition on marriage between certain relatives, although a few states make limited exceptions. For instance, whereas Rhode Island law contains a fairly standard set of prohibitions on marriages between close relatives (whether biological relatives or in-laws),[44] it is unique in excepting "any marriage which shall be solemnized among the Jewish people, within the degrees of affinity or consanguinity allowed by their religion."[45] Colorado makes a similar exception for those following "the established customs of aboriginal cultures."[46] For the most part, though, marriage prohibitions apply to parents, siblings, aunts, and uncles; the variation applies mostly to whether one can marry a first cousin,[47] or whether one can marry (presumably former) in-laws.[48] Some states allow first-cousin marriages only if

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[38] *See* OHIO REV. CODE ANN. § 2907.03(A)(5) (West 1997). Such persons include biological and adoptive parents, stepparents, guardians, custodians, and persons *in loco parentis*. *Id.*; *see also* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1621 (1998).

[39] *See* N.J. STAT. ANN. § 2C:14-2 (West 2005).

[40] MASS. GEN. LAWS ANN. ch. 272, § 17 (West Supp. 2005); *see also id.* ch. 207, § 1 (West 1998).

[41] *See* HAW. REV. STAT. ANN. § 572–1(1) (LexisNexis 2005); *id.* § 707-741 (LexisNexis 2003); *see also id.* § 706-660.

[42] *See* UTAH CODE ANN. 76-7-102 (2003); *see also id.* 76-3-203.

[43] *See* Bienen, *supra* note 38, at 1576–77 (describing rape laws reformed in the 1970s as being "a long step away from the traditional formulation of Incest" and the reform definitions as "part of a more general movement to protect children from sexual exploitation and victimization").

[44] R.I. GEN. LAWS §§ 15-1-1 to -2 (2003).

[45] *Id.* § 15-1-4.

[46] COLO. REV. STAT. ANN. § 14-2-110 (West 2005).

[47] For instance, first-cousin marriages are prohibited in Arkansas, *see* ARK. CODE ANN. § 9-11-106 (2002), and Michigan, *see* MICH. COMP. LAWS ANN. § 551.3 (West 2005), but are allowed in Georgia, *see* GA. CODE ANN. § 19-3-3 (2004), and Vermont, *see* VT. STAT. ANN. tit. 15, § 1 (2002).

[48] *Compare* D.C. CODE ANN. § 46-401(1) (LexisNexis 2001) (listing, among other prohibited marriage partners, a man's "wife's mother" or "son's wife"), *with* IOWA CODE ANN. § 595.19 (West 2001) (prohibiting marriage only "between [certain] persons who are *related by blood*" (emphasis added)).

the spouses will not be able to reproduce[49] or if they obtain "genetic counseling."[50]

B. The Privileged Sexual Marriage as the Heart of the Family

Sociologist Talcott Parsons once noted that the "common core" of the incest taboo is "the prohibition of marriage and in general of sexual relationships between members of a nuclear family except of course the conjugal couple whose marriage establishes it."[51] It is to this "of course" that this Note now turns.

Sexual relationships between the so-called "conjugal couple" are not typically thought of as an "exception" to the incest taboo. In many ways, the sexual aspect of the relationship is the very cornerstone of marriage. One scholar describes the common denominator of an "empirically based definition" of marriage as "a socially approved union between unrelated parties that gives rise to new families and, by implication, to *socially approved sexual relations*."[52] The Supreme Court, in the landmark case *Griswold v. Connecticut*,[53] described "marital bedrooms" as "sacred" and government intrusion into those bedrooms as "having a maximum destructive impact upon [the marriage] relationship."[54] Sex is not merely an incidental feature of marriage but lies at its heart,[55] and the legal imperative to protect marriage — and its sexual nature — is of constitutional import.

Not only does marriage give rise to an approved sexual relationship, but also in many societies (including, in some respects, the United States), marriage gives rise to the *only* legally legitimate sexual relationship.[56] Sex outside marriage is still relatively verboten. In a few states "fornication" (sex between unmarried persons) is still technically a crime,[57] and there are penalties for adultery in states' criminal[58] and

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[49] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101(B) (2000).

[50] *See* ME. REV. STAT. ANN. tit. 17-A, § 556 (1983 & Supp. 2005); *id.* tit. 19-A, § 701(2)(B) (1998).

[51] Talcott Parsons, *The Incest Taboo in Relation to Social Structure*, *in* THE FAMILY: ITS STRUCTURE AND FUNCTIONS 48, 49 (Rose Laub Coser ed., 1964).

[52] Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1838 (1987) (emphasis added).

[53] 381 U.S. 479 (1965).

[54] *Id.* at 485.

[55] Recall also that "marital rape" once was an oxymoron because "the marriage contract was a license to have sex." GRAFF, *supra* note 15, at 260.

[56] FINEMAN, *supra* note 1, at 146 ("In law, marriage traditionally has been designated as the only legitimate sexual relationship. States have punished extramarital sexual relationships through laws making cohabitation, fornication, and adultery criminal.").

