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# SCALIA’S SHIP OF REVULSION HAS SAILED: WILL *LAWRENCE* PROTECT ADULTS WHO ADOPT LOVERS TO HELP ENSURE THEIR INHERITANCE FROM INCEST PROSECUTION?

Terry L. Turnipseed<sup>1</sup>

**in·cest** (in'sĕst') Sexual relations between family members or close relatives, including children related by adoption.<sup>2</sup>

## I. INTRODUCTION

THERE is a growing trend in this country – startling to many – of adopting one’s adult lover or spouse for various reasons, mostly inheritance-based. Should one who adopts his or her adult lover or spouse be prosecuted for incest? Think about it: the person is having sexual relations with his or her legal child. Is that not incest? Even if a state<sup>3</sup> agrees that it is, will *Lawrence v. Texas*<sup>4</sup> now protect this behavior, preventing these people from being successfully prosecuted for this type of incest? Indeed, given its prevalence in modern society, will this be the first post-*Lawrence* individual sexual privacy rights case to which the Court will grant a writ of *certiorari*?

In no less than four instances, Justice Scalia in *Lawrence* warned that adult incest<sup>5</sup> can no longer be outlawed by state or federal governments:<sup>6</sup> with the decision in *Lawrence*,

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<sup>2</sup> BLACK’S LAW DICTIONARY 776 (8th ed. 2004) (emphasis added).

<sup>3</sup> See *infra* Part IV, for a discussion of the possibility of federal prosecution under the Mann Act, 19 U.S.C. § 2421, but since the Mann Act relies on state law to determine whether a particular behavior is a sexual crime and thus within the purview of the federal Mann Act, this article will primarily discuss this issue from the viewpoint of state law as restricted by the federal constitution.

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558, 561 (2003).

<sup>5</sup> Note that when I talk about incest in this Article, I am discussing sexual relations between a parent and a consenting adult child. This Article does not address sexual relations, whether consensual or not, between a parent and a minor child, or between a parent and unwilling adult child. To save space, I may often omit the modifiers adult and consensual. Rape and statutory rape laws generally cover those relationships and, in general, have not been the subject of attack by scholars or the courts.

<sup>6</sup> *Lawrence*, 539 U.S. at 590. (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.”); *Id.* at 598 (“States continue to prosecute all sorts of crimes by adults “in matters pertaining to sex”: prostitution, adult incest, adultery, obscenity, and child pornography.”); *Id.* at 599 (“The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable,’ [citing *Bowers*, at 196] – the

Justice Scalia lost his incest repellant<sup>7</sup> (*i.e.*, *Bowers*<sup>8</sup>). Others have echoed Justice Scalia's sentiments.<sup>9</sup> Since the Court's decision in *Lawrence*, the median viewpoint among legal scholars seems to be that incest is the next battle.<sup>10</sup> It appears that neither Justice Scalia, nor legal scholars realize that the parade of horrors – with adult adoption of lovers leading the band – has already started. It has started with a whimper, though, and not a bang. It has not begun with what is considered “core” incest<sup>11</sup> (sexual relations between biological parents and children or between biological full siblings), but instead with a growing set of behavior classified in many states as incest – sexual relations between an adult who adopts his or her lover or spouse (a subset of “non-core” incest that also includes sexual relations between distant relatives such as cousins).

For some time now adults – both heterosexual and homosexual – have been adopting their lovers and spouses all over the country<sup>12</sup> for various reasons: to better guarantee the adoptee's right to inherit directly from the adoptor; to keep collateral relatives from having standing to contest the adoptor's estate plan; or to add a loved one to a class of trust beneficiaries (allowing the adoptee to inherit “through” the adoptor).<sup>13</sup> It appears that, post-*Lawrence*, both the academy and the judiciary have completely overlooked this

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same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion.”); *Id.* at 600 (“No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers* – society's belief that certain forms of sexual behavior are “immoral and unacceptable,” [citing *Bowers* at 196]. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner – for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.”).

<sup>7</sup> Sadly, I can only dream of being clever enough to have invented this term. See William Saletan, *Incest Repellent? If Gay Sex is Private, Why Isn't Incest?* SLATE, Apr. 23, 2003, <http://www.slate.com/id/2081904/> (last visited July 10, 2008).

<sup>8</sup> *Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

<sup>9</sup> Including U.S. Senator Rick Santorum in a statement just before *Lawrence* was issued: “If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to incest, you have the right to adultery. You have the right to anything.” 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, 1544 (2005) (citing Associated Press interview with Sen. Rick Santorum (Apr. 7, 2003)). Of course, Senator Santorum and those who espouse his view on this issue have their critics. See, e.g., *Id.* at 1544 (citing Dahlia Lithwick, *Slippery Slope: The Maddening Slippery Slope Argument Against Gay Marriage*, SLATE, May 19, 2004) (“Since few opponents of homosexual unions are brave enough to admit that gay weddings just freak them out, they hide behind the claim that it's an inexorable slide from legalizing gay marriage to having sex with penguins outside JC Penney's. The problem is it's virtually impossible to debate against a slippery slope. Before you know it you fall down, break your crown, and Rick Santorum comes tumbling after.”).

<sup>10</sup> See, e.g., Cahill, *supra* note 9, at 1544 (citing Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 227, 227 (2004); Cass Sunstein, *What Did Lawrence Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48.).

<sup>11</sup> What some call “core” incest, others call “nuclear” incest. See, e.g., Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 288 (1984). For consistency, I will stay with the term “core” and “non-core” throughout this article, if only to avoid the term “anti-nuclear” since, as a nuclear engineer by educational background, the latter term still evokes unwanted ire in my subconscious.

<sup>12</sup> This article explicitly does not discuss the important issue of whether homosexual couples have just as much of a right as heterosexual couples to adopt children. There is a very large body of existing scholarship on this issue that is legally distinct from the subject matter herein.

<sup>13</sup> See *infra* Part II.

steadily growing, albeit stealthy, trend.

The definition of incest is broad enough in many states<sup>14</sup> to include not only sex between a parent and his or her adult *biological* child, but also between a parent and his or her adult *adopted* child. Despite falling squarely under these states' definition of incest, there are precious few reported cases of actual prosecutions for incest in adult adoption situations, and no reported cases post-*Lawrence*.<sup>15</sup>

I wonder if both sides are scared to go to war? Are they scared to engage fully in a prosecution for this type of incest, only to be rebuffed by a *Lawrence*-based constitutional defense? For the reasons stated later in this article, I think that this particular form of incest is *the* most probable next case in the *Lawrence* progeny, and that *Lawrence* will protect this subset of non-core incest likely resulting in the first step down Scalia's slippery slope.<sup>16</sup>

The stakes are extraordinarily high. If a constitutional challenge to a prosecution for incest of an adult who adopted a lover were successful, it would likely validate at least some, and possibly all, of Justice Scalia's anxious *Lawrence* dissent, and the whole house of sexual-crime cards could well fall with it: not only for this strand of incest laws, but also for laws addressing "core" incest, adultery, bestiality, masturbation, fornication, bigamy, and possibly ending with the brass ring of same-sex marriage. As one commentator noted, "[O]ne of the reasons incest has been such a durable and effective player on the slippery slope is because almost everyone is repulsed by it, regardless of political affiliation. Those who are undecided over the issue of same-sex marriage might be easily swayed by the invocation of incest."<sup>17</sup> Though no one seems to realize it right now, the outcome of this upcoming battle might well impact millions of American lives.

