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IS INCEST NEXT?

BRETT H. MCDONNELL[*]

INTRODUCTION

Fear of a slippery slope has been a leading criticism of the decision in *Lawrence v. Texas*.[1] Critics fear that a variety of other laws concerning sexual behavior are now vulnerable under the logic of *Lawrence*. Many defenders of the decision hasten to reassure the public that there are relevant differences between sodomy and these other laws.

I will examine how the decision in *Lawrence* affects laws regulating other forms of sexual behavior, choosing in particular consensual adult incest as a way to give the argument focus.[2] The slippery slope panic has included concerns about incest. In his dissent, Justice Scalia declared that the majority opinion "effectively decrees the end of all morals legislation,"[3] and earlier in the same paragraph listed criminal laws banning adult incest, as well as fornication, bigamy, adultery, bestiality and obscenity, as the type of laws whose justifications are now in question.[4] Judicial concern with this particular slope did not begin with Justice Scalia. In *Bowers v. Hardwick*,[5] the case which *Lawrence* overturned, Justice White's majority opinion stated, in a key passage, that, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."[6] Now they have started.

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[1] 123 S. Ct. 2472 (2003).

[2] The adjectives "consensual" and "adult" are important. I take it as relatively easy to distinguish behavior that is not consensual or where one or more of the persons involved is not adult. To save space and breath in what follows, unless stated otherwise when I refer to "incest," I mean consensual sex between adults related by blood or marriage. The exact degree of relationship is an issue I will consider below. *See infra* text accompanying notes 72 through 92 and accompanying text.

[3] *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

[4] *See id.*

[5] 478 U.S. 186 (1986).

[6] *Id.* at 195-96.

Sometimes courts will slide down a slippery slope, and sometimes they will not.[7] Even when an opinion specifically denies the presence of a slippery slope, future cases may prove it wrong. *Lawrence* itself is an example.[8] But the fact that the Court has now gone partway down a slippery slope does not mean that it is irrevocably committed to going further. My purpose in this article is to explore whether the *Lawrence* decision supports a protected right to engage in consensual adult incest. In doing so, I engage in two distinct kinds of inquiries. The first inquiry is formalistic (Part I). It attempts to make sense of *Lawrence* using traditional legal materials, primarily its text as well as the text of earlier decisions on which it relies. The formalist approach will only get us so far, however, and I will then move on to a realist inquiry (Part II). This inquiry considers the political and social reality in which the Court is situated. Both inquiries suggest that it is unlikely that the Court will protect incest any time soon, although there is some chance that incest between cousins, and less likely, between persons related through marriage rather than blood, could receive protection. If the Court does ever protect incest, it will happen only when most Americans are unwilling to throw people in jail for that type behavior.

I. FORMALIST INQUIRY

Almost from its inception, the Supreme Court has recognized and protected individual rights not specifically enumerated in the Constitution, as amended. Arguably that practice goes back at least to *Fletcher v. Peck*,[9] found controversial expression in *Dred Scott v. Sandford*,[10] and flourished during the early twentieth century in cases such as *Lochner v. New York*.[11] The era of such unenumerated rights seemed to end when the *Lochner* line of cases ended with *West Coast Hotel Co. v. Parrish*.[12] However, unenumerated liberty rights were revived in *Griswold v. Connecticut*[13] and its progeny.[14] *Lawrence* is the latest case in that line.

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[7] *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

[8] In his dissent in *Poe v. Ullman*, Justice Harlan listed homosexual practices as behavior the law could rightfully regulate. *See* 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). In his concurrence in *Griswold v. Connecticut*, Justice Goldberg approvingly cited a passage from *Poe*. *See* 381 U.S. 479, 499 (1965) (Goldberg, J., concurring). The majority in *Lawrence* pays no attention to these relevant passages from *Poe* and *Griswold*.

[9] 10 U.S. 87, 139 (1810) (striking down a Georgia legislative act purporting to rescind a sale of public land, in part based on "general principles, which are common to our free institutions").

[10] 60 U.S. 393 (1857).

[11] 198 U.S. 45 (1905).

[12] 300 U.S. 379 (1937).

[13] 381 U.S. 479 (1965).

[14] There were some related cases in between. *See* Palko v. Connecticut, 302 U.S. 319 (1937); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

As we shall see, exactly how *Lawrence* relates to and expands upon the earlier cases in this line is rather murky. However, the cases have a basic structure, which I shall follow in this section. First, one must identify the implicated individual liberty interest and examine the extent to which the interest is constitutionally protected. Second, one must identify the state's interests in regulating that behavior. The analysis concludes by bringing together these two and deciding whether the state's interests justify violating the individual's interest.

A. *Protected Individual Liberty Interests*

Putting aside the highly-disputed question of the textual basis for protecting individual liberty interests not specifically enumerated anywhere in the Constitution, once one recognizes that such rights exist, one faces a difficult question as to the scope of those rights.[15] The text of the Constitution itself can provide only limited guidance, since the rights are by definition not specifically included.[16] So far, the Court has decided to protect the use of contraception by married couples,[17] the use of contraception by unmarried couples,[18] abortion,[19] and probably, the right to refuse medical assistance.[20] Before *Lawrence*, the court refused to recognize a right to engage in homosexual sodomy,[21] the right to be recognized as the father of one's natural child,[22] or the right to commit suicide with the assistance of a physician.[23] How does the Court generalize from these and other cases to recognize and limit such individual rights?

I see three basic approaches to identifying liberty interests, all with some support in the Court's history. The "conservative Burkean" approach is reluctant to identify new rights, and will allow the Court to recognize a right only if it can be clearly shown that our society has specifically and widely acknowledged the right for a long time. The "Millian" approach forbids the state from regulating behavior, which directly affects only those who engage

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[15] Personally, I find it quite plausible that the Ninth Amendment and the Privileges and Immunities Clause of the Fourteen Amendment recognize such rights. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000).

[16] Specific constitutional provisions may, however, help point to more general related liberty interests. For instance, the Third and Fourth Amendments may support a general interest in behavior that occurs within the home.

[17] *See Griswold*, 381 U.S. at 479.

[18] *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (actually decided on equal protection grounds, but with a strong substantive due process flavor).

[19] *See* Roe v. Wade, 410 U.S. 113 (1973).

[20] *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990).

[21] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[22] *See* Michael H. v. Gerald D., 491 U.S. 1101 (1989).

[23] *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

in it, and does not harm anyone else. The "liberal Burkean" approach looks to our history and is unwilling to impose a simple general harm principle, but is willing to allow that over time we may come to recognize new sorts of interests that should be protected, in an evolutionary process highly influenced by the Millian harm principle, though not coinciding with it.[24] In *Lawrence*, a majority of the Court (for now) seems to have had a Goldilocks moment: the conservative Burkean approach is too restrictive in recognizing liberty interests, the Millian approach is too expansive, but the liberal Burkean approach is just right.

1. The Conservative Burkean Approach: "This One is Too Restrictive"

The conservative Burkean approach is highly reluctant to identify unenumerated liberty rights. It does so only if a close study of our legal and political history shows that such rights are well established in America's political and social institutions. One justification for such an approach is a conservative appreciation for long-lasting traditions and a skepticism of new ideas, which have not yet stood the test of time. Another justification is more specific to the Court as an institution. Since unenumerated rights have no clear textual mooring, there is a risk that the justices will simply impose their own personal preferences, which will be perceived as an illegitimate exercise of power by those unhappy with the decision.[25]

Bowers followed this approach. More recently the Court restated the approach in *Glucksberg*. According to Chief Justice Rehnquist's opinion in *Glucksberg*, the method for establishing a substantive due process right has "two primary features."[26] First, the right must be shown to be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[27] Second, there must be a careful description of the asserted fundamental liberty interest. In the majority opinion in *Michael H.*, Justice Scalia stated that the interest should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[28] In *Bowers* the question was phrased as "whether the

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[24] In thinking about the Burkean interpretation of *Lawrence*, I have particularly benefited from discussions with Dale Carpenter; although I should note that he believes what I label the "liberal Burkean" approach should simply be called the Burkean approach. For his application of a Burkean approach to *Romer*, see Dale Carpenter, *A Conservative Defense of* Romer v. Evans, 76 IND. L. J. 403 (2001). For my response, see *infra* note 50.