[57] *See, e.g.*, GA. CODE ANN. § 16-6-18 (2003); UTAH CODE ANN. § 76-7-104 (2003).

[58] This is true in twenty-four states. *See* Moshe Landman, *Sexual Privacy After* Lawrence*: Co-Habitation, Sodomy, and Adultery*, 6 GEO. J. GENDER & L. 379, 387 (2005).

divorce laws.[59] Marriage without sex also can be considered deficient. In many states, impotence, at least when the condition existed at the time of marriage, is a valid basis for a divorce or annulment,[60] as is one spouse's "desertion" of the other[61] (that is, a refusal to have sex).[62]

Furthermore, marriage is often thought of as the cornerstone of family, and the relationship tends to operate this way both culturally and legally. The family is thought to "find[] its origin in marriage" and consist of "husband, wife, and children born in their wedlock."[63] Although nontraditional family types have emerged more prominently in recent years, traditional conceptions of the family as centered around a married couple remain culturally potent.[64] The American legal and moral systems likewise privilege marriage-based families over other types through doctrines such as family privacy, legally enforced economic privileges, and social constructs of deviancy and normalcy.[65] The numerous legal supports granted to marriage also cause all members of the marriage-based family to be legally privileged.[66]

IV. OBFUSCATED INCEST LAWS

The social and legal norms described in the previous section take center stage in the enforcement (or nonenforcement) of incest laws, often leading to decisions based on inconsistent or tautological references to "marriage" or "family." These norms hinder the law's ability to operate on the basis of a legally consistent and normatively preferable

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[59] Adultery is grounds for divorce in about twenty-nine states. *See* Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 752 (2004).

[60] *See, e.g.*, ALA. CODE § 30-2-1(a)(1) (1998); DEL. CODE ANN. tit. 13, § 1506(a)(2) (1999).

[61] *See, e.g.*, GA. CODE ANN. § 19-5-3(7) (2004) (stating as a grounds for divorce "[w]illful and continued desertion by either of the parties for the term of one year").

[62] *See, e.g.*, Wilkinson v. Wilkinson, 125 S.E. 856, 856–57 (Ga. 1924) (defining desertion as a "persistent[] and continuous[]" refusal to grant "conjugal rights" (emphasis omitted)).

[63] Rose Laub Coser, *Introduction* to THE FAMILY: ITS STRUCTURE AND FUNCTIONS, *supra* note 51, at xiii, xiv.

[64] *See* FINEMAN, *supra* note 1, at 4 (recounting how her students usually describe marriage, or informal relationships that are marriage-like, as the "core" of the "family").

[65] *See id.* at 143 ("The sexual family is considered the 'natural' form for the social and cultural organization of intimacy, its form ordained by divine prescription and perpetuated by opinion polls. The sexual family is an entity entitled to protection — granted 'privacy' or immunity from substantial state supervision."); *id.* at 144 (noting the characterization of "the growth of unwed mother-child units as constituting a threat to the family" and that "the characterization of some family groupings as deviant legitimates state intervention and the regulation of relationships well beyond what would be socially tolerated if directed at more traditional family forms"); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–57 (Mass. 2003) (listing some of the "[t]angible as well as intangible benefits [that] flow from marriage").

[66] *See Goodridge*, 798 N.E.2d at 956 ("Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage.").

scheme premised on nonconsent. The haphazard application of the law not only prohibits some relationships between consenting adults, but also muddies any message the law might send about the impropriety of abusing intrafamilial dependency relationships.

A. Statutes

Among the most notable examples of incest statutes that operate problematically under the influence of competing family norms are those that criminalize sexual conduct between two family members but create an exception when the two people are in a valid marriage. Indiana's criminal statute is representative. That law prohibits adults from engaging in sexual conduct with "a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew," but states: "It is a defense that the accused person's otherwise incestuous relation with the other person was based on their marriage, if it was valid where entered into."[67] Even though marriages contracted *in Indiana* between relatives for whom sexual behavior is criminalized would not be valid,[68] the statute leaves open the possibility that such a marriage contracted elsewhere may be considered valid, which would provide a full defense to a prosecution for criminal incest. Similar exemptions for marriage partners apply in Louisiana,[69] Maine,[70] Michigan,[71] Ohio,[72] and South Dakota.[73]

One might argue that this is an expression of interstate comity and nothing more. On this reading, a statute such as Indiana's merely acknowledges that a couple's relationship cannot be so offensive to public policy if the marriage is valid elsewhere in the country or that the citizens' reasonable expectations and deference to other states' laws favor exempting that couple from criminal prosecution.