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<sup>14</sup> See *infra* Part III for a list of states.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> In recent years, there has been some very important work on the legal theory of slippery slopes, some of it related to *Lawrence*. See, e.g., Eugene Volokh, *Same Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005). The intricacies of this collective scholarship are beyond the scope of this Article.

<sup>17</sup> Cahill, *supra* note 9, at 1607-08. To be clear, this article is not about the ability (or inability) of government to prevent same-sex marriage – an enormous body of work already exists on that subject. However, the implications of the ability of government to prevent incest are undeniably tied – for better or worse, richer or poorer – to the same-sex marriage issue.

## II. WHY WOULD SOMEONE CHOOSE TO ADOPT A LOVER?

*[T]aboos do not work rationally but seek to induce reflexive disgust at a prohibited practice.*<sup>18</sup>

In olden<sup>19</sup> times, the notion of adoption was, mostly, to care for orphaned children.<sup>20</sup> But it has also served some very important purposes: To provide an heir for the adoptor and/or to perpetuate a family name by a childless individual;<sup>21</sup> to enable a stepparent to adopt a spouse's children, whether adult or not;<sup>22</sup> or to adopt an adult who was raised by the adopter (but, for whatever reason, did not get adopted during childhood).<sup>23</sup> In the 20th and 21st centuries, several different and more controversial motives have emerged

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<sup>18</sup> Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1526 (1968).

<sup>19</sup> Walter Wadlington, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478, 483 (1963).

Adoption was known to the Egyptians, Assyrians and Hebrews, but reached a high level of legal development during Roman times. The primary purpose in early civilizations was to benefit the adopter by preserving continuity of family lines and religious rites, with the practice being used more as a will substitute than anything else. As primarily a creature of Roman law, adoption is found most prevalently in civil law countries today.  
*Id.*

*See also* Walter Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566, 567 (“Under Roman law, adoption became a well established practice which on some occasions even determine imperial succession.”) (citing H. WOLFF, ROMAN LAW 17, 45 (1951) (specific instances where adoption determined imperial succession)). Wolff, in fact, cites to a “long period of good government” that became possible by the fact that neither Nerva (who ruled briefly from A.D. 96-98) “. . . nor any of his first three successors had a son, so that they were able to select worthy successors through the formal step of adopting them.” Wolff, *supra*, at 17. From the earliest days of civilization, then, adopted children were often more worthy than their biological counterparts.

<sup>20</sup> Russell G. Donaldson, Annotation, *Marital or Sexual Relationship Between Parties as Affecting Right to Adopt*, 42 A.L.R.4th 776, § 2[a] (1985).

<sup>21</sup> *Id.* (citing W. Wadlington, *supra*, note 19 at 567); *Id.* at § 3[a] (citing *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 235 (1984)). One high profile example involved Doris Duke. *Matter of Duke*, 305 N.J.Super. 408, 415 (N.J. Super. Ct. Ch. Div. 1995). In 1924, James B. Duke, executed his will and two trusts. *Id.* One trust entitled the “Doris Duke Trust” was created for the benefit of Duke’s daughter Doris and other named relatives. *Id.* This trust provided that two-thirds of the income should be paid to Doris each year until her death. *Id.* Upon her death, this two-thirds of the trust income would be paid to her lineal descendants for life not to exceed the perpetuities period. *Id.* At the expiration of the perpetuities period, two-thirds of the trust corpus would be paid to her lineal descendants. *Id.* If Doris died without lineal descendants, the trust would terminate and her portion would be paid to Mr. Duke’s other trust, which had been set up for charitable purposes. *Id.* Doris had one biological child who died in infancy. *Id.* In 1988 at the age of 75, Doris legally adopted thirty-five-year-old Charlene Gail Heffner (later known as Chandi Duke Heffner) pursuant to the New Jersey adoption statute. *Id.* When Doris died in 1993, Chandi (as she was then known) demanded that the trustee start paying her Doris’s two-thirds income interest (off of a corpus worth, in 1995 dollars, an estimated \$170,000,000) since she was now a lineal descendant of Doris. *Id.* at 416. The issues before the court were many and complex, essentially boiling down to whether they should apply the adoption law in place when the trust was settled in 1925 (that did not allow adults to be adopted, only children), or the law passed 100 days after the execution of the trust that remained essentially unchanged explicitly allowing adult adoptions. *Id.* at 416 – 435. The court ruled against Chandi under the so-called “stranger to the adoption” doctrine; that Chandi was a stranger to testator Mr. Duke and that he almost certainly had not contemplated that an elderly Doris would adopt Chandi despite there being no parent-child relationship in the traditional sense. *Id.* at 435.

<sup>22</sup> Donaldson, *supra* note 20, at 776, § 3[a] (citing *Matter of Adoption of Robert Paul P.*, 63 N.Y.2d 233, 235 (1984)).

<sup>23</sup> *Id.*

as well.<sup>24</sup> The two case studies below are illustrative of these more controversial types of adoptions that are now being seen all over the country.<sup>25</sup>

Some background is important. Without exception in America, if an unmarried individual dies without a will, survived by an adopted child but no biological children, the adopted child will take all of the decedent's probate property via intestacy to the exclusion of any other biological relative including siblings and parents.<sup>26</sup> Even if someone has a will (making intestacy irrelevant, assuming the will withstands challenge), adoption generally keeps other relatives from having standing to challenge a will (more on this later). Adoption, then, is an obvious, well-tested technique that helps to ensure that the adoptee takes the adoptor's property.<sup>27</sup>

In the first case study, IBM (a company then known by another name) hired Tom Watson and in less than a year, he became president.<sup>28</sup> He was the highest paid CEO in 1930s America.<sup>29</sup> Watson turned over the reins of IBM to his son, Tom Watson, Jr., in 1952.<sup>30</sup> Watson, Jr., established a large trust fund for the benefit of his children and

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<sup>24</sup> Though probably not an adoption of a lover, the following is illustrative of the genius of the human spirit. Some time in 1940, Jerri Blanchard began renting an apartment in Manhattan. 333 East 53rd Street Associates v. Mann, 503 N.Y.S.2d, 289, 289 (N.Y. App. Div. 1986). In 1970, Helen Mann moved into the apartment as a co-tenant with Blanchard. *Id.* In 1983, the building was converted to a co-op, but Blanchard and Mann were allowed to continue to rent under a rent-controlled regime, though at all times Blanchard was the only official tenant. *Id.* Five days after the conversion to co-op status, Blanchard's (then 83) adoption of Mann (then 67) became final via a New York County Surrogate Court order. *Id.* Blanchard died in 1984, at which time Mann invoked § 56(d) of the New York City Rent, Eviction and Rehabilitation Regulations (*see* 9 NYCRR § 2104.6[d]) that provides in part: "No occupant of housing accommodations shall be evicted under this section where the occupant is either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant." *Id.* (emphasis added). The co-op association sued to evict Mann arguing that the order of adoption was fraudulent because it was obtained for the sole purpose of allowing Mann to keep the rent-controlled apartment after the death of Blanchard. *Id.* With one dissenter, the majority of the Appellate Division of the New York Supreme Court ruled for Mann saying that the adoption would not have been fraudulent even if the co-op association could prove it had been solely motivated by the desire to protect Mann's rights in the rent-controlled apartment after Blanchard's death. *Id.* at 291. The court cited the A.L.R.3d: "Most of the cases which permit the adoption of an adult have recognized, at least by implication, that the fact that an adult is adopted for the purpose of making him eligible to inherit property or to share in the distribution of a trust does not necessarily affect the validity of the adoption." *Id.* (citing K.M. Potraker, *Adoption of an Adult*, 21 A.L.R.3d 1012, 1029 (1968)).