[25] *See Bowers*, 478 U.S. at 194-95; *Glucksberg*, 521 U.S. at 721. The position can also be justified on originalist grounds.

[26] *See Glucksberg*, 521 U.S. at 720.

[27] *Id.* at 721 (quoting Moore v. East Cleveland, 431 U.S. 494 (1977)); *see also* Palko v. Connecticut, 302 U.S. 319 (1937) (allowing retrial did not violate fundamental principles of liberty and justice).

[28] *Michael H.*, 491 U.S. at 127 n.6. Notably, Justice O'Connor, joined by Justice Kennedy,

Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[29] This very specific, narrow description of the liberty interest is crucial to the conservative strategy. By allowing a broader, more abstract definition of the liberty interest, a more liberal Burkean approach can use more high-minded tradition to criticize specific historical practices.[30]

So stated, American tradition established no such right. True, some of the specifics of the Texas sodomy statute were relatively new. Laws singling out homosexual conduct were a twentieth century innovation,[31] and it might be that criminalization of oral sex as opposed to anal sex was also a later development.[32] Even so, one cannot say that the freedom to commit homosexual sodomy is deeply rooted in this Nation's history and tradition.

The *Lawrence* majority made no attempt to say that. This is the first hint that the Court had no intention of following the conservative Burkean approach approved just several years earlier in *Glucksberg*. After looking at old history, the Court stated "we think that our laws and traditions in the past half century are of most relevance here. . . . [H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[33]

The Court found that a trend to decriminalize sodomy began with the Model Penal Code, they then pointed to several recent cases, *Casey* and *Romer*, and finally mentioned cases in other countries, which recognized a right for homosexual adults to engage in intimate conduct.[34] The Court ended by stating that, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[35] Limiting the Court to recognizing only old, traditional freedoms prevents them from learning new lessons from more recent experiences. It would thus risk not protecting behavior which we have now learned should be protected. The Court declined to follow such a conservative Burkean approach.

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refused to concur because they felt that the Court had not always followed such a restrictive methodology, and should not foreclose future options. *See id.* at 132 (O'Connor, J., concurring in part).

[29] *Bowers*, 478 U.S. at 190.

[30] *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 701-06 (1994).

[31] *See Lawrence*, 123 S. Ct. at 2479.

[32] *See* Brief of the Cato Institute as Amici Curiae at 9-10, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).

[33] *Lawrence*, 123 S. Ct. at 2480 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

[34] *See id.* at 2480-82.

[35] *Id.* at 2484.

2. The Millian Approach: "This One is Too Expansive"

In *On Liberty*, John Stuart Mill laid out what has become the classic defense for a liberal (old term) or libertarian (new term) approach to governmental regulation of individual behavior.[36] Mill set out that in the "harm principle" the "only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[37] Thus:

> There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affect others, only with their free, voluntary, and undeceived consent and participation.[38]

On a broader level, *Lawrence* applies the harm principle to all areas of human life involving sexual autonomy and intimacy. There are certainly statements in Justice Kennedy's opinion, which support such a broad reading. Early on the opinion states, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"[39] a sentence that could be taken straight out of *On Liberty* (but pay attention to that word "certain" before "intimate conduct").[40] Later, the Court quotes *Casey*, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[41] Towards the end of the opinion the Court says:

> [This] case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'[42]

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[36] *See generally* JOHN STUART MILL, ON LIBERTY (Gateway 1955) (1859).

[37] *Id.* at 13.

[38] *Id.* at 17. Perhaps the most comprehensive elucidation of a Millian approach to the criminal law is JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1984-88).

[39] *Lawrence*, 123 S. Ct. at 2475.

[40] And several sentences earlier, in the very first line of the opinion, the Court says "[l]iberty protects the person from unwarranted government intrusion into a dwelling or other private places." *Id.*

[41] *Id.* at 2480 (quoting *Casey*, 505 U.S. at 850). As we shall see, the fact that the Court draws here on *Casey* is an indication that its method may be more limited than this quote suggests.

[42] *Id.* at 2484 (quoting *Casey*, 505 U.S. at 847). Note again the quote from *Casey*, and the reference to "sexual practices common to a homosexual lifestyle." I argue that both of these features point to a possible limit on the scope of the liberty interest, which the Court recognizes.

A variety of scholars have read *Lawrence* this broadly.[43] Some, including leading libertarian scholar Randy Barnett,[44] applaud it. Others condemn it.[45] Justice Scalia's dissent fears the majority sweeps broadly as well. He cautions that it "effectively decrees the end of all morals legislation."[46] He also warns that "the people, unlike judges, need not carry things to their logical conclusion"[47] suggesting the majority has set in motion a powerful logic that will apply well beyond the facts of *Lawrence* itself.

If the Court really has gone that far, it would be a major event indeed. Logic would not be able to cabin such a decision to sex-related behavior. Recognizing an open-ended recognition of a zone of individual autonomy to engage in acts that do not harm others would raise the specter of a return to the *Lochner* era.[48] Yet, in *Griswold*, the case that began the modern line of cases recognizing unenumerated rights, the Court was careful to disavow *Lochner*.[49] Nor does the Court ever explicitly state that the government can only criminalize behavior that causes harm to others. Given this history, we should try to find a way of understanding *Lawrence* that does not put us quite so far on the road back to *Lochner*.

3. The Liberal Burkean Approach: "This One is Just Right"

What I call the liberal Burkean approach mediates between the conservative Burkean approach and the Millian approach. Like conservative Burkeans, liberal Burkeans start with traditional practices and norms.

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[43] *See* Eugene Volokh (July 17, 2003), *available at* http://volokh.com/2003_07_13_volokh_archive.html; Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming March 2004).

[44] *See* Randy E. Barnett, *Kennedy's Libertarian Revolution:* Lawrence v. Texas, CATO SUPREME COURT REV. 21(2002-03). Barnett reads *Lawrence* as extending beyond the realm of sexual autonomy, and returning to something close to *Lochner*.

[45] *See, e.g.*, Jeffrey Rosen, *Sex Appeal*, THE NEW REPUBLIC (June 30, 2003), *available at* http://www.tnr.com/docprint.mhtml?i-express&s-rosen063003.

[46] *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

[47] *Id.* at 2497.

[48] It is interesting to note, though, that Mill himself did not think that the harm principle applied to economic trade, because "trade is a social act" which affects the interests of others. *See* MILL, *supra* note 36, at 140. Mill did generally advocate a laissez-faire policy for trade, but used somewhat different arguments. *See id.* This might give one Millian grounds for not extending the strong protection of liberty into the economic realm, as the *Lochner* line did. It is unclear to me whether Mill's distinction really holds up. Perhaps most commercial or economic behavior does have greater impact on third parties than most sexual behavior, but I don't think the point is obvious or simply true.

[49] *See Griswold*, 381 U.S. at 481-82. "Overtones of some arguments suggest that Lochner v. State of New York should be our guide. But we decline that invitation . . . ." *Id.* At about the same time, the Court adamantly restated its rejection of the *Lochner* line in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*

However, liberal Burkeans do not stop there.[50] Rather, they recognize that over time we may learn how to improve some of those old practices, and jettison some old prejudices. In considering how far our institutions should evolve, the Millian harm principle strongly influences the analysis, since the Millian principal represents a powerful abstract statement of the love of liberty so central to American tradition. And yet, liberal Burkeans are reluctant to follow that principle all the way to its logical conclusion, choosing rather to see that current beliefs and values should limit liberty.

Several key moments in the evolution of the modern cases follow this liberal Burkean approach. One crucial moment is Justice Harlan's dissent in *Poe*, which laid the conceptual groundwork for *Griswold*. This extended passage is worth quoting, as it quite explicitly sets out what I call the "liberal Burkean approach":

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance, which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court, which radically departs from it, could not long survive, while a decision, which builds on what has survived, is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[51]

Jump ahead to *Casey*, the decision, which (largely) saved *Roe*, and perhaps even the entire *Griswold* line. In their decision for the Court, Justices O'Connor, Kennedy and Souter rely at length on Justice Harlan's dissent in *Poe*. In responding to those who worry that going beyond the conservative Burkean approach would give judges too much discretion, they

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[50] I do not care to speculate whether Burke himself is better described as a conservative, or a liberal Burkean as I use those terms here. Some passages in Burke support a very strong bias in favor of ancient principles and institutions. Other passages recognize the need for gradual change and improvement. Much of the debate in the context here will depend upon how one understands the proper institutional rule for the Supreme Court of the United States—a question on which Burke himself gives us no guidance. Ernest Young has argued strongly that Burke's writings support what I call the liberal Burkean approach. *See* Young, *supra* note 30; *see also* Carpenter, *supra* note 24. Others read those writings as supporting what I call the conservative Burkean approach. *See* J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19 (2000).