On another reading of the statute, however, the exemption prominently underscores how the all-important *marriage* can intrude on incest laws and effectively turn them on their head. Sexual relations that would have been criminally prohibited are transformed, by virtue of a marriage contracted in a particular location, into sexual relations that are legally encouraged. Two potent norms have collided: the married couple should not be in a sexual relationship because they are family, and yet they *should* be in a sexual relationship because they are married and have begun a new family. States with marriage excep-

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67 IND. CODE ANN. § 35-46-1-3 (West 1998).
68 *See id.* § 31-11-1-2 (LexisNexis 2003).
69 *See* LA. REV. STAT. ANN. § 14:78(C) (2004).
70 *See* ME. REV. STAT. ANN. tit. 17-A, § 556(1-A) (1983).
71 *See* MICH. COMP. LAWS ANN. § 750.520d(1)(d) (West 2004).
72 *See* OHIO REV. CODE ANN. § 2907.03(A) (West 1997).
73 *See* S.D. CODIFIED LAWS § 22-22-19.1 (1998); *id.* § 25-1-6 (1999).

tions seem to resolve this tension by privileging the new family's condoned sexuality over the old family's prohibited sexuality.

These norms obstruct consistent enforcement of incest laws on the basis of nonconsent. Even if a state like Indiana *had* premised its incest laws on nonconsent, the exception for marriage partners focuses the law instead on whether the marriage is technically valid: if it is, the sexual unions are condoned; if not (such that the norm surrounding the sexual marriage is not in play), the relations are criminalized.

Yet concerns about nonconsent are not necessarily diminished by the act of marriage. One could argue that marriage is less likely to be coerced than nonmarital sexual relationships, so a marriage defense is consistent with nonconsent rationales for incest laws. This reasoning is problematic, however, because incestuous marriage could, like incestuous sex, emerge from an imbalanced family power dynamic and thus raise concerns about nonconsent. Equally important, it seems highly unlikely that the consent rationale motivates these exemptions because marriage is such an under- (and, if a power imbalance is involved, perhaps over-) inclusive indicator of consent — and consent itself is not even a defense.[74] Of course, the statute makes no pretension that marriage logically alters the premises for an incest conviction; the fact of marriage and all that it signifies are sufficient. This law thus may condemn relationships that raise no concerns about consent simply because there is no "valid marriage" and may *permit* nonconsensual relationships simply because there *is* a "valid marriage."

Laws that deal with in-laws or step-relatives by a former marriage suffer from similar problems. A number of states categorize incest prohibitions as applicable to step-relatives and in-laws; the question then arises whether these prohibitions are maintained when the marriage linking the two people is terminated by death or divorce. Some states declare that they are not. The incest statutes of Alabama, Missouri, and Utah explicitly provide that sexual relationships among affinity-related persons are prohibited *only* "while the marriage creating the relationship exists."[75] In other states, courts have reached the same conclusion as a matter of statutory interpretation.[76]

Some states respond in the opposite manner, however, looking only to whether there was *ever* a marriage linking the two people. For instance, in Texas, Vermont, Virginia, and West Virginia, the marriage statutes either prohibit marriages between "current or former" step-

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[74] No other possible rationale for incest laws is altered by the fact of marriage, either. Genetic, family harmony, religious, or evolutionary rationales are not plausibly affected.

[75] ALA. CODE § 13A-13-3(a)(3) (LexisNexis 2005); *see also* MO. ANN. STAT. § 568.020(1)(2) (West 1999); UTAH CODE ANN. § 76-7-102(1) (2003).

[76] *See, e.g.*, Noble v. State, 22 Ohio St. 541, 544 (1872).

children and stepparents[77] or note that incest prohibitions "founded on a marriage" shall "continue in force notwithstanding the dissolution of such marriage by death or divorce."[78]

Once again, the *focus* of these statutes seems radically misplaced. These laws operate not on the basis of the targeted relationship's characteristics, but rather on the basis of a modulation between competing sets of norms regarding marriage, sex, and the family. On one hand are the integrated values that sex between family members is prohibited and that family is defined by a core marriage. On the other hand is the troublesome fact that marriages can dissolve by death or divorce, leaving in flux what constitutes the family for purposes of incest. Although family-like relationships may or may not continue in fact between two people formerly related by marriage — and thus may or may not entail dependency conditions that would support a continuation of incest prohibitions — the laws make no effort to draw the line on such functional bases. By contrast, one could imagine premising the prohibition on a more straightforward inquiry into whether a dependency relationship persisted, regardless of technical family status. Though concededly subjective, this inquiry would at least ground the incest laws in a consistent and normatively defensible framework. Instead, laws prohibiting sexual relationships between former affinity relations offer only an arbitrary resolution to the question whether "family" ceases to exist when the marriage at its core ceases.[79]

Even worse, statutes under which terminated marriages continue to be relevant for purposes of incest operate according to a norm of marriage that seems out of step with the treatment of marriage in other areas of the law. Historically, the very notion that one is related to one's in-laws drew on the idea that "the sexual union makes man and woman one flesh," and thus one's relatives by affinity are transformed into relatives by blood.[80] By maintaining this "one flesh" notion even

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[77] *See* TEX. FAM. CODE ANN. § 6.206 (Vernon Supp. 2005).