<sup>25</sup> Unlike tracking the adoption of children, there are no statistics on the number of adults adopted – lovers or otherwise – in this country. *See e.g.*, Karen Hawkins, *Adult Adoption Isn't Just About Flashy Court Cases*, ASSOCIATED PRESS REPORT (Mar. 12, 2007).

<sup>26</sup> Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 253 (1981) (citing, e.g., ILL. REV. STAT. ch. 110 1/2, §§ 2-1(b), 2-4 (1979); 20 PA. CONS. STAT. ANN. §§ 2103, 2108 (Purdon Supp. 1979)).

<sup>27</sup> One sure disadvantage – in addition to its obvious irrevocable nature – is that adoption very often cuts off the ability of the adoptee from inheriting from his or her own natural parents under intestacy (the natural parents could still provide for the adoptee via a valid will). The law in this area varies dramatically from state-to-state. *See, e.g.*, DUKEMINIER, JOHANSON, LINDGREN AND SITKOFF, *WILLS, TRUSTS, AND ESTATES*, 87 n. 1 (7th Ed. Aspen 2005). Just guessing, in most instances this is a probably only a minor drawback that can be remedied by the natural parents if desired. Peter N. Fowler, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 681 (1984) ("in the majority of instances, the possibility or expectation of inheritance from one's natural parents or relatives may be a minor factor in deciding whether to use adult adoption as a means to legitimate a lesbian or gay relationship and designate one's own heir").

<sup>28</sup> Tim Reid, *Adoption Could Earn Lesbian Lover a Fortune*, THE TIMES Feb. 27, 2007, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article1444139.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article1444139.ece) (last visited June 10, 2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

grandchildren, such that his children would receive assets during their lifetime, and when Watson Jr. and his wife died, each of his grandchildren would receive trust payments once each turned 35 years old.<sup>31</sup>

One of Watson, Jr.'s children was Olive Watson.<sup>32</sup> As an adult, Olive was engaged in a committed lesbian relationship with one Patricia Spado, a slightly older woman.<sup>33</sup> Olive wanted to ensure that Patricia was well cared for in case Olive died, so she legally adopted the older Patricia under the laws of Maine.<sup>34</sup> As sometimes happens in any relationship, the two split apart about a year after the adoption was approved, with Patricia receiving a \$500,000 settlement in exchange for relinquishing a real estate claim.<sup>35</sup> The settlement made clear, though, that Olive would at no time initiate any action to revoke or annul her adoption of Patricia.<sup>36</sup> Activists in the gay community said that the case showed just how far same-sex couples must go to obtain the rights that those able to marry are routinely granted.<sup>37</sup>

Watson, Jr. and his wife eventually died, with the result being that Watson, Jr.'s grandchildren, who had reached the age of 35, immediately became trust beneficiaries.<sup>38</sup> There were 18 grandchildren known to the trustee of the trust, Thomas J. Watson III.<sup>39</sup> During probate, Patricia came forward as the putative 19th grandchild.<sup>40</sup> As one article indicated, in what was undoubtedly an understatement, "this was not received warmly by Mr. Watson III."<sup>41</sup> Lawsuits in Connecticut and Maine ensued.<sup>42</sup>

For the homosexuals in jurisdictions that do not recognize same-sex marriage (or something close that yields many of the same benefits and burdens), adoption is one darn sure (or darn-close to darn sure) way of ensuring inheritance, albeit drastic (read "irrevocable"<sup>43</sup>). There are many contract-based methods that are available to any

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Mandi Rae Urban, *The History of Adult Adoption in California*, 11 J. CONTEMP. LEGAL ISSUES 612, 615 n.21 (2000) (citing Gwendolyn L. Snodgrass, *Creating Family Without Marriage: the Advantages and Disadvantages of Adult Adoption Among*

competent individual of majority – wills, trusts, life insurance, retirement plans, powers of attorney for financial and health care matters, etc. – but all are subject to claims by heirs-at-law (those who would take probate property absent a will) of undue influence against the partner-recipient of the assets.<sup>44</sup> These suits are more successful than one might imagine, since anti-gay biases are often quite evident in jury verdicts.<sup>45</sup>

To prevent blood relatives from having standing to sue after the death of the higher-net-worth partner, the lower-net-worth partner is adopted. Then the decedent would have a “child” who is his or her sole heir at law (the sole person who would take probate property absent a will) to the exclusion of siblings, parents, and more remote relatives. Because generally only heirs are given standing to sue to overturn a will or other contract to pass property, then the blood relatives are shut out completely from suing to overturn a will (or trust or life insurance policy, etc.) on undue influence grounds.<sup>46</sup> How elegant.

In the second case study, we find one Luella Graybill, who set up a trust for her son Robert in 1914 to last during his life, with the remainder after Robert’s death to “the heirs at law of my said son.”<sup>47</sup> If Robert died without any heirs, the estate was to be divided

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*Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 83 (1998) (“Unless fraud or undue influence is present, adoption cannot be annulled”). Another commentator gave this more complete analysis:

Except in very narrow circumstances, [citation omitted] or unless the statute provides for it, [citation omitted] once an individual has adopted her/his lover, the adoption cannot be abrogated. The adoptee is a legal heir forever unless by chance or design the adoptee is subsequently adopted by someone else. As a result, although either individual always has the power to disinherit the other [by will except in Louisiana], the adoption gives either the adoptor or adoptee the standing to contest the other’s will, even if s/he has long since ended the relationship.

Fowler, *supra* note 27, at 706; But see CAL. CIVIL CODE § 227(p) (6) (2007) (allowing an adopted adult to file a petition for termination of the adoptive relationship after written notification is provided to the adoptive parent).

<sup>44</sup> See generally, Sherman, *supra* note 26, at 255; DUKEMINIER ET AL., *supra* note 27, at 158-86.

<sup>45</sup> Snodgrass, *supra* note 43, at 76 (citing Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 386 (1995)).

<sup>46</sup> See, e.g., In re Adoption of Brundage, 134 N.Y.S.2d 703 (1954), *aff’d* 143 N.Y.S.2d 611 (1955), *appeal denied*, 144 N.Y.S.2d 921 (1955) (adoptive parent’s blood relatives are estopped from questioning validity of adoption order).