[51] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

quote the above passage in its entirety.[52]

The *Casey* opinion also has important language trying to further define the scope of liberty protected in the *Griswold* line. We have already seen two of these passages quoted by the *Lawrence* majority.[53] Another crucial passage, also quoted by *Lawrence*, is:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[54]

This passage can be taken as a strong Millian statement. However, in context its Millian edge is tempered by a liberal Burkean method of reasoning tied closely to past precedents and existing institutions.

The third notable moment to consider preceding *Lawrence* is Justice Souter's concurrence in *Washington v. Glucksberg*. There, in a case that tried to burn the conservative Burkean approach firmly into the Supreme Court jurisprudence, Justice Souter kept alive the liberal Burkean approach. Souter leans heavily on the *Poe* dissent and on *Casey*. He then states his Goldilocks position quite clearly:

> My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level.[55]

In sum, Justice Souter recommends essentially a common law method, one that pays, "respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The 'tradition is a living thing,' albeit one that moves by moderate steps carefully taken."[56]

The *Lawrence* majority opinion is best understood in light of these prior cases.[57] Of particular note is the *Casey* opinion, in which Justice Kennedy

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[52] *See Casey*, 505 U.S. at 849-50.

[53] *See Lawrence*, 123 S. Ct. at 2480-82.

[54] *See id.* at 2481 (quoting *Casey*, 505 U.S. at 851). Alas, I cannot read this passage without hearing Madeleine Kahn singing, *Sweet Mystery of Life*, in YOUNG FRANKENSTEIN.

[55] Washington v. Glucksberg, 521 U.S. 702, 765 (1997) (Souter, J., concurring).

[56] *Id.* at 770 (internal citations omitted). It is odd that Justice Kennedy signed on to Justice Scalia's opinion in *Glucksberg*, and then a few years later wrote *Lawrence*. Yet, we have already seen that *Lawrence* is not consistent with the methodology of *Glucksberg*.

[57] For recent scholarly contributions which take a liberal Burkean approach, see Young, *supra* note 30; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

wrote the relevant portion.[58] We have seen that key passages in *Lawrence*, which could be taken in a strong Millian way, are drawn in part from opinions which are liberal Burkean in outlook. *Lawrence* fits within the liberal Burkean approach, although it could certainly be placed in the Millian box as well.[59] Conservative Burkeans are just going to have to disavow it. Of course, the liberal Burkean position leaves one to wonder how far the liberty interest extends. I will explore that point when I turn to the case of incest. But first we must consider how *Lawrence* handles the second part of its analysis.

B. *Asserted State Regulatory Interests*

At times, the Court has seemed to follow a relatively straightforward scheme in reviewing a state's asserted regulatory interests. If the regulation infringes on a fundamental liberty, then the Court applies strict scrutiny, and the state must show that the regulation is narrowly tailored to advance a compelling state interest.[60] If a fundamental liberty interest is not implicated, then the regulation receives only rational basis scrutiny, and the state need only show that the regulation is rationally related to a legitimate state interest.[61]

Lawrence's place within this traditional scheme is puzzling. As Justice Scalia points out, nowhere does the majority say that it has identified a "fundamental liberty interest,"[62] and when it comes to reviewing the state's asserted interests, it does not use the language of strict scrutiny. The majority never really identifies any asserted state interest at all; it simply says that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[63] The phrase "legitimate state interest" suggests rational basis review, not strict scrutiny.

Yet one can argue that implicitly the Court did engage in strict scrutiny. One hallmark of strict scrutiny as opposed to rational basis is that under the latter, the Court is willing to consider any legitimate state interest, even if that interest did not actually motivate the legislation, and even if the state itself does not present that interest. In *Lawrence*, the only interest that the

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58 *See* Barnett, *supra* note 44.

59 The most problematic element of *Lawrence* from a Burkean viewpoint is its rather cavalier treatment of *stare decisis*, an important principle for a traditionalist. This cavalier view is also at odds with the *Casey* plurality, as Justice Scalia points out in his dissent. *See Lawrence*, 123 S. Ct. at 2488-91. But, a liberal Burkean is willing to overturn precedent when times have clearly passed the precedent by. American culture has changed rapidly since *Bowers*, which was already rather creaky when it was decided.

60 *See Roe*, 410 U.S. at 155.

61 *See Glucksberg*, 521 U.S. at 728.

62 *See Lawrence*, 123 S. Ct. at 2492 (Scalia, J., dissenting).

63 *See id.* at 2484.

state gave in its brief was the moral disapproval of sodomy. However, amici briefs for the state of Texas suggested at least one other interest, public health, clearly a legitimate state interest. According to the amici, sodomy facilitated the spread of sexually transmitted diseases. During the heyday of the AIDS epidemic, the disease was linked mainly to gay sex, so making such sex illegal would seem rationally related to protecting public health against the spread of the deadly disease. Yet, the Court ignored this rationale. That may make sense under strict scrutiny, where one focuses on the interests that actually supported the legislation. Moreover, under strict scrutiny, it would be hard to show that the sodomy statute was narrowly tailored to prevent disease transmission. But under ordinary rational basis review, the public health justification would seem to have saved the statute.[64] This seems to show that the Court was not engaging in rational basis review.[65]

Another possibility is that the Court has introduced "rational basis with bite" into its liberty jurisprudence. "Rational basis with bite" refers to a line of equal protection cases, which have applied a less lenient version of rational basis review in situations where a law has burdened disfavored groups who do not receive strict or intermediate scrutiny review.[66] The most recent and relevant of these cases is *Romer v. Evans* (another opinion by Justice Kennedy), which found a state constitutional amendment burdening gays to be motivated solely by animus, and held that such animus was not a legitimate state interest.[67] Justice O'Connor in her *Lawrence* concurrence follows *Romer* in finding that the same-sex Texas sodomy statute was motivated by unconstitutional animus against gays.[68] When the majority opinion found that no *legitimate* state interest justified the intrusion into the private lives of gay people, perhaps it was saying that giving expression to a majority's moral disapproval of individual behavior is not a legitimate interest. Indeed, the Court stated that, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[69] Related to

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[64] The statute is clearly overbroad. Lesbian sex, for instance, poses very little public health risk. However, I doubt it is too overbroad for ordinary rational basis review, especially when one considers that gay men probably significantly outnumber lesbians, or at least that incidents of gay male sex occur much more frequently than lesbian sex.

[65] Eugene Volokh has made a similar argument. *See supra* note 43.

[66] *See* Romer v. Evans, 517 U.S. 620 (1996) (homosexuals); Cleburne, TX. v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (mentally retarded); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (hippies); *see also* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 483-85 (2001); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by any Other Name*, 62 IND. L.J. 779 (1987); Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 53-71 (1996).

[67] *See Romer*, 517 U.S. at 634-35.

[68] *See Lawrence*, 123 S. Ct. at 2486-87 (O'Connor, J., concurring).

[69] *See id.* at 2483 (quoting Justice Stevens' dissent in *Bowers*).

this possibility, conceivably the Court is moving away from the idea of levels of scrutiny to a case-by-case comparison of the strength of the individual's protected interest to the strength of the state's interests and how well those interests fit the statute. Some think the Court may move that way in its equal protection jurisprudence and similar analysis could apply to *Lawrence*.[70]

The majority's sparse discussion leaves major questions open. Is all moral disapproval now an illegitimate state interest, or will the Court continue to allow moral disapproval to justify statutes where that moral disapproval is of a certain sort, and if so, what sort?[71] My guess is that where moral disapproval is of long enough standing and still widely agreed upon by most Americans, the Court would be unlikely to overturn a law reflecting such disapproval- such caution would be in keeping with a liberal Burkean approach. One may also question whether moral disapproval is the most likely explanation for a law's existence where other legitimate interests could also justify the law. It may be that where the Court finds a law tainted by the illegitimate purpose of moral disapproval, it will now look more closely at other interests to see whether the state actually relied on such interests, and how well those interests justify the law. That is how the Court appears to proceed in the equal protection "rational basis with bite" cases like *Romer*.[72]

This is all speculation, as the Court gives us so little to go on in *Lawrence* when it comes to the nature of a state's interests. I now turn to incest statutes, where we shall see that these questions become quite important.