[78] VT. STAT. ANN. tit. 15, § 3 (2002); *see also* VA. CODE ANN. § 20-39 (2004); W. VA. CODE ANN. § 48-2-302(c) (LexisNexis 2004). A final complication addressed in these three statutes is that if the original marriage were itself defective and void, then the family relationships arising out of *that* purported marriage are meaningless for purposes of incest. *See* VT. STAT. ANN. tit. 15, § 3; VA. CODE ANN. § 20-39; W. VA. CODE ANN. § 48-2-302(c). This is another instance of the legal technicality of marriage being privileged at the expense of functional inquiries. There is no reason why people related through a technically invalid marriage should stand in any different *functional* relationship to one another than those related through a technically valid marriage.

[79] Pop culture has taken a stab at answering this question as well. In the movie *Clueless*, the protagonist asks her father why her ex-stepbrother still stays at their house and is told: "You divorce wives, not children." CLUELESS (Paramount Pictures 1995). However, the protagonist and her ex-stepbrother become romantically involved at the end of the movie, implying a different answer to the question.

[80] *In re* Bordeaux' Estate, 225 P.2d 433, 436 (Wash. 1950) (en banc). Or, put more simply: "I am you, and being you, I cannot have sexual relations with your blood relative." FRANÇOISE

after the dissolution of the marriage, these incest laws treat as forever inviolable the two norms of marriage: it creates family and it is the *only* sexual relationship that may take place within that family. But the effects of marriage are not treated as forever inviolable in other areas of modern law. Indeed, the idea of marriage having everlasting effects recalls the highly "status"-like position marriage embodied in past eras and contradicts the progressive treatment of marriage as more "contractual." Although marriage today is certainly not exclusively contractual,[81] laws regulating marriage have moved over time in this direction,[82] such as by allowing divorce and then no-fault divorce, and by allowing and enforcing premarital contracts.[83] The incest laws in some states thus not only prohibit intimate, potentially consensual relationships on the basis of an abstract conception of marriage, but also do so on the basis of a conception that is legally outdated, resting on a view of marriage as highly "status"-like and everlasting in its effects.

B. Cases

The case law also demonstrates the ways in which overshadowing norms regarding marriage and the family undermine a consistent, consent-based scheme for enforcing incest prohibitions. Two strands of the case law reveal this problem particularly well.

First are cases that grapple with how to treat two people whose marriage the incest laws attempt to bar, but who marry nonetheless and begin a new family. The language of these cases often presents the issue as a collision of normative family visions. On one hand, the incestuous relationship violates the protection of the original family because the first marriage is meant to delimit the exclusive sexual relationship for that family. On the other hand, there is the subsequent family, which, when conceived *as* a family, founded on a marriage, deserves protection in its own right. Once again the "nonsexual" and "sexual" aspects of the family are brought into tension in these cases:

HÉRITIER, TWO SISTERS AND THEIR MOTHER: THE ANTHROPOLOGY OF INCEST 13 (1999).

81 *See* Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 427 (2005) (observing that the privatization of the family as "part of a more general transition of family law from status to contract" is "a process that remains incomplete").

82 *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2134 (1994) (noting that "the 'status-to-contract' story continues to shape contemporary understanding of family law"). *But cf. id.* at 2140 (arguing that the shift is better described as the modernization of an "antiquated body of status law" to make it "regulate gender relations in the emerging industrial economy").

83 *See* Cossman, *supra* note 81, at 426 ("The consequences of marital breakdown have similarly seen an increase in the ability of spouses to define their own relationships with the shift from fault to no-fault divorce and the ability to alter the obligations of marriage by contract.").

nonsexual family members have created a sexual marriage, and both norms cannot be maintained at once. Often it seems the outcome of these cases is determined by whether the second family is judged — usually without explanation — to be a "true" family: if so, the incest laws give way; if not, that family receives no protection and may even be subject to criminal penalties. These cases elide even a perfunctory inquiry into whether any consistent rationale behind the incest laws dictates when prohibitions should be applied. As such, the consent/nonconsent distinction fails to figure into the courts' decisions.

Perhaps two of the most well-known cases in which courts ruled in favor of the "incestuous" family are *In re May's Estate*[84] and *Israel v. Allen*.[85] In *May's Estate*, a New York court considered whether a marriage between an uncle and a niece who had married in Rhode Island, where such marriages were legal, could be declared valid in New York, where the couple had always resided but where such marriages were "incestuous and void."[86] The highest New York court upheld the marriage on the basis that it "was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law."[87]

According to the conflict of laws principles in play, the court had to rule in large part on the basis of whether the Mays' marriage was "within the prohibition of natural law."[88] In ruling that it was not, the court observed that the marriage was "between persons of the Jewish faith whose kinship was not in the direct ascending or descending line of consanguinity and who were not brother and sister,"[89] which apparently made the marriage less offensive. The court was also aware that the marriage had lasted for thirty-two years, until the wife's death, and resulted in six children.[90] Still, there was no inquiry into whether any individuals had been harmed by the prohibited conduct in a way the incest laws were meant to deter. Instead, by turning heavily on "natural law," the outcome was likely dictated by a subjective weighing of family norms: the norm prohibiting sex among family members, technically breached by the Mays, versus the norms protecting the *new* (albeit incestuous) marriage and family created by the Mays.[91] Per-

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[84] 114 N.E.2d 4 (N.Y. 1953).