<sup>47</sup> *Bedinger v. Graybill’s Executor & Trustee*, 302 S.W.2d 594, 596 (Ky. 1957). The court in *Bedinger* detailed a nice summary of the statutory nature and origins of adoption.

Adoption, in the sense of voluntarily taking a child of other parents as one’s own child, is of ancient origin. The history and development of adoption reflect its use as the means of establishing not only the social relationship of parent and child but as well its use for the exclusive purpose of making the adoptee eligible to inherit property the same as one born to a party in lawful wedlock. Adoption was practiced by ancient Egyptians and Hebrews. When Joseph went up out of Egypt to the land of Goshen to visit his sick father, Jacob, he took with him his two sons, born of an Egyptian mother, and presented them to his father. Jacob adopted them, and Manasseh and Ephraim took their stations and heritage as Jacob’s heirs in the place of Joseph, and their descendants became two of the twelve tribes of Israel. *Genesis*, 41:50, 52; 48:5, 14-20. Years afterward Moses, the Hebrew child, was adopted by the Egyptian Pharaoh’s daughter as her own son. *Exodus* 2:10. Adoption was a familiar Roman custom; and the modern law came to us from the civil law, for the practice was unknown in the English common law. *Power v. Hafley*, 4 S.W. 683 (1887). Hence, adoption has always been and is now strictly a statutory creation.

between two charities.<sup>48</sup> Perhaps sensing that they were not ever going to produce biological children, Robert (then 58 years old) got the bright idea to adopt his wife Louise (then 45 years old), thereby instantly producing a sole heir at law under the rules of descent and distribution in Kentucky.<sup>49</sup> Robert died in 1955 without children.<sup>50</sup> Robert's cousins (who would have been his heirs at law absent the adoption) and the two charities brought suit, challenging the distribution to Louise.<sup>51</sup> Citing to the very clear Kentucky adoption law that said "[a]ny adult person who is a resident of Kentucky may petition . . . for leave to adopt a child or another adult,"<sup>52</sup> the Kentucky Court of Appeals ruled that Louise was the sole remainder beneficiary of the trust: "Neither the cleverness of the scheme of Graybill to establish his wife as the ultimate beneficiary of the trust estate, nor the incongruity of the legal status of the parent and child, can lead the court away from the fact that the adoption was within the authorization of the statute."<sup>53</sup>

There was a strong dissent in the case that seemed to rely, for the most part, on the "ick" reflex (just in case it is not obvious, these are my words, not the dissenting judge's), and on the very real issue of the testator's intent: "[w]e perceive no reason for assuming that Harry Baylor Hanger contemplated that a child adopted by one of his own heirs at law should take upon the death of the adoptive parent."<sup>54</sup> (For those not specializing in *God's work* (trusts and estates law), this concept is commonly known as the "stranger to the adoption" rule.)<sup>55</sup>

The majority decision of the Kentucky court did indeed think to look at the incest statute, but as it was written at the time, the statute applied only to those related by blood.<sup>56</sup> This implies that a court looking at a similar situation today in one of the many states listed below in Part IV that includes adopted relationships within the definition of incest could/should/would take a long, hard look at the incest statute to see if it is relevant.

The latter case study brings forth the issue of whether adopted children are, in general (*i.e.*, absent a sexual relationship between the adoptor and adoptee) included in the class

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*Id.* at 597. For more on the history of the law of adoption, see Potraker, *supra* note 24, at § 2.

<sup>48</sup> *Bedinger*, 302 S.W.2d at 596.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 597.

<sup>53</sup> *Id.* at 600.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., *DUKEMINIER ET AL.*, *supra* note 27, at 655.

<sup>56</sup> *Id.*

gifts of ancestors who never knew the adopted child. Courts have gone both ways on this issue, with some courts refusing to allow individuals adopted as an adult to count as part of a class (such as “to my descendants” written into the trust document of a parent or grandparent of the settler-adopter),<sup>57</sup> while other courts have allowed adult adoptees to qualify for class gifts.<sup>58</sup> The Uniform Probate Code would disallow adult lover adoptees from taking a class gift through a decedent-adopter, specifying that in construing class gifts “an adopted individual is not considered the child of the adopting parent unless the adopted individual lives while a minor ... as a regular member of the household of the adopting parent.”<sup>59</sup>

Finally, there are, sometimes, other lesser advantages – some tax-related and some not – that encourage adult adoptions. In some states, the state inheritance tax rate is lower if property flows to a close relative than if it flows to someone unrelated, an advantage mentioned in at least one reported case.<sup>60</sup> One can also imagine almost countless other possible advantages, including (but certainly not limited to): access to health insurance coverage and other employee benefits of the adopter; allowing recovery in tort actions and survivor benefits;<sup>61</sup> circumventing housing and zoning restrictions; life insurance

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<sup>57</sup> WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES*, 104 n.46 (3d ed. 2004) (citing *Matter of Trust Created by Belgard*, 829 P.2d 457 (Colo. Ct. App. 1991); *Matter of Duke*, 702 A.2d at 1007; *Cox v. Whitten*, 704 S.W.2d 628, 628 (Ark. 1986) (48-year-old adoptee); *Cross v. Cross*, 532 N.E.2d 486, 488-89 (Ill. App. Ct. 1988) (the “adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge” that “does great violence to the intent and purpose of our adoption laws”); *In re Estate of Ida Graham Ketcham*, 495 A.2d 594, 597 (Pa. Super. Ct. 1985) (85-year-old life tenant adopted a 56-year-old in an attempt to qualify as a “child” of the life tenant under the terms of the testatrix’s will that directed the life tenant’s estate be paid as a gift over to third parties if the life tenant died without children: court said this was “a blatant attempt to rewrite the testatrix’s will . . . to prevent a gift over in default of a natural child or children”); *In re Nowells Estate*, 399 N.W.2d 861, 863 (Mich. Ct. App. 1983) (statutory presumption that adopted persons are included within the term “child” does not operate in favor of a person adopted as an adult when an examination of the circumstances shows that the probable intent of the testator was not to include the adopted adult as a beneficiary); *Bürgerliches Gesetzbuch [BGB] [Civil Code] 2008 § 1771(1)*, sentence 1, *available at* [http://www.bundesrecht.juris.de/bgb/\\_1771.html](http://www.bundesrecht.juris.de/bgb/_1771.html) (last visited July 3, 2008) (adoption of an adult normally has no effect on relatives of the adopter)).

<sup>58</sup> MCGOVERN ET AL., *supra* note 57, at 104 n.47 (citing *Solomon v. Central Trust Co.*, 584 N.E.2d 1185, 1186 (Ohio 1992) (adoptee had lived with adopter from age 9, even though adopted as an adult); *Satterfield v. Bonyhady*, 446 N.W.2d 214, 215 (Neb. 1989) (adopted stepchild); *In re Estate of Joslyn*, 45 Cal.Rptr. 612, 616 (Cal. Ct. App. 1995); *Hagaman v. Morgan*, 886 S.W.2d 398, 399 (Tex. App. 1994) (stepdaughter); *Evans v. McCoy*, 436 A.2d 436, 437 (Md. 1981) (adoption of a 53-year-old cousin bars a gift over on death “without issue”)).