C. *Applying the Analysis to Incest Statutes*

The state statutes criminalizing incest come in a great variety of forms.[73]

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[70] *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2274-79; Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. L. 372 (2002); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

[71] Many have long debated whether moral disapproval alone can justify a law. High points include MILL, *supra* note 36; JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (H. Holt and Co. 1873); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford University Press 1965); H.L. A. HART, LAW, LIBERTY AND MORALITY (Stanford University Press 1963); FEINBERG, *supra* note 38.

[72] It makes sense that the Court's analysis resembles these equal protection cases, as much of the argument in *Lawrence* seems to resonate with an equal protection analysis. For some evidence that the Court sees it that way, consider its decision to remand for reconsideration in light of *Lawrence* a Kansas case involving an 18 year old jailed for 17 years for statutory rape, where his sentence would have been much shorter had the sexual contact been with a girl rather than a boy. *See* Limon v. Kansas, 123 S. Ct. 2638 (2003); Charles Lane, *Gay Rights Ruling Affects Kan. Case; 17-Year Term in Teen Sex Case at Issue*, WASH. POST, June 28, 2003, at A08.

[73] I am concerned with laws that criminalize incestuous acts. A parallel set of laws voids incestuous marriages. In a number of states, the two laws are structurally interrelated: the statute criminalizing incestuous acts will refer to the statute voiding incestuous marriages to define which types of relationships are covered. *See, e.g.*, CAL. PENAL CODE § 285 (West 1977) (criminalizing incest); CAL. FAM. CODE § 2200 (West 1994) (defining void marriages).

Table 1 lays out some of the variations. All but three states criminalize some forms of consensual adult incest.[74] Every state that does so criminalizes at least incest between parents and their children.[75] All but one state that criminalizes incest also applies its laws to sex between siblings.[76] All but six states that criminalize incest extend their laws to sex between aunts or uncles and nephews or nieces.[77] Twenty-two states criminalize sex between stepparents and stepchildren,[78] although some provide for a consent defense between adults.[79] Eight states criminalize sex between first cousins,[80] although two of those states allow the cousins to marry and have sex, if either they are old enough or if at least one of them is sterile.[81] The geography of these eight is a bit less striking than the sodomy laws- the South and West are well represented (Arizona, Mississippi, Nevada, Oklahoma and Utah), but so are three states from the upper Midwest (North Dakota, South Dakota and Wisconsin). The twenty-two states banning stepparent and stepchild sex tend to be in the South and West, with some exceptions.[82] The statutes also vary in how they handle adopted children.[83] As we shall see, the strength of the constitutional case against the statutes may vary depending on exactly what type of relationship is at issue.

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[74] *See infra* Table 1. Rhode Island repealed its incest law in 1989. *See* R.I. GEN. LAWS §§ 11-6-3, 11-6-4 (repealed 1989). Michigan and New Jersey both criminalize some incestuous sex involving persons under 18, but not between adults. *See* MICH. COMP. LAWS ANN. §§ 750.520b, 750.520c (West 1984); N.J. STAT. ANN. § 2C:14-2 (West 1979). A good brief overview of incest laws as of 1996 is RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 129-42 (University of Chicago Press 1996); Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998). A more detailed, though by now somewhat dated, set of tables similar to Table 1 can be found in the appendix to Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 298-309 (1984).

[75] *See infra* Table 1.

[76] *See id.*; *see also* OHIO REV. CODE ANN. § 2907.03 (Andersen 1994).

[77] *See infra* Table 1. The six states that do not are Illinois, Kentucky, Montana, Ohio, Washington and Wyoming. *See* ILL. COMP. STAT. ANN. ch. 720, para. 5/11-11 (West 1986); KY. REV. STAT. ANN. § 530.020 (Michie 1994); MONT. CODE ANN. § 45-5-507 (1995); OHIO REV. CODE ANN. § 2907.03 (Andersen 1994); WASH. REV. CODE ANN. § 9A.64.020 (West 1990); and WYO. STAT. ANN. § 6-4-402 (Michie1993).

[78] *See infra* Table 1.

[79] *See, e.g.*, MONT. CODE ANN. § 45-5-507 (1995); S.D. CODIFIED LAWS § 22-22-19.1 (Michie 2003). For a more detailed breakdown of the laws affecting affinity relationships, see Bratt, *supra* note 74.

[80] *See infra* Table 1; ARIZ. REV. STAT. ANN. § 13-3608, § 25-101 (West 1996); MISS. CODE ANN. § 97-29-5, § 93-1-1 (1960); NEV. REV. STAT. ANN. § 122.020, § 201.180 (Michie 1995); N.D. CENT. CODE § 12.1-20-11, § 14-03-03 (1989); OKLA. STAT. tit. 21, § 885, tit. 43, § 2 (1969); S.D. CODIFIED LAWS § 22-22-19.1, § 25-1-6, § 25-1-7 (Michie 2003); UTAH CODE ANN. § 76-7-102 (1983); WIS. STAT. ANN. § 944.06, § 765.03 (West 1979).

[81] *See* ARIZ REV. STAT ANN. § 25-101 (West 1996); WIS. STAT. ANN. § 765.03 (West 1979). The Arizona statute allows cousins to marry if one of them is 65 or older; the Wisconsin statute allows marriage if the woman is 55 or older.

[82] *See infra* Table 1.

[83] *See* MODEL PENAL CODE § 230.2 Offenses Against the Family (Proposed Official Draft 1962) [hereinafter MPC].

Let us now apply what we have learned about *Lawrence*'s analysis, such as it is, to the incest laws.[84] Does consensual adult incest (incestuous sex, not marriage) fall within the zone of intimate behavior covered by the Constitution's guarantee of liberty? Befitting the Court's liberal Burkean analysis, I start with a brief historical sketch of the treatment of incest, but do not end there. Almost every society has sought to discourage some forms of incest.[85] The Bible contains prohibitions against various forms of incest.[86] Incest was not prohibited at common law, but was instead handled by the ecclesiastical court, and was not prohibited by statute in England until 1908.[87] American states criminalized incest early on.[88] There has been a gradual move to limit the extent of the relationships covered by the statute.[89] The Model Penal Code does not cover step-parents and children or cousins, and it brackets uncles, aunts, nephews and nieces.[90] At the time the Model Penal Code was drafted, eighteen states prohibited sex between first cousins,[91] and that number has now dropped to eight.[92] Thus, incest between first cousins today is forbidden by fewer states than forbade sodomy before *Lawrence*,[93] incest between step-parents and children is forbidden by a few more states than forbade sodomy, while the closer forms of incest are forbidden by many more states—noteworthy figures if we take the number of

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[84] Several courts have held that incest statutes do not violate the Due Process Clause, mostly with little discussion. *See* Smith v. State, 6 S.W.3d 512 (Tenn. Crim. App., 1999) (holding that the conviction for incest with uncle did not violate state constitution's right to privacy, with unusually lengthy discussion following a conservative Burkean approach); State v. Buck, 757 P.2d 861 (Or. Ct. App., 1999) (holding that a conviction for incest with adult stepdaughter did not violate the right to privacy); Byrom v. State, 648 S.W.2d 440 (Tex. Ct. App., 1983) (holding that incest statute is not "an unwarranted Governmental interference in the private sexual relations of its citizens"); People v. Hurd, 85 Cal. Rptr. 718 (Cal. Ct. App., 1970) (holding that an incest statute not an unconstitutional infringement of right to privacy as applied to incest between father and minor daughter). *But see* Israel v. Allen, 577 P.2d 762 (Colo. 1978) (holding that a statute prohibiting marriage between brother and sister related by adoption violates equal protection). Several scholars have argued that prohibitions on certain incestuous marriages violate the constitutional right to marry. *See* Bratt, *supra* note 74; Christ 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 (Winter 2000); Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993).