[85] 577 P.2d 762 (Colo. 1978) (en banc).

[86] *May's Estate*, 114 N.E.2d at 4–5. The case arose because one of the couple's six children challenged her father's right to administer her mother's estate by alleging that the marriage was invalid. *Id.* at 5.

[87] *Id.* at 7.

[88] *Id.* at 6.

[89] *Id.* at 7.

[90] *See id.* at 4–5.

[91] *Cf.* CLARK, *supra* note 12, § 2.9, at 83 ("The religious and moral background of the law of incestuous marriage has led some courts to discuss difficult questions of statutory construction or

haps simply because the Mays' subsequent family, at least in hindsight, seemed acceptable to the judge *as* a family, it was allowed to stand.

In *Israel v. Allen*, the Colorado Supreme Court came closer to taking a harm-based approach to a case of incest, yet its opinion was still clouded by competing norms regulating sex and the family. The case arose on a constitutional challenge to an incest statute that banned marriage between siblings related by adoption.[92] The would-be couple's parents had married when their children were teenagers, and the husband subsequently adopted his stepdaughter.[93] Ultimately, the two children themselves wanted to marry.[94] The court allowed them to do so, striking down the statute as unconstitutional insofar as it applied to siblings by adoption because it failed to meet the standard of minimum rationality.[95]

The court based its decision in part on the fact that biologically unrelated people are less likely to have children with genetic problems.[96] The court may also have been swayed by the lack of evidence that the children had ever lived in the same state, much less the same household — although the opinion makes no reference to this as a factor in the decision.[97] In any event, the court did not rest on such functional considerations. Instead, it went on to note that non-biological relationships do not inspire the same "natural repugnance" and "moral condemnation" as consanguineous relationships.[98] Moreover, in response to objections by the state that allowing such marriages would disrupt "family harmony" — meaning the harmony of the *original* family — the court noted that it was "just as likely that prohibiting [the relationship] will result in family discord" in *this* case because all family members involved supported the proposed marriage.[99]

Thus, the court rested its holding in part on its own determination of what constitutes an acceptable family and what will promote family harmony, in order to overcome the norms that *marriages* necessarily create families and that sex among family members who are not in the central marriage relationship is forbidden. Even though the court briefly recognized that these norms were operating as a bar to a mar-

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the conflict of laws in terms of divine or natural law when the opinions expressed may have little more basis than the court's personal predilection.").

92 Israel v. Allen, 577 P.2d 762, 763 (Colo. 1978) (en banc).

93 *Id.*

94 *Id.*

95 *See id.* at 764.

96 *See id.* (citing 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 183 (1931)).

97 When the couple's parents married, the son was eighteen and living in Washington and the daughter was thirteen and living in Colorado. *See id.* at 763.

98 *Id.* at 764 (quoting VERNIER, *supra* note 96, at 183).

99 *See id.* at 764 & n.2.

riage that was functionally unobjectionable, it still adhered to the obligatory discourse of "morality" and "family." In support of its ruling, for instance, the court declared that these children were not *really* of the same "family" in this context, adoption laws and their parents' marriage notwithstanding.[100] The court marshaled in support of this conclusion the fact that adopted family members are not prohibited from having sex by Colorado criminal law.[101] But this strand of the court's reasoning reduces to the idea that adoptive siblings may marry because they are not actually "family," and they are not family because some other areas of the law treat them as nonfamily. Yet still *other* areas of the law of course *do* treat adopted children as family (not least the statute here declared unconstitutional), and thus the court's reasoning is devoid of real explanatory force. It is this sort of empty "family" discourse that hinders courts' ability to straightforwardly apply the law in a way that is consistent with a consent-based rationale.

Courts that condemn incestuous relationships produce opinions with similarly obscured reasoning. In *Rhodes v. McAfee*,[102] a court held invalid, after the death of the husband, a fourteen-year marriage between a man and his former stepdaughter that resulted in three children.[103] The effect of the holding was to deny the widow homestead and dower rights.[104] The court concluded that the Tennessee statute criminalizing the marriage of a man to his "wife's daughter"[105] expressed "settled public policy" on "public morals and good order in society."[106] The opinion further declared that this case was "a good example of why such marriages are prohibited": the stepdaughter had lived in the same household as her mother and stepfather before their divorce, so "[i]f there were no statutes prohibiting such marriages, [this] not only could but very likely would result in *discord and disharmony in the family*."[107]

As commentators such as Professor Christine McNiece Metteer point out, enforcing the statute to protect the harmony of the *first* family merely creates disorder in the *second* family, depriving it of traditional legal protections such as inheritance rights.[108] The case can

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[100] *Id.* at 764 ("It is clear . . . that adopted children are not engrafted upon their adoptive families for all purposes.").

[101] *Id.* (citing COLO. REV. STAT. ANN. § 18-6-301 (West 2004)).