<sup>59</sup> MCGOVERN ET AL., *supra* note 57, at 105 (citing UNIF. PROBATE CODE § 2-705(c) (1990) (applying only when donor or testator is a stranger to the adoption)).

<sup>60</sup> *See, e.g., In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993) (court allowed one man (age 66) to adopt his “companion of 17 years” (age 51) with the complainants offering a three-fold purpose to “formalize the close emotional relationship that had existed between them for many years,” to “prevent collateral claims on their respective estates from remote family members,” and to “obtain the reduced inheritance tax rate which natural and adopted children enjoy under Delaware law”). Note that Delaware has since repealed its inheritance tax and replaced it with an estate tax that does not differentiate the rate based on who is receiving the property. 71 DEL. LAWS, c. 353, § 10, eff. Jan. 1, 1999. Eleven states still collect an inheritance tax, including: Connecticut, Indiana, Iowa, Kansas, Kentucky, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, and Tennessee. *See Retirement Living Information Center*, <http://www.retirementliving.com/RLtaxes.html> (last visited July 3, 2008). In some of these states, transfers to children are exempt from taxation completely, or have a reduced taxation rate. *Id.* Adult adoption also triggers some income tax considerations, including dependency exemptions and head of household status. Chase, *supra* note 45, at 388.

<sup>61</sup> *See, e.g., Gwendolyn L. Snodgrass*, Note, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 82-83 (1997) (“Because adult adoption creates a legal relationship between two people, it also creates the right to recover damages in tort for actions available only to family members.”).

beneficiary designation;<sup>62</sup> Social Security payments;<sup>63</sup> consent authorizations or visitation privileges relating to hospitals, jails, and other governmental agencies;<sup>64</sup> attainment of immigration status; obtaining royalty status;<sup>65</sup> taking advantage of rent control;<sup>66</sup> and, something near and dear to my heart, permitting an adopted child of a university employee to enroll in said university (or a reciprocal university) free of charge.<sup>67</sup>

### III. ARE ADULT ADOPTIONS OF LOVERS GENERALLY RECOGNIZED AS VALID?

*We know it's strange, but does it hurt anybody?*<sup>68</sup>

This Article addresses two types of non-core family concepts: adult adoption and adoptive incest. Neither is what people typically think of when they think of adoption or incest. In this way, they are related. They are related in another way: Courts and legislatures have tried to set policy/determine the validity of both (absent the federal constitutional overlay only recently present post-*Lawrence*) by using almost exactly the same set of arguments discussed in detail below. The statutory and common law bottom

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Snodgrass also cites the case of a man that witnessed the physical assault of his gay partner, but was unable to recover tort damages. *Id.* at 83 (citing *Coon v. Joseph*, 237 Cal. Rptr. 873 (Cal. Ct. App. 1987)).

<sup>62</sup> As one commentator explained:

Before they will issue life insurance policies, insurance companies often require evidence of a close relationship between the insured and her/his proposed beneficiary. While an individual may designate anyone she/he wishes as beneficiary, and some states prohibit carrier discrimination in the issuance of policies on the basis of sexual orientation [citation omitted], prospective heirs might raise undue influence to attack the deceased policyholder's designation of beneficiary. In such instances, adoption may provide persuasive factual evidence as to the relationship between the beneficiary and the insured thus countering an allegation of undue influence. Fowler, *supra* note 27, at 682.

<sup>63</sup> Angela Chaput Foy, *Adult Adoption and the Elder Population*, 8 MARQ. ELDER'S ADVISOR 109, 119 (2006).

<sup>64</sup> Fowler, *supra* note 27, at 681.

<sup>65</sup> My friends, colleagues, and students all know that I can work Anna Nicole Smith into virtually any discussion given the myriad legal (and other) issues surrounding her life and death. This article is, by goodness, no exception. One of the men who claimed to be the father of Anna's daughter, Prince Frederick von Anhalt, (since proven by DNA testing not to be the father) the 59-year-old husband of actress Zsa Zsa Gabor, obtained his royal title by being adopted as an adult by a German princess. Hawkins, *supra* note 25. The Prince, who claimed to have had a decade-long affair with Anna, wanted to adopt Anna so she could fulfill every young girl's dream of becoming a princess. *Id.* (By the way, how cool would that have been!) Not surprisingly, Gabor would not sign the necessary paperwork to effectuate the adoption. *Id.* Yet another heartwarming Anna story.

<sup>66</sup> See, e.g., discussion, *supra*, note 24 of 333 East 53rd Street Associates v. Mann.

<sup>67</sup> Urban, *supra* note 43, at 612 & n.1. One last note, in case you believe the author made an error by omission: The Woody Allen/Soon-Yi Previn relationship is not germane to this article in the strict legal sense as Mr. Allen was never Ms. Previn's adopted father, nor was she ever his stepdaughter. See generally, Marion Meade, *The Unruly Life of Woody Allen*, (Cooper Square Publishers, 2001). Nonetheless, many who followed this very public and controversial relationship were repulsed in a way quite similar to the aversion often displayed toward relationships between two individuals who have been in a legal parent/child relationship. Doubtless, there are many such relationships that never enter the public sphere.

<sup>68</sup> Wadlington, *supra* note 19, at 579.

lines of both, in addition, vary dramatically between jurisdictions. Precisely because they are both non-core, there is something tangibly important to looking at both in a single piece since adult adoption and adoptive incest have more in common than people might think at first glance.

Adoption “is the common<sup>69</sup> means by which a status or relationship of parent and child is created between persons who are not so related by nature.”<sup>70</sup> It is strictly a creature of statute, not common law.<sup>71</sup> Generally, if a jurisdiction’s statute does not specifically authorize the particular type of adoption being attempted, then a court will disallow its validity.<sup>72</sup> So far, neither the Congress nor the federal courts have recognized a right to adopt.<sup>73</sup> In lieu of the dearth of federal action, many state legislatures have recognized such a right. The Uniform Adoption Act, for example, allows an adult to be adopted.<sup>74</sup> There appear to be only six states – Arizona, Florida, Idaho, Nebraska, New Jersey, and Ohio – plus Puerto Rico that currently prohibit or place restrictions on adoptions of adults even in the absence of a sexual or marital relationship.<sup>75</sup> It should be

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<sup>69</sup> As of the 1980s, an estimated 150,000 children were adopted annually, about five percent of the children born annually in the U.S., and the relationships created affected up to one-third of the citizenry. Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 711-12 (1984).

<sup>70</sup> Potraker, *supra* note 24, at § 2.

<sup>71</sup> Donaldson, *supra* note 20, at § 4.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 894-95 (2006).