[85] *See* MPC, *supra* note 83, at 398; *see also* Katharine B. Silbaugh, *Sex Offenses: Consensual, in* ENCYCLOPEDIA OF CRIME & JUSTICE 1465, 1469 (Joshua Dressler ed., 2nd ed. 1999-2002) [hereinafter Silbaugh]; Lois G. Forer, *Incest, in* ENCYCLOPEDIA OF CRIME AND JUSTICE 880-81 (Sanford H. Kadish ed., 1983) [hereinafter Forer].

[86] *See* Leviticus 18: 7-18; *see also* MPC, *supra* note 83, at 398 n.5; Forer, *supra* note 85, at 881.

[87] *See* MPC, *supra* note 83, at 398; Forer, *supra* note 85, at 881.

[88] *See* MPC, *supra* note 83, at 400.

[89] *See id.* at 401.

[90] *See id.* at 397. The language in the Model Penal Code prohibiting those relationships is put in brackets, signaling to adopting legislatures that there is controversy concerning those terms.

[91] *See id.* at 401; Bratt, *supra* note 74, at 284.

[92] *See supra* note 80 and accompanying text.

[93] At the time of *Lawrence* thirteen states had sodomy laws.

states criminalizing behavior as a rough estimate of the current state of social norms. The trend toward decriminalizing first cousin incest roughly resembles the trend for sodomy, while the trend toward decriminalizing incest between step-parents and step-children is weaker and the trend toward decriminalizing closer relationship incest is non-existent.

Does this history matter? For a conservative Burkean, the answer is yes, and incest is clearly not a fundamental interest with ancient roots. But neither is sodomy. For a Millian, the answer is no. If incest falls within the general zone of protected intimate behavior, abstractly defined, then it receives protection, although it might be that there are legitimate reasons for regulating it based on harm to others. It seems hard to distinguish an adult brother and sister having sex in the privacy of their own home from two unrelated adult men having sex in the privacy of their own home, in terms of their own interests being at stake.

For a liberal Burkean, the history does matter, but it is not as dispositive as it is for the conservative Burkean. The history suggests a long, still strong, history of prohibiting incest, so that we should be careful before extending constitutional protection to it. On the other hand, as with sodomy, we have in recent years seemed to be moving toward an understanding that at least some types of incest (between cousins, and perhaps between various step-relatives) are not proper matters for the law to prohibit. Moreover, there appears to be a close analogy with sodomy, so that a common law approach to extending the zone of privacy may suggest extending *Lawrence.* Is there any non-arbitrary way to distinguish the two? Perhaps. Consider the "mystery of human life" passage.[94] Maybe prohibiting sodomy is particularly damaging because it severely limits the ability of a whole class of people, those attracted only to others of the same sex, to develop intimate relationships.[95] In contrast, there are few if any people deeply predisposed to committing incest.[96] Incest laws will frustrate people who want to engage in particular relationships, but will not prevent them from developing any sort of intimate relationship. I find this argument somewhat plausible, though I suspect that those who have fallen deeply in love with a close

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94 *See supra* note 54 and accompanying text.

95 Andrew Sullivan has made an argument along these lines. *See* Andrew Sullivan, *Citizens: In Defense of* Lawrence, THE NEW REPUBLIC, July 21, 2003, *at* http://www.tnr.com; *see also* Martha C. Nussbaum, *Millean Liberty and Sexual Orientation: A Discussion of Edward Stein's* The Mismeasure of Desire, 21 L. & PHIL. 317 (2002). Note that this argument does not apply very well to straight sodomy, which the Court presumably also protected in *Lawrence* (at least in dicta), but then the Court largely ignores straight sodomy in its opinion.

96 The nature of the disposition to engage in homosexual sex is itself highly debated. *See* EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION (Oxford University Press 1999) for a survey of this debate. It is not clear whether this matters to the Court, but it might, particularly given the equal protection elements of *Lawrence.*

relative may find that it slights their legitimate interests—saying that you can go ahead and love all sorts of other people is rather cold comfort if you risk jail for bonding with the person whom you actually love. Note that this argument draws deeply upon shared social understandings of what matters to people—understandings that change over time. Thus, many historians think that until relatively recently people did not conceive of homosexuality as a major classification of desire;[97] perhaps some day our understanding of people who engage in incestuous relationships will change as well. This is one important way in which the legal concepts of *Lawrence* point to prevailing social norms and concepts, and thus the formalist inquiry of necessity must look outside itself.

Suppose that one does not buy the distinction just suggested and thinks that at least some forms of incest are constitutionally protected. The inquiry must then move to the second step and consider the state's justification for regulating incest. The state's justification will receive either strict scrutiny or rational basis review with bite.[98] One leading justification is clearly buttressing prevailing moral or religious values.[99] This risks being treated as an illegitimate interest in light of *Lawrence*, although I will shortly suggest that this might not be so. But first, several other more clearly legitimate state interests are more strongly present in the case of incest than that of sodomy.

One of these is the risk of genetic defects posed for the offspring of incestuous relations. This a widely-cited justification for incest laws,[100] and some incest laws have elements structured with this in mind.[101] However, the genetic justification has problems. Many of the laws are quite overbroad in *what* they prohibit, same sex incest for instance[102] or in *who* they prohibit since sexual relations between stepchildren and adopted children pose no genetic problems. Indeed, a more narrowly tailored law would simply make it illegal to have children through certain incestuous couplings. The risk to the offspring of first cousins is quite mild.[103] Even for closer relationships,

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97 Nor, say some historians, did people conceive of heterosexuality as a major classification of desire. *See* STEIN, *supra* note 96, at 100-01.

98 This is true unless the Court has abandoned tiers of scrutiny and moved to a sliding scale. *See supra* Part I.B.

99 *See* MPC, *supra* note 83; Silbaugh, *supra* note 85, at 1469; Bratt, *supra* note 74, at 281-89; Mahoney, *supra* note 84, at *28; Metteer, *supra* note 84, at 274-75.

100 *See* MPC, *supra* note 83, at 402-05; Forer, *supra* note 85, at 883; Silbaugh, *supra* note 85, at 1469.

101 Most striking are the provisions in Arizona and Wisconsin, which allow first cousins to marry only if they are over 55 (Wisconsin) or 65 (Arizona) or sterile. *See supra* note 81 and accompanying text. Also relevant is the fact that some statutes limit prohibited sexual conduct to vaginal sex between a man and a woman. *See, e.g.*, FLA. STAT. ANN. § 826.04 (West 2003). Thus, in a state like this gay incest is now legal.

102 *See, e.g.*, KAN. STAT. ANN. § 21-3602 (2002) (including same-sex incestuous sodomy as violation of incest statute).

103 *See* Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, April 4, 2002, at A1 (reporting on a review of six major studies).

who is supposed to be harmed? Moreover, there is also a heightened chance of *positive* traits through recessive genes.[104] Even as to negative genes, some scientists think that society may benefit from incest. What is special genetically about the offspring of close relatives is that they are more likely to pair two chromosomes with a recessive gene. A recessive gene is a characteristic that will be seen in the person only if the genes from both the father and the mother contain that characteristic. If the characteristic is good, that is good for society. If it is bad, that is bad for the resulting child. However, bad for the child may not be bad for society. If the characteristic is bad enough, the child will not have children, eliminating those genes from the general pool. In the long run, that may be better for society than to have those recessive genes continue lurking in the pool over generations, where they may eventually be expressed in greater numbers.[105] These weaknesses might make the genetic justification fail strict scrutiny, although the justification would seem strong enough to survive rational basis with bite (for core forms of incest), at least as understood so far.

Another leading justification is protecting relations within the family from becoming overly-sexualized.[106] This justification can explain the inclusion of at least some affinity relations and adopted children, although it has a harder time with cousins. The argument comes in several variants. Prohibiting sex between adult relatives may affect how adults behave toward under-age relatives. If they knew that relations with such young relatives would be legal once they were old enough, they might be more inclined to see those children as sex objects. However, the incentives could work in the opposite way: adults might be more likely to hold off on making advances on under-age relatives if they knew that the conduct, while illegal at the moment, would be legal if they waited long enough. On the other hand, if adult sex between relatives were illegal, they would see no gain in waiting. Moreover, sodomy laws may also discourage sexual advances without consent, although *Lawrence* does not specifically protect those laws.