[102] 457 S.W.2d 522 (Tenn. 1970).

[103] *See id.* at 522, 524.

[104] *See id.* at 524.

[105] *Id.* at 523 (quoting TENN. CODE ANN. § 39-705 (current version at TENN. CODE ANN. § 39-15-302 (LexisNexis 2003))).

[106] *Id.* at 524.

[107] *Id.* (emphasis added).

[108] *See, e.g.*, Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right To Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L & PUB. POL'Y 262, 277 (2000).

therefore be viewed as having presented the judge with a choice of which of two "families" was more worthy of the law's protection because "protecting family harmony" could have cut either way. The court's decision apparently was driven by the idea that the original marriage had created a "family" in which the marriage had a legal monopoly on sexual relationships; the court ignored the competing norm that the second marriage also had created a "family," now clamoring for legal protection in its own right. The court did not explain why the "family" whose harmony it chose to protect was more worthy than the "family" that was effectively dismantled by the decision. Most important for present purposes is that this "family" conflict seems to have framed the court's decision, leaving to one side any inquiry into concrete harms such as those flowing from possible nonconsent.

In fact, the strong preference for the first family exhibited by the *Rhodes* court may reflect a view of marriage that is inconsistent with other areas of law. The "protection of family harmony" rationale, based on the notion that incest prohibitions prevent sexual jealousies and rivalries among family members,[109] makes the most sense when presupposing that marriage is the only sexual relationship allowed within a family and that this status is so deserving — and in need — of protection that other sexual unions must be strictly prohibited so as not to interfere with or threaten that relationship in any way. For although sexual jealousies could potentially damage the harmony of family life in general, it is the marriage — the sexually privileged relationship, and one with relatively breakable ties — that seems especially sheltered. Indeed, the protection of *marriage* has been cited explicitly as the aim of some incest laws: "The possibility of marriage between stepfather and stepdaughter" may be prohibited because it "is likely to prove highly disruptive of the stepfather's *first marriage*."[110]

Yet not only is it arbitrary on some level to protect one consensual intimate relationship at the expense of another, but also this strong form of protection seems out of proportion to the modern treatment of marriage in other areas of law. This is an era of no-fault divorce, in which the state has staked out a position closer to neutrality regarding whether or why any particular marriage breaks up, as long as at least one of the spouses so desires. Moreover, the state no longer tends to impose penalties on third parties for emotional "interference" with a marriage relationship that would tend to cause the spouses to want to

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[109] *See, e.g.*, Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21, 29 (1993).

[110] PETER NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 135 (1993) (emphasis added).

break up.[111] Finally, even if the state does have a legitimate interest in protecting an already-contracted marriage, state action must still overcome the strong constitutional presumption against interfering with individuals' desire to enter *new* intimate relationships and marriages.[112] Thus the "family harmony" rationale, even if plausible at first blush, seems to rest largely on outdated norms regarding the marriage relationship.

Lest it appear that cases like *Rhodes* are themselves simply outdated, it is important to note that similar reasoning has held fast in recent cases, such as *In re Tiffany Nicole M.*[113] *Tiffany Nicole M.* upheld as constitutional a Wisconsin statute specifying that the incestuous relationship of a parent may justify termination of his or her parental rights.[114] The court's analysis did not focus on what is wrong, or what the legislature might have thought wrong, with the kind of incestuous relationship at issue (one between siblings). Instead, the court concluded perfunctorily that the statute "is narrowly tailored to serve the State's compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society."[115]

As in *Rhodes*, the *Tiffany Nicole M.* court thus defended the law as promoting the "preservation of family," even though the enforcement in this case literally disintegrated the family before the court: the (illegally) married parents[116] and their three children.[117] Perhaps to extract itself from this paradox, the court treated the second family as not a *true* family, stating that "the fundamentally *disordered circumstances* in which the child of an incestuous relationship will be raised" create "a home that mocks even the most *rudimentary conception of*

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[111] The common law tort for "alienation of affections" has been abolished in many states. *See* Wyman v. Wallace, 615 P.2d 452, 453 & n.1 (Wash. 1980) (en banc) (listing states). In *Wyman*, the court affirmed the appellate court's abolition of the tort as based on "the realities of a marital relationship" since the "policy of preserving marital relationships and preventing third party interference with one spouse's mental attitude to the other spouse" does not track our modern conception of a marriage worth preserving or capable of being preserved. *See id.* at 455; *see also* Wyman v. Wallace, 549 P.2d 71, 74 (Wash. Ct. App. 1976) ("In our opinion, a viable marriage is not one where the 'mental attitude' of one spouse towards the other is susceptible to interference by an outsider.").

[112] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (sexual intimacy); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (marriage).

[113] 571 N.W.2d 872 (Wis. Ct. App. 1997).

[114] *See id.* at 876. The statute specifies that an incestuous relationship between the parents makes them unfit, *see* WIS. STAT. § 48.415(7) (2003), but a court must still determine whether termination of parental rights serves the child's best interests or is warranted, *see Tiffany Nicole M.*, 571 N.W.2d at 879.