The question of a constitutional right to public recognition of family relationships is by no means unique to marriage. Lower federal and state courts have relied on the same limiting principle suggested in *Lawrence* to conclude, for example, that the right of privacy does not include a right to adopt children. [Citations omitted] Whatever protection the privacy right might afford against state destruction of established family relations, these courts have held, the Constitution cannot be construed to entitle a claimant to the state’s affirmative assistance in forming an adoptive relationship. As the Ninth Circuit put it, “[a] negative right to be free of governmental interference in an already existing familial relationship does not translate into an affirmative right to create an entirely new family unit out of whole cloth.” [citing *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (citing *Lipscomb v. Simmons*, 962 F.2d 1374, 1378-79 (9th Cir. 1992).] Because adoption is “wholly a creature of the state,” the courts have dismissed almost out of hand the suggestion that there might be a “fundamental right to adopt or to be adopted:”

The decision to adopt a child is not a private one, but a public act. At a minimum, would-be adoptive parents are asking the state to confer official recognition – and, consequently, the highest level of constitutional insulation from subsequent state interference – on a relationship where there exists no natural filial bond. . . . Accordingly, such intrusions into private family matters are on a different constitutional plane than those that “seek[ ] to foist orthodoxy on the unwilling by banning or criminally prosecuting” nonconformity. [citing *Lofton v. Sec. of Dept. of Children and Family Services*, 358 F.3d 804, (11th Cir. 2004).]

<sup>74</sup> UNIF. ADOPTION ACT, § 3 (1994).

<sup>75</sup> See ARIZ. REV. STAT. ANN. § 14-8101 (2007), as amended by 2008 ARIZ. LEGIS. SERV. CH. 162 (2008) (requires any adult adoptee older than twenty-one to be a “stepchild, niece, nephew, cousin or grandchild of the adopting person” and allows a foster parent to adopt an adult who was placed in his or her care as a juvenile as long as the foster parent and the adoptee have maintained a familial relationship for at least five years); see also FLA. STAT. ANN. § 63.042 (2007) (no “person eligible to adopt under this statute may adopt if that person is a homosexual”); MCGOVERN ET AL., *supra* note 57, at 104 & n.42 (citing *Matter of Adoption of Chaney*,

noted that Ohio has a unique statute that allows an individual to designate an heir, which might serve the needs of the couple just as well (and perhaps better in some instances) than adoption if inheritance is the prime motivating factor.<sup>76</sup> Is it possible, by the way, that something as simple as this replicated in other states might appease both sides of this issue? It certainly seems quite sound from a policy perspective.

Once you add a sexual relationship between two adults who desire to enter into a parent/child bond, however, the plot definitely thickens in many states.<sup>77</sup> Despite scholars thinking about this issue as early as the mid-19th century,<sup>78</sup> the situation today is

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887 P.2d 1061 (Idaho 1995) (refusing to allow an eighteen year old to be adopted because statutory procedures contemplated only adoption of minors); NEB. REV. STAT. § 43-101 (2007) (adoption of an adult by another adult who is not the adoptee's stepparent is only permitted if the two have had a parent-child relationship for a period of at least six months preceding the adoptee's age of majority); N.J. STAT. ANN. § 2A:2202 (2000) (adoptee must be at least 10 years younger than adopter, but court may waive requirement); OHIO REV. CODE ANN. § 3107.02 (2006) (adult may be adopted only if disabled, mentally retarded, or established a child-parent relationship while still a minor); and P.R. Laws Ann. tit. 31, § 531(4) (2007) (adoptee must be at least 14 years younger than adoptor). Note that four other states require that the adoptor be older than the adoptee, which would not as much hinder an adult adoption as fix who is to be the adoptor and who is to be the adoptee. See CAL. CIV. CODE § 227p (2007); CONN. GEN. STAT. ANN. § 45-67 (2007); MASS. GEN. LAWS ANN. ch 210, § 1 (2007); and NEV. REV. STAT. § 127.190 (2007). The person who has the shorter life expectancy and the wealthier relatives should be the adoptor. Sherman, *supra* note 26, at 256-57 (noting two relevant issues: first, in some states, the adoptee's blood relatives would have standing to contest the adoptee's will if the adoptee dies first; and second, in most states, an adopted person loses his or her right to inherit from or through his natural parents so the person with the wealthier relatives should be the adoptor).

<sup>76</sup> Fowler, *supra* note 27, at 703 (citing OHIO REV. CODE ANN. § 3107.02 (any competent person may file a written declaration that appoints another as an heir at law and will take via intestacy the same as a child "born in lawful wedlock").

<sup>77</sup> From as early as 1968, commentators have been calling adult adoption of a mistress or a homosexual partner, for example, an "undesirable social use" of adult adoption. See, e.g., Wadlington, *supra* note 19, at 579.

<sup>78</sup> As Cahn noted:

In 1873, Philip Joachimsen lamented that the New York adoption statute did not address incest. Philip J. Joachimsen, *The Statute to Legalize the Adoption of Minor Children*, 8 ALB. L. REV. 353, 357 (1873). And, in 1876, Whitmore called for better definition of how adoption affected existing incest laws. WILLIAM H. WHITMORE, *THE LAW OF ADOPTION IN THE UNITED STATES AND ESPECIALLY IN MASSACHUSETTS*, 83-88 (1876). That same year, Massachusetts amended its adoption statute to prohibit marriage between an adopted parent and child. Massachusetts also clarified that, although the adopted child was otherwise severed from her biological parents, this was inapplicable concerning "marriage, incest, or cohabitation." *Delano v. Bruerton*, 20 N.E. 308, 308 (Mass. 1889). Adoptees were thus subject to two sets of prohibited incestuous relationships: those involving their biological and adoptive parents. William Whitmore compared marriage to adopted children to the prohibition in other nations of marriage to stepchildren. Whitmore, *supra*, at 83 ("In most English speaking nations the marriage of near relations is forbidden, and a person is debarred from marrying a stepparent or stepchild."). Incest, including stepparent incest, was frequently labeled a crime "Against Public Morals." E.g., IND. REV. STAT., art. 5, § 1990, at 373 (1881). Because statutes explicitly addressed the stepparent relationship, and otherwise generally confined themselves to blood-based or affinity-based (*i.e.*, marriage-based) incest, adoptive relationships would not have been included under the general crime of incest. And, although Whitmore did not explain why, it may be that adoptive-child incest was not a crime against the marriage in the way that stepchild incest was, because the latter involved the blood relative of the aggressor's spouse. Adoptive-child incest was certainly a problem. As one historical study found, in contrasting incest committed by biological and nonbiological caretakers, the nonbiological fathers were overrepresented. Linda Gordon & Paul O'Keefe, *Incest as a Form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27, 30 (1984) (reporting on case records from 1880 to 1960, with nonbiological fathers including step, foster, and adoptive fathers). Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1141-42 (2003).

indeed murky.

To start, the official commentary to the Uniform Adoption Act specifically prohibits the adoption of a spouse, though adoption of a non-spousal lover is conspicuously absent from the uniform act's language.<sup>79</sup> Regarding spousal adoption,<sup>80</sup> as you might expect, reported cases are rare (and mostly in Kentucky, for some odd reason), though as you might not expect, almost all of those rare cases have allowed the validity of these adoptions (though the adopted spouse has not always been allowed to be the beneficiary of a will drafted by an ancestor of the adoptor under principles of will construction).<sup>81</sup>

At first blush, the acceptance of these spousal adoptions is an odd result, is it not? The husband's wife is also his daughter, or vice-versa. Courts have, however, struggled to find any way of stopping these seemingly unnatural multiple legal relationships.<sup>82</sup>

Outside of the instances where one spouse is attempting to bring the other spouse into

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<sup>79</sup> UNIF. ADOPTION ACT, § 3(4) (Official Commentary).