Incestuous behavior may also impose negative external pressures on the community. If people start seeing incest as a possibility, intimate non-sexual conduct between relatives may be seen as tainted. A legal prohibition may help keep incest unthinkable. Yet, this argument also has its problems. The incest taboo would still remain without the law and incestuous sex would remain rare.[107] Indeed, one can argue that making incest illegal helps make

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104 *See* Silbaugh, *supra* note 85, at 1469.

105 *See* Bratt, *supra* note 74, at 267-76 for a good discussion of the genetic implications of incest; *see also* MPC, *supra* note 83. Moreover, the genetic argument also has a eugenic smell that is rather unpleasant. *See* Bratt, *supra* note 74, at 276-81.

106 *See* MPC, *supra* note 83; Forer, *supra* note 85, at 883; Bratt, *supra* note 74, at 289-96; Mahoney, *supra* note 84, at 28-29; Metteer, *supra* note 84, at 275-78.

107 *See* RICHARD A. POSNER, SEX AND REASON 200 (Harvard University Press 1992).

it attractive precisely because it is forbidden.[108] Moreover, a similar argument also applies to same-sex sodomy. Once gay relationships become thinkable, certain same-sex conduct once thought of as non-sexual will be tainted, making straight people less willing to do it (think of football players patting each other on the butt in celebration). I think this is actually a major part of the cultural unease with homosexuality. And yet, it does not justify the sodomy laws.

A final concern with sexualizing families is that consent becomes harder to determine or even define given the authority relationships within the family. However, insofar as the concern is sexual imposition, then laws could be more narrowly tailored to get directly at the problem.[109] Since we are focused on relationships between adults it appears paternalistic to assume that most such relationships would be coercive in a way that courts could not observe.

Is reinforcing moral norms necessarily illegitimate (as the leading justification for a law infringing on liberty) in the wake of *Lawrence*? The answer is unclear, but I would hesitate before saying yes. Where a norm is near-universal, and it is generally unquestioned that the norm should be enforced legally, a liberal Burkean approach might be willing to allow such a norm to justify a law. That description probably applies to the norm against parent/child and sibling incest, and most likely to aunt/uncle/niece/nephew incest as well, although it remains more questionable for step-parents (and more questionable still for other sorts of step-relations) and cousins. If I am right on this point then here again our formalist inquiry must give way to a consideration of how judges should perceive general social norms.

The bottom line? The core of incest statutes—parent/child, sibling, and probably aunts et. al.—would most likely appear safe from *Lawrence*, both because the behavior may not fall within the liberty interest, and because adequate state interests justify such rules (although if strict scrutiny applies, the states might be in a difficult situation even here). Prohibitions on step-parent and step-child sex are harder to justify, but I would guess would still pass muster, for now. Step-siblings and other sorts of step-relations or adoptive relations, though, are harder to justify,[110] and the few remaining prohibitions on cousin incest could also be vulnerable, though only if the courts push *Lawrence* pretty aggressively. Most actual prosecutions

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108 *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 45 (Robert Hurley trans., Vintage Books 1978).

109 The Michigan criminal sexual misconduct law, for instance, refers to situations where the "actor is in a position of authority over the victim and used this authority to coerce the victim to submit." MICH. COMP. L. ANN. § 750.520b(1)(b)(iii) (West 1984).

110 *See* Israel v. Allen, 577 P.2d 762 (Colo. 1978) (statute prohibiting marriage between brother and sister related by adoption violates equal protection).

for incest involve a father's contact with an under-age daughter, which can clearly still be criminalized under *Lawrence*.[111] This suggests a chance for a slow, common-law approach to examining incest laws, taking on the most suspect applications of those laws first. The application of *Lawrence* to incest has helped demonstrate many holes and vague points in that case's analysis, and has also shown that *Lawrence*'s logic itself seems to point outside of precedent when examining prevailing norms.

II. REALIST INQUIRY

A legal realist inquiry views the Court as a political institution and asks how it is likely to respond to future cases given both the preferences of its members and the political constraints which they face. The direct policy preferences of the individual justices matter, but so do a variety of other factors. Let us look at them in turn, and see how those factors compare in the differing cases of sodomy and incest.

I start with the direct policy preferences of the justices. Justice Scalia complains that the Court has "largely signed on to the so-called homosexual agenda,"[112] a code-term which shows that Justice Scalia himself has signed on to a highly conservative religious agenda. The opinion does read as if Justice Kennedy is rather sympathetic to the problems sodomy laws create for gay people, a position that no doubt reflects the majority's personal policy preferences. How is that likely to translate to the case of incest? On the one hand, justices are, as Justice Scalia remarks,[113] drawn from the legal culture, which is well-educated and thus tends to be relatively liberal in its attitude on sexual matters. On the other hand, justices are typically not youngsters, which would tend to make them more conservative on sexual matters. It is not clear what the net effect of these two factors is. Either way, most people today are probably more likely to endorse criminalizing incest (at least core forms of incest) than sodomy, so most likely the same should apply to the attitudes of the justices.

Direct policy preferences are not the only relevant preferences of the justices. They also have preferences as to how they carry out their jobs. One part of being a good judge is following the rule of law, and most judges believe that showing restraint in imposing their own values on society is a part of that function.[114] Justice Thomas's dissent in *Lawrence* is a nice example as he clearly takes pride in demonstrating that he can distinguish between his own personal preferences (sodomy laws are uncommonly silly) and what he thinks the law dictates (sodomy laws are not

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111 *See* Bratt, *supra* note 74, at 257.

112 *See Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

113 *See id.*

114 *See* RICHARD A. POSNER, OVERCOMING LAW 133 (Harvard University Press 1995).

unconstitutional).[115] This factor could cut both ways in the case of incest. On the one hand, a justice who personally is inclined to think that consensual adult incest should not be illegal may think that holding incest laws unconstitutional would be too drastic a jump from the existing case law. On the other hand, a justice personally repelled by incest may think that it is too hard to distinguish incest and sodomy in a non-arbitrary way, and hence will feel compelled to hold incest laws unconstitutional.[116] Thus, the realist inquiry points back to the formalist inquiry, which as Part I suggests that is rather indeterminate, and so it is not clear how strongly this factor would operate. It may depend on how the *Griswold/Lawrence* line of cases develops in the interim. For instance, if the Court were to strike down a fornication law and in the process clearly state that the *Griswold* line applies generally to private, consensual sexual relations between adults, it might have been difficult to distinguish the incest laws. If the Court instead were to uphold a fornication law, stating that the liberty interest is weaker than in *Lawrence* then incest laws would be more difficult to strike down.

Another factor that matters to judges is reputation—how well others (lawyers, political elites, and the general public) believe they are doing their job. This is why Justice Scalia attacks the professional legal culture in his dissents in both *Lawrence* and *Romer*.[117] In part, this depends on whether they are seen as dispassionately fulfilling their role as judges, and thus harks back to the previous point, but in part it also depends on the direct policy preferences of the people judging the justices. Thus, both general social norms and the norms of lawyers will influence the Court.

More directly, political factors also influence the Court. In constitutional cases, it is hard for other political actors (Congress, the President and other politicians) to overturn the Court's decisions, given the difficulty of amending the Constitution, although such a threat can exist in more extreme cases.[118] More importantly, if the Court displeases the other two branches on an important issue, it risks them appointing future justices with different preferences who will move the Court in a new direction. Everyone on today's Court surely remembers the defeat of Robert Bork's nomination with critics especially angry about his criticisms of *Roe* and *Griswold*.[119] Interestingly, Justice Kennedy made it to the Court because the

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115 *See Lawrence*, 123 S. Ct. at 2498 (Thomas, J., dissenting).

116 This would be what Eugene Volokh refers to as an "equality slippery slope." *See* Volokh, *supra* note 7, at 1068. We have seen that in his dissent, Justice Scalia warns against this risk. *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting) and accompanying text.

117 *See Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting); *Romer*, 517 U.S. at 652-53 (Scalia, J., dissenting). Of course, Justice Scalia's dissents in *Romer* and *Lawrence* demonstrate that not all justices respond to the legal community in the same way, but if Justice Scalia is right about his colleagues, it also shows that many do respond to reputation.

118 *See* Eskridge, *supra* note 70, at 2372 n.1434.

119 *See id.* at 2248.