[115] *Tiffany Nicole M.*, 571 N.W.2d at 876.

[116] *See* Muth v. Frank, 412 F.3d 808, 811 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 575 (2005).

[117] *Tiffany Nicole M.*, 571 N.W.2d at 873. Indeed, the state did more to disintegrate this family, for after the termination proceeding, both parents were criminally convicted of incest. *See Muth*, 412 F.3d at 818 (denying a writ of habeas corpus to the father).

family."[118] This reasoning, however, again borders on tautology: the second family is said not to be a family because it "mocks" the "conception" of a family. Although there may be functional reasons why the parents in this case, or parents like them, should be deprived of their parental rights, the court alluded to none, considering it sufficient to focus on whether the family before it was, in fact, a family. This type of obscured and hollow reasoning prevents the incest laws from operating on the consistent and defensible basis of nonconsent — for even a nonconsenting incestuous relationship may fit a particular judge's "conception of a family," whereas a consenting relationship may not.

A final set of cases that reveal that consistent application of the incest laws is hindered by notions of marriage as "family" consists of those that confront relationships between step-relatives. In *State v. Buck*,[119] a stepfather was convicted of sexual incest with his stepdaughter (who was of majority age).[120] On appeal, he argued, *inter alia*, that it was an unconstitutional violation of his equal protection rights for him to be prosecuted merely on the basis of whether he was married to the woman's mother because that alone was what made the relationship incestuous.[121] In rejecting this argument, the court's language reveals that its focus was indeed on the background marriage and not on the relationship at issue: "*Marrying* the natural or adoptive parent of a child *creates the relationship* that the statutory proscription against incest *is intended to protect*. The different treatment accorded to those who fit within that relationship . . . is closely and rationally related to the legitimate governmental purpose of *protection of the family*."[122] This language strongly implies not only that the court believed that marriage "creates" the family, but also that it is the marriage-based family (and perhaps even just the marriage itself) that the incest statutes are "intended to protect." The court ignored the particular characteristics of the relationship between the stepfather and stepdaughter and thus any question of consent. What was deemed vital, instead, was the norm that marriage constitutes the only sexual relationship in a marriage-centered family.[123] The marriage, rather than the incestuous relationship, took center stage.

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118 *Tiffany Nicole M.*, 571 N.W.2d at 879 (emphasis added).

119 757 P.2d 861 (Or. App. 1988).

120 *See id.* at 863.

121 *See id.* at 864.

122 *Id.* (emphases added).

123 This same focus is evident in *Argo v. State*, 371 S.E.2d 922 (Ga. Ct. App. 1988), in which an incest conviction was upheld on the basis of a stepfather-stepdaughter relationship despite lack of proof that the defendant had been married to the stepdaughter's mother, but only after an exhaustive detailing of why that couple was still *effectively* "married." *See id.* at 923–24. A dissenting opinion argued that without proof of marriage, there cannot be incest. *See id.* at 925 (Beasley, J.,

V. A NEW PARADIGM: FINEMAN'S "DEPENDENCY" FAMILY

As has been argued in the preceding sections, some of the problems that inhere in incest statutes and case law can be traced to the fact that the prohibitions operate in the shadow of highly charged values surrounding sex, marriage, and the family, and the intense focus these norms attract. Envisioning a change in the family structure that eschews marriage and instead focuses on dependency relationships may therefore point the way, conceptually, toward improved incest laws.

Professor Martha Fineman promotes a vision of the family that serves as a useful counterpoint to the traditional conception. She proposes "the abolition of the legal supports for the sexual family,"[124] defined as a family based on a marriage or a marriage-like relationship.[125] She would instead institute a legal system that protects "the nurturing unit of caretaker and dependent exemplified by the Mother/Child dyad,"[126] as opposed to the "Husband/Wife dyad that forms the basic unit of the sexual family."[127] "Mothers" in this scheme represent natural caretakers of any gender, whereas "Children" represent natural dependents, whether because of age, illness, or disability.[128] The fact that Professor Fineman would "abolish marriage as a legal category and with it any privilege based on sexual affiliation"[129] is not to say that she would abolish marriage-like intimate relationships; rather, those relationships would simply have no particular "*legal* (enforceable in court) consequences."[130]

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dissenting). Still, some judges do examine the functional relationship at issue rather than the background marriage. See the discussion of *Gish v. State*, 352 S.E.2d 800, 802 (Ga. Ct. App. 1987) in Part V, *infra* pp. 2484–85.

In fact, although today biological parent-child relationships suffice to create an incestuous connection without a marriage holding the parties together as a "family," *see, e.g.*, State v. Kuntz, 295 P.2d 707, 709 (Mont. 1956), this may not always have been true. In one early Connecticut case, the judge treated the issue whether the defendant's biological daughter was "legitimate" as crucial to the incest conviction. *See* State v. Roswell, 6 Conn. 446, 450 (1827). Although this issue may have arisen because of technicalities stemming from the prosecution's pleading, the judge ignored arguments that determining the daughter's legitimacy was legally unnecessary.