<sup>80</sup> The advisability of intra-family marriage prohibitions generally have long been disputed, at least since Biblical times. Walter Wadlington, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478, 479 (1963) (citing 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 383-387 (1895); Moore, *A Defense of First-Cousin Marriages*, 10 CLEV.-MAR. L. REV. 136, 137 (1961)).

<sup>81</sup> See Donaldson, *supra*, note 20 at §§ 2[a], 7; see also *Matter of Trust Created by Belgard*, 829 P.2d 457, 458 (Colo. Ct. App. 1991) (adoption of wife allowed, but the court disallowed the adopted wife from taking as a remainder beneficiary of a trust established by the adoptor's mother; this despite the trust explicitly defining "child" and "descendant" to include "persons legally adopted by my said son" because the adoptee was a stranger to the trust settler and at the time of trust establishment, the state did not recognize adult adoptions); *Bedinger v. Graybill's Executor and Trustee*, 302 S.W.2d 594, 596 (Ky. 1957), *overruled on other grounds in* *Minary v. Citizens Fidelity & Trust Co.*, 419 S.W.2d 340, 341 (Ky. 1957) (rejecting an attempt to void a spousal adoption to allow spouse to take corpus of a trust as adoptor's heir at law because state incest statute defined incest to be only those marriages between persons who are of "kin to each other by consanguinity" in specified degrees construed to embrace only blood relationships); *Pennington v. Citizens Fidelity Bank & Trust Co.*, 390 S.W.2d 671, 671 (Ky. 1965) (adoption of a 71-year-old husband by his childless, 74-year-old wife, court recognized the validity of the adoption, but then interpreted the particular language of the wife's mother's will as not bringing the adopted husband within the class of beneficiaries: the adoption gave the husband the status of "heir at law" but not "child"); *Minary v. Minary*, 395 S.W.2d 588, 588 (Ky. 1965) (though the court refused to rule on the validity of a husband's adoption of his wife, since the court held that *in personam* jurisdiction had not been obtained in the case; nonetheless, the mere fact that the adoption had been obtained at all indicated that the adoption had been recognized as valid by the court initially ordering it); *Minary v. Citizens Fidelity Bank & Trust Company*, 419 S.W.2d 340, 341 (Ky. 1967) (recognizing a husband's adoption of his wife, but that wife was not an "heir" of husband's mother within the meaning of the mother's will that created a trust for her husband and three sons with remainder to "my then surviving heirs, according to the laws of descent and distribution then in force in Kentucky"); *Successions of Plummer ex rel. Guttuso v. Plummer*, 577 So. 2d 751, 752 (La. Ct. App. 1991), *cert. denied*, 580 So. 2d 676, 677 (La. 1991) (under a complex web of related statutory provisions, court set aside father's attempted adoption of his second wife such that she could not inherit from the estate of the father's parent; this result despite the fact that there would have been no criminal incest consequences because the two were not related by blood as required by the incest statute).

<sup>82</sup> Do not get confused between adopting an existing spouse and attempting to marry someone you are related to by adoption, as the latter is a distinct legal issue that is beyond the scope of this article. See, e.g., *Meisner v. Geile*, 747 S.W.2d 757, 757 (Mo. Ct. App. 1988) (uncle and niece related by adoption did not come within statutory prohibition of marriage between uncle and niece); see also *Bagnardi v. Hartnett*, 366 N.Y.S.2d 89, 89 (N.Y. App. Div. 1975) (marriage between adoptive father and adopted daughter legally permissible under marriage statute); *In re Marriage of MEW and MLB*, 4 Pa. D. & C.3d 51, 51 (1977) (marriage of adopted siblings denied on ground of "public policy and decency" and, if allowed, such marriages would "undermine the fabric of family life"). Even pre-Lawrence, at least one prohibition on the right to marry of individuals related only by adoption was ruled unconstitutional. *Israel v. Allen*, 577 P.2d 762, 764 (Colo. 1978) (Statutory provision prohibiting marriage between a sister and a brother related by adoption was struck down because it failed to satisfy even rational basis review. The court reasoned that there was no reason to prevent an adopted sister and brother from marrying as there was no genetic issue. In part, the court based its decision on the fact that the Colorado criminal incest statute did not prohibit adopted family members from having sexual relations.). For a summary of U.S. Supreme Court jurisprudence on the right to marry, see Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 KY. L.J. 275, 291-294 (2008).

a class of trust beneficiaries ultimately for pecuniary gain, the remaining controversial adult adoptions do not involve adopting a spouse, but instead adopting a non-spousal lover – either heterosexual adulterers or same-sex lovers.<sup>83</sup> Once you think about it, this makes sense because most heterosexual, unmarried lovers who desire to ensure (or at least to vastly increase the chances) that their partner ultimately becomes their heir and/or beneficiary have only to get married.<sup>84</sup> Of course, many same-sex couples may now gain many of these same rights in a large handful of states, at least at the state level.<sup>85</sup> While the list is growing, same-sex couples cannot gain the state-level privileges of marriage in the overwhelming majority of jurisdictions.

Should we really care why one is being adopted? Should adoption be purpose-neutral? Or should we require some sort of true parent/child-type relationship in order to adopt? Commentators and courts are both split, with some jurisdictions judging harshly the morals of a paramour or spousal adoption<sup>86</sup> and some indicating its irrelevancy absent specific statutory language denying someone from adopting a lover<sup>87</sup> or spouse.<sup>88</sup>

For courts rejecting the right to adopt a lover or spouse, several grounds consistently arise: (1) non-statutory public policy;<sup>89</sup> (2) very narrow statutory interpretation;<sup>90</sup> (3) fraud on the court by attempting to conceal the sexual relationship;<sup>91</sup> and/or (4) incest-related arguments.<sup>92</sup>

Most courts supporting the right to adopt a lover or spouse make the simple argument that, in essence, adoption purely a statutory creation and if the statute says you can adopt

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<sup>83</sup> Donaldson, *supra* note 20, at §§ 2[a], 8 and 9.

<sup>84</sup> *Id.* at § 2[a].

<sup>85</sup> Also note that DOMA disallows all federal rights and privileges to same-sex couples.

<sup>86</sup> Donaldson, *supra* note 20, at §§ 2[a], 8[b] and 9.

<sup>87</sup> *Id.* at §§ 2[a] and 8[a].

<sup>88</sup> *Id.* at §§ 2[a] and 7.