Congress rejected Bork's nomination. This suggests that the Court will be wary before making a decision that departs too far from the preferences of prevailing political powers. *Lawrence* itself is somewhat surprising in this respect, given Republican control of the Senate and Presidency,[120] so moving further in a direction that might seem too extreme would be quite risky for the Court's more liberal members.

This discussion leads us to one major difference between sodomy and incest. A strong gay political movement exists opposing sodomy laws. This movement helped defeat Bork, has succeeded in passing a variety of gay positive laws at the local and state level, and has helped change public norms.[121] No analog of remotely similar strength exists for incest.[122] One major political force concerned with family law is the women's movement, but feminists who typically support gay rights have focused on *increasing* enforcement of incest laws, although typically in non-consensual contexts involving an adult and a child. The conservative family values movement, which supported sodomy laws, would also presumably oppose attempts to decriminalize incest. Thus, there seems no large political constituency available to reform incest laws.[123] *Lawrence* may reinforce the political momentum of the gay movement, and hence pave the way for further gay rights gains, but no such effect seems likely for incest.[124] The role of the gay rights movement politically ties to a point made in Part I: the liberty interest might be stronger for sodomy than for incest because sodomy laws more drastically limit the ability of gay people to pursue happiness and intimacy. This may in part explain why there is a gay rights movement but no incest rights movement. Also, people in an incestuous relationship may be less visible to strangers than people in a same-sex relationship, giving the former less reason to organize. Furthermore, gay people are much more likely to socialize together than people who engage in incest, providing a basis for political organization. Thus, while both are in the small minority, gay people are a politically well-organized minority, while people who engage in incest are not. In addition, only miniscule amounts of people engage in incest. Incest thus does not have the natural protection against legal interference that straight sodomy has. Since many people engage in straight sodomy at

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120 Although President Bush's low-key response to the decision suggests that the Republican Party nationally does not see this issue as a winner.

121 *See* WILLIAM N. ESKRIDGE, JR., GAYLAW 139-41 (Harvard University Press 1999).

122 There are some incest advocates, see www.kissingcousins.com and www.cousincouples.com, but not on any level approaching the scale of the gay movement.

123 One possible exception is the growing number of immigrants from countries where cousin marriage is more common. William Eskridge has emphasized the importance of social movements for inspiring major constitutional changes. *See* Eskridge, *supra* note 70, at 2274-79.

124 In Volokh's typology of slippery slopes, *Lawrence* may lead to a political power or political momentum slippery slope for gay issues, possibly including gay marriage, but not for incest. *See* Volokh, *supra* note 7, at 1112-24.

some point in their lives it would much more difficult for legislators to declare such behavior illegal.

The final political factor to consider is general social norms. This concept is relevant to the direct policy preferences of the justices, to their reputation, to the general political balance of power, and as Part I suggests, it is also relevant to the explicit legal analysis in *Lawrence.* Justice Scalia complains that *Lawrence* reflects the norms of the legal culture and not the general population. In this he is almost surely wrong. The prevailing American view is personal dislike for gay sex combined with a belief that it is not appropriate to make such sex illegal.[125] *Lawrence* angered a vocal minority of social conservatives, but they are outside the American mainstream.[126] The low-key response to *Lawrence* by a conservative Republican president reinforces this impression.

What about incest and social norms? Because incest has no analog to the gay movement, issues surrounding incest have not been pushed in the public's face in the same way making it a topic that most people have not thought about nearly as much. The dwindling of laws prohibiting incest between cousins, with little visible protest, suggests that at least the more attenuated forms of incest no longer evoke great shock. That reinforces the conclusion of Part I that laws against cousin incest and step-relative incest might prove legally vulnerable after *Lawrence.* However, it appears unlikely that most Americans are currently willing to tolerate, even legally, the core forms of incest—parent/child, sibling, and probably uncle/aunt/nephew/niece.[127] Will the *Lawrence* decision help lead to a general liberalization of public norms concerning sex, including incest? I find it unlikely that Supreme Court decisions have that much impact on the general culture, particularly impact on an area far from the facts of the case

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[125] *See* ALAN WOLFE, ONE NATION, AFTER ALL 74 (Viking Press 1998) (arguing that most Americans disapprove of homosexual relations but do not think they should be illegal); The Williams Project, *Geography of Sodomy Seen as Obvious in Law Sodomy Ruling Applauded Here, at* http://www1.law.ucla.edu/~williamsproj/press/geography.html (June 27, 2003) (finding that a Gallup poll showed that 60% of those surveyed believed that homosexual relations between consenting adults should be legal); *70% of Americans Say Scrap Texas Sodomy Law,* U.K.Gay.Com (May 7, 2003), *at* http://uk.gay.com/headlines/4261 (demonstrating that a Harris Interactive poll showed that 74% of those surveyed said that the Supreme Court should overturn laws that criminalize same-sex sexual relations).

[126] As this was written, post-*Lawrence* polls showed some sign of an anti-gay backlash. A Gallup poll done after the case showed only 48% of those surveyed said homosexual relations between consenting adults should be legal. *See* Will Lester, *Poll Suggests Less Support of Gay Rights,* GUARDIAN UNLIMITED, July 29, 2003 (as opposed to 60% before the case). It is too soon to tell if this is a lasting trend. One possibility for the Gallup result is that the question refers to "homosexual relations," and some respondents may interpret that as a reference to marriage rather than sodomy. That language was the same in both polls, but gay marriage became quite a salient issue after *Lawrence* for a variety of reasons.

[127] In my brief research I have been unable to find any survey data on attitudes to incest laws.

itself.[128] However, we do not know much about the effect of the Court on public preferences,[129] so this question is hard to answer with any assurance.

CONCLUSION

The formalist and realist inquiries reinforce each other. Both suggest that at this point, the slide from decriminalizing sodomy to decriminalizing consensual adult incest is unlikely, except perhaps for incest between cousins or step-relatives. That is not to suggest that opponents of *Lawrence* have been merely fear-mongering on this issue. The arguments are not at all free from doubt given the many open questions arising from the case. Moreover, I find something unseemly about the efforts of many gay advocates to deny the analogy.[130] They are a group of people who have gained their own liberty paying scant heed to the liberty of others.[131]

I have more confidence in the realist inquiry than the formalist inquiry. The legal rules in *Lawrence* are too unclear and open-ended as well as subject to differing interpretations, to give much confidence to how the case's analysis will apply elsewhere. Moreover, the legal analysis itself points to the evolution of general norms and hence to the realist inquiry. As a political matter, I feel pretty confident that it would be rather crazy for the Court to try to set aside the core laws against incest, laws that exist in the vast majority of states.

Thus, in this instance realism has more explanatory power than formalism. That does not mean that realism is generally superior, of course. First, as a normative matter, one could argue that the analysis shows that the particular legal course the Court has chosen to follow in *Lawrence* is unwise because it is too unclear.[132] Second, as a predictive matter, formalism may do better than realism in other, less emotionally-fraught areas with more detailed provisions (especially statutory provisions) guiding the Court.

Finally, what do our two inquiries tell us about the purpose and effect of the *Lawrence* decision? The Court is willing to strike down laws regulating intimate behavior, but only once a strong majority of Americans have come to believe that the laws make little sense. Why then not leave it to the

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[128] I thus doubt there will be what Volokh calls an attitude-altering slippery slope. *See* Volokh, *supra* note 7, at 1077.

[129] *See* Brett McDonnell, *Dynamic Statutory Interpretation and Sluggish Social Movements*, 85 CAL. L. REV. 919, 939-40 (1997).

[130] *See* William Saletan, *Incest Repellent? If Gay Sex is Private, Why isn't Incest?* SLATE (Apr. 23, 2003) *at* http://www.slate.msn.com/id/2081904/. A similar dynamic is in play as gay marriage advocates frequently deny the analogy to polygamy.

[131] Personally, if I were dictator I would take the Millian approach and repeal the laws against consensual adult incest, although as a matter of the proper role of courts I think the liberal Burkean approach is probably wiser, suggesting caution on this issue.