124 FINEMAN, *supra* note 1, at 228.

125 *See id.* at 143.

126 *Id.* at 228. Although Professor Fineman has "deliberately (even defiantly) chosen not to make [her] alternative vision gender neutral[,] . . . men can and should be Mothers," so the vision is not inherently gendered. *Id.* at 234.

127 *Id.* at 233.

128 *Id.* at 234–35.

129 *Id.* at 228.

130 *Id.* at 229. Contract law would instead govern such long-term relationships. *Id.*; *see also id.* at 230 (conceding that "ideas of 'arms-length' transaction or the 'autonomous' individual 'voluntarily consenting' that are the basis of current contract law may have to be rethought," but noting that "this would be an improvement for contract law in general").

Professor Fineman acknowledges that her proposed regime is unlikely to come to fruition.[131] Still, as she points out, "re-visioning" can be "valuable simply because it forces us to look at old relationships in new lights."[132] Although Professor Fineman advocates her model out of a concern for the welfare of caretaking units inadequately protected by current law and policy, for purposes of this Note, revisioning the family as composed of dependency units may help expose how the solicitude for marriage and marriage-centered families prevents the incest laws from functioning on a legally consistent and normatively defensible basis such as nonconsent.

Under a regime of desexualized "Fineman families," incest laws could still operate according to the same essential command that they do now: sex among "family members" is prohibited. In fact, the prohibition would operate even more consistently in a world of Fineman families because it would be unnecessary to carve out an exception for the marriage relationship. The difference would be that in a Fineman family, these prohibitions would necessarily focus on the functional relationship between the two people at issue rather than on whether a marriage was operating in the background. The determination whether two people were "family members" would be an inquiry into whether there was a natural dependency relationship involved, which in turn would have a direct bearing on the likelihood of nonconsent.

Using Professor Fineman's definition of family might even result in an extension of incest prohibitions in some cases, since sexual conduct toward a child by a de facto parent, one acting as a caregiver, would be straightforwardly illegal regardless of whether a marriage technically created a parent-child relationship. Courts would not be forced to reason around statutes in order to arrive at the obviously appropriate outcome, as they sometimes currently must. In *Gish v. State*,[133] for instance, an *ex*-stepfather who continued to care for his stepdaughter after her mother's death was convicted of incest.[134] The court included the defendant under the statutory definition of a family member based on functional considerations even though by statute, and "[a]s a general rule," "affinity ceases upon the death of the blood relative through whom the relationship of affinity was created."[135]

Cases such as *Gish* take a functional and perhaps consent-based approach to incest laws by considering factors such as the actual "familial relationship" involved and that "the victim . . . resided in [the

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131 *Id.* at 232 ("We can be sure that change will not occur any time soon (if at all).").

132 *Id.*

133 352 S.E.2d 800 (Ga. Ct. App. 1987).

134 *See id.* at 800.

135 *Id.* at 801.

defendant's] home."[136] Such cases could provide guidance to future courts interpreting incest laws according to the scheme encouraged by this Note. Similarly, legislators could look to Ohio for an example of a criminal incest statute organized according to nonconsent.[137] In that statute, no family members are criminalized for sexual conduct except those most likely to be in a position of authority over a dependent.[138] Thus, natural or adoptive parents, stepparents, guardians, custodians, and persons in loco parentis are all subject to prosecution.[139]

Although such cases and statutes have made headway toward using consent as the guiding principle of incest laws, and although presumptive nonconsent based on authority relationships has impacted other areas of the criminal law such as rape law,[140] almost all traditional criminal incest statutes remain on the books — as do all incest marriage laws.[141] Thus, the haphazard influence of family norms in creating and applying incest laws may continue to obscure the crucial issue of consent.

VI. CONCLUSION

The dysfunctional reasoning that underlies current incest laws can be traced in large part to the gravitational pull of unexamined and outdated notions about marriage and the family. This focus is problematic because it draws attention away from intrafamilial relationships involving dependents that are likely to be nonconsensual. Basing incest laws on a nonconsent rationale premised on dependency relationships would not only generate freedom for nondependents wishing to engage in consensual intimate relationships, but would also provide protection for vulnerable dependents. Simply understanding that unexamined norms surrounding the marriage relationship and family are currently hindering this area of law from achieving a coherent framework may point the way toward better incest laws in the future.

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136 *Id.*

137 *See* OHIO REV. CODE ANN. § 2907.03(A) (West 1997 & Supp. 2005).

138 *See id.*

139 *Id.* Other sexually intimate authority-dependency relationships are also barred by the same statute, such as those between a hospitalized patient and someone with "supervisory or disciplinary authority" over that person. *See id.*

140 *See* Bienen, *supra* note 38, at 1575 n.249 (noting how rape reform legislation uses authority relationships as an indicator of nonconsent).

141 *See id.* at 1564 (noting that despite rape reform, traditional incest statutes remain in force in most states).