[132] Lack of clarity has its defenders, though. *See generally* Andrew Koppelman, Against Clarity in the Law of Freedom of Association (unpublished manuscript, on file with the author).

democratic process to finish off these types of law as the dissenters would prefer?[133] The answer would seem to be that given our representative institutions, states with a vocal minority would be able to block legislation that the majority would support. Repeal of those laws would help a group of persons who have convinced most people that these laws seriously infringe on their rights, and that the repeal of those laws would not hurt anyone except for a nosy conservative minority. In such instances, the Court is willing to step in and speed up the process of eliminating dated, harmful laws. The Court must balance democracy and liberty, both of which I see as justified pragmatically. Democracy within a federalist system allows collective experimentation, learning from the collective wisdom of many people acting together. Liberty allows individual experimentation, learning from the wisdom of many people acting on their own. The two conflict when legislatures choose to limit liberty. Although we do not want judges imposing the limited wisdom of a group of no more than nine justices against the states, where democracy and liberty conflict, something must give. Under a liberal Burkean approach, judges overrule democratic decisions only once it has become clear that a certain type of law has proven itself unwise, and that the democratic process does not seem to be working well.

Is this gain enough to justify lost legitimacy from the resulting claims that the Court is too activist and politicized? I am sympathetic to arguments that it is not, but skeptical. What counts is the *net* lost legitimacy from overturning a law. Yes, many people are mad at the Court after *Lawrence*, but suppose the Court had gone the other way? A different group of people would be very upset.[134] It is not clear that the Court worsens its public standing much if at all when it strikes down a law that most people do not like anyway.

In the end, Justice Scalia aims at the wrong target. He sees the problem as overly-liberal colleagues unduly influenced by an elite legal culture. His true target should be much broader: the American people. The liberal Burkean majority of the Court did not jump the gun in *Lawrence*. They did not want to get ahead of the prevailing moral views of their time, and they have not done so. Justice Scalia has been in Washington too long, and during this time a tolerance for gay people has spread to middle America. His vision of America outside the Beltway is dated by several decades. Thus, the best answer to conservative critics of *Lawrence* is: America—love it or leave it.

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[133] *See Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

[134] The majority's language in *Bowers* was so painful to gay people that when my boyfriend and I met in Europe shortly after the decision we were both toying with the idea of staying away from our home country because of it.

TABLE 1

Incest Laws in the 50 States

State	Statute(s)	Parent/ Child	Sibling	Uncle/ Niece	Cousin	Step-parent
Alabama	ALA. CODE ANN. § 13A-13-3	Yes	Yes	Yes	No	Yes
Alaska	ALASKA STAT. § 11.41.450	Yes	Yes	Yes	No	No
Arizona	ARIZ. REV. STAT. ANN. §§ 13-3608, 25-101	Yes	Yes	Yes	Yes*	No
Arkansas	ARK. CODE ANN. § 5-26-202	Yes	Yes	Yes	No	Yes
California	CAL. PENAL CODE § 285 CAL. FAM. CODE § 2200	Yes	Yes	Yes	No	No
Colorado	COLO. REV. STAT. §§ 18-6-301, 18-6-302	Yes	Yes	Yes	No	Yes
Connecticut	CONN. GEN. STAT. § 53a-191, § 466-21	Yes	Yes	Yes	No	Yes
Delaware	DEL. CODE ANN. tit. 11, § 766	Yes	Yes	Yes	No	No
Florida	FLA. STAT. ANN. § 826.04	Yes	Yes	Yes	No	No
Georgia	GA. CODE ANN. § 16-6-22	Yes	Yes	Yes	No	Yes
Hawaii	HAW. REV. STAT. §§ 707-741, 572-1	Yes	Yes	Yes	No	No
Idaho	IDAHO CODE §§ 18-6602, 32-205	Yes	Yes	Yes	No	No
Illinois	ILL. COMP. STAT. ANN. § 5/11-11	Yes	Yes	No	No	Yes
Indiana	IND. CODE § 35-46-1-3	Yes	Yes	Yes	No	No
Iowa	IOWA CODE ANN. § 726.2	Yes	Yes	Yes	No	No
Kansas	KAN. STAT. ANN. § 21-3602-3603	Yes	Yes	Yes	No	No
Kentucky	KY. REV. STAT. ANN. § 530.020	Yes	Yes	No	No	Yes

* In Arizona, first cousins may marry (and also engage in incest) if neither is under 65 or if one cannot reproduce.

Louisiana	LA. REV. STAT. ANN. § 14:78	Yes	Yes	Yes	No	No
Maine	ME. REV. STAT. ANN. tit. 17-A, § 566	Yes	Yes	Yes	No	No
Maryland	MD. CODE ANN., CRIM. LAW § 335 MD. CODE ANN., FAM. LAW § 2-202	Yes	Yes	Yes	No	Yes
Massachusetts	MASS. GEN. LAWS ch. 272, § 17, ch. 207, §§ 1-2	Yes	Yes	Yes	No	Yes
Michigan	MICH. COMP. LAWS. ANN. §§ 750.520b, 750.520c	No**	No	No	No	No
Minnesota	MINN. STAT. ANN. § 609.365	Yes	Yes	Yes	No	No
Mississippi	MISS. CODE ANN. §§ 97-29-5, 93-1-1	Yes	Yes	Yes	Yes	Yes
Missouri	MO. ANN. STAT. § 568.020	Yes	Yes	Yes	No	Yes
Montana	MONT. CODE ANN. § 45-5-507	Yes	Yes	No	No	Sort of***
Nebraska	NEB. REV. STAT. §§ 28-702, 28-703	Yes	Yes	Yes	No	No
Nevada	NEV. REV. STAT. ANN. §§ 122.020, 201.180	Yes	Yes	Yes	Yes	No
New Hampshire	N.H. REV. STAT. ANN. § 639:2	Yes	Yes	Yes	No	No
New Jersey	N.J. STAT. ANN. § 2C:14-2	No**	No	No	No	No
New Mexico	N.M. STAT. ANN. § 30-10-3	Yes	Yes	Yes	No	No
New York	N.Y. PENAL LAW § 255.25	Yes	Yes	Yes	No	No
North Carolina	N.C. GEN. STAT. §§ 14-178	Yes	Yes	Yes	No	Yes

** Michigan and New Jersey's laws prohibit incest involving persons under 18 years old, but not if both are above that age.

*** In Montana and West Virginia, incest between step-parents and children is prohibited, but consent is a defense if both are 18 or older.

North Dakota	N.D. CENT. CODE §§ 12.1-20-11, 14-03-03	Yes	Yes	Yes	Yes	No
Ohio	OHIO REV. CODE ANN. § 2907.03	Yes	No	No	No	Yes
Oklahoma	OKLA. STAT. tit. 21, § 885, tit. 43, § 2	Yes	Yes	Yes	Yes	Yes
Oregon	OR. REV. STAT. § 163.525	Yes	Yes	No	No	No
Pennsylvania	18 PA. CONS. STAT. ANN. § 4302	Yes	Yes	Yes	No	No
Rhode Island	Repealed	No	No	No	No	No
South Carolina	S.C. CODE ANN. § 16-15-20	Yes	Yes	Yes	No	Yes
South Dakota	S.D. CODIFIED LAWS §§§ 22-22-19.1, 25-1-6 - 25-1-7	Yes	Yes	Yes	Yes	No
Tennessee	TENN. CODE ANN. § 39-15-302	Yes	Yes	Yes	No	Yes
Texas	TEX. PENAL CODE ANN. § 35.02	Yes	Yes	Yes	No	Yes
Utah	UTAH CODE ANN. § 76-7-102	Yes	Yes	Yes	Yes	Yes
Vermont	VT. STAT. ANN. tit. 15, §§ 1-3, tit. 13, § 205	Yes	Yes	Yes	No	No
Virginia	VA. CODE ANN. §§ 18.2-366, 20-38.1	Yes	Yes	Yes	No	No
Washington	WASH. REV. CODE ANN. § 9A.64.020	Yes	Yes	No	No	No****
West Virginia	W. VA. CODE § 61-8-12	Yes	Yes	Yes	No	Sort of***
Wisconsin	WIS. STAT. ANN. §§ 944.06, 765.03	Yes	Yes	Yes	Yes*****	No
Wyoming	WYO. STAT. § 6-4-402	Yes	Yes	No	No	Yes

**** In Washington, step-parent/child incest is illegal if one is under 18 years old.

***** In Wisconsin, cousins can marry or engage in incest if the woman is older than 55 or if either one is sterile.