<sup>89</sup> *Id.* §§ 2[a] and 3[a]; *see, e.g.*, Matter of Robert Paul P., 63 N.Y.2d 233, 234 (N.Y. 1984) (The relationship between the relevant adult parties “utterly incompatible with the creation of a parent-child relationship,” such that adoption is not the “proper vehicle by which to formalize their partnership in the eyes of the law.” The legislature must specifically choose to embrace this form of adoption as a matter of state public policy.); Stevens v. Halstead, 168 N.Y.S. 142, 142 (N.Y. App. Div. 1917) (against public policy for 70-year-old man to adopt a “woman of no more than middle years” who were allegedly having sexual relations); In re Jones 411 A.2d 910, 910 (R.I. 1980) (in disallowing a married man to adopt his paramour, court declared “a statute will not be construed so as to achieve an absurd, meaningless, or patently inane result,” and that “public opinion had not descended to such a nadir as to require” an adoption of this type lest one “concede that the legislature had intended a sardonically ludicrous result”); Adoption of John A., 1992 WL 361416, \*4 (Del. Fam. Ct. 1992) (“inheritance is a proper purpose of an adult adoption only where it is accompanied by a parent-child relationship”); Successions of Plummer ex rel. Guttuso, 577 So. 2d at 751.

<sup>90</sup> Donaldson, *supra* note 20, at §§ 2[a] and 4[a].

<sup>91</sup> *Id.* at §§ 2[a] and 6[a].

<sup>92</sup> *See* Part IV, *supra*; *see also Id.* §§ 2[a] and 5[a].

anyone then you can adopt anyone – case closed.<sup>93</sup> Some have gone on to say that concealment of the sexual relationship is not sufficient to stop the adoption,<sup>94</sup> and some have expressly rejected the adoption-creates-incest argument.<sup>95</sup> Keep in mind as well that most state statutes do not require that the parties serve notice of the adoption on either their own biological parents or other blood relatives,<sup>96</sup> which obviously tends to give courts a rather one-sided version of the situation.

New York courts, in particular, have had to struggle with numerous reported cases of adult adoption of lovers.<sup>97</sup> New York’s adoption statute gives little in the way of guidance on these issues, stating simply that “an adult unmarried person or an adult husband and his adult wife together may adopt another person” as long as consent is obtained of “the parties involved.”<sup>98</sup> New York courts, then, have had to fill in the blanks.

For adult adoptions, the New York standard is whether the adoption promotes the moral and temporal interests of the adoptee.<sup>99</sup> New York courts originally approved adult adoptions quite liberally, examining only the legal and economic purposes behind it to see if these purposes violated public policy.<sup>100</sup> New York courts seem not to factor in age differences between adoptors and adoptees,<sup>101</sup> allowing adoptions when the adoptor is younger than the adoptee,<sup>102</sup> something in direct conflict with some state statutes such as

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<sup>93</sup> *Id.* §§ 2[a] and 3[b].

<sup>94</sup> *Id.* §§ 2[a] and 5[b].

<sup>95</sup> *See* Part IV, *supra*; *see also Id.* §§ 2[a] and 5[b].

<sup>96</sup> Rein, *supra* note 69, at 756 (“How can one respond to something he does not even know has occurred?”).

<sup>97</sup> The importance of the New York precedent was highlighted by one commentator:

There is nothing especially unique about lesbians or gay men in New York, nor about the New York legal system. Rather, the importance of those decisions lies in the fact that the issue has been raised there first. Courts in other states will confront this issue eventually, but they will do so without a wealth of judicial opinion upon which to rely. Lacking direction from their own supreme courts, as well as attorneys, will naturally look to any reported decisions from other states for persuasive authority. For this reason, the preceding New York cases are important. Fowler, *supra* note 27, at 704.

<sup>98</sup> N.Y. DOM. REL. LAW § 111(4) (McKinney 2007).

<sup>99</sup> This standard was first announced in *Stevens*, 168 N.Y.S. at 142 (N.Y. App. Div. 1917), and has been followed in New York since. Interestingly, the court in *Stevens* said in dicta that public policy would be violated if a married man was permitted to adopt his mistress. *Id.* at 144.

<sup>100</sup> *See, e.g.*, In re Adult Anonymous II, 452 N.Y.S.2d 198, 200 (1982).

<sup>101</sup> *See, e.g.*, In Adoption of Elizabeth P.S. by Eileen C., 509 N.Y.S.2d 746, 746 (N.Y. Fam. Ct. 1986) (a 49-year-old nun and a 48-year-old woman could form the necessary parent-child relationship as the parties had known each other for a number of years and the nun had been a caregiver to the other woman).

<sup>102</sup> *See* Matter of Adoption of Adult Anonymous, 435 N.Y.S.2d 527, 527 (N.Y. Fam. Ct. 1981) (adoptor was 22, adoptee was 26); *see also* In re Adult Anonymous II, 452 N.Y.S.2d at 200 (adoptor was 32, adoptee was 43).

California.<sup>103</sup> New York courts have dealt with all three types of adult adoptions mentioned above.

In particular, New York courts have dealt with the issue of adult adoption of homosexual lovers more than any other jurisdiction.<sup>104</sup> As one commentator noted about adoption of gay and lesbian lovers generally: “The statutes and precedent on adult adoption . . . largely date from a time when legislators and courts did not realize that gay people existed, and therefore did not design the law to avoid helping them. Ironically, gay and lesbian litigants have no incentive to bring the law up to date.”<sup>105</sup>

While the first reported New York case found that adoption of a homosexual lover did not violate public policy,<sup>106</sup> this result has since been overturned,<sup>107</sup> so that currently, as a matter of common law in New York state, one may not adopt one’s lover – whether homosexual or heterosexual.<sup>108</sup>

In *Adoption of Robert Paul*, the New York Court of Appeals<sup>109</sup> took up the case of a 57-year-old male attempting to adopt a 50-year-old male who had resided with him continuously for more than 25 years, and with whom he was in a homosexual relationship.<sup>110</sup> As noted above, New York’s statute, like most state adoption statutes, gives no guidance as to the legality of homosexual relationship adoptions within its text other than to say that an adult “may adopt another person” without restriction.<sup>111</sup> When faced with such a liberal statute, most states that have addressed this issue have allowed adoptions even when confronted with sexual relationships between the parties.<sup>112</sup> The New York Court of Appeals’ decision, on the other hand, spends quite a bit of time detailing the history of adoption (“unknown at common law, . . . unknown in England until . . . 1926,” and “exist[ing] only by virtue of the legislative acts that authorize it”) saying that adoption has never been a “means of obtaining a legal status for a nonmarital sexual relationship – whether homosexual or heterosexual” – with such being a “cynical

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<sup>103</sup> KATHRYN KIRKLAND, IRA LURVEY, & DIANA RICHMOND, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE § 173.05 (2d ed. 1997). CAL. FAM. CODE § 9300-9340 (2007).

<sup>104</sup> Lisa R. Zimmer, *Family Marriage, and the Same Sex Couple*, 12 CARDOZO L. REV. 681, 689 (1990).

<sup>105</sup> Urban, *supra* note 43, at 615, n.18 (citing Thomas S. Hixson, Public and Private Recognition of the Families of Lesbians and Gay Men, 5 AM. U. J. GENDER SOC. POL’Y & L. 501, 515 (1997)).

<sup>106</sup> See *Matter of Adoption of Adult Anonymous*, 435 N.Y.S.2d at 527; see also *In re Adult Anonymous II*, 452 N.Y.S.2d at 200.

<sup>107</sup> *Matter of Robert Paul P.*, 63 N.Y.2d at 233.

<sup>108</sup> *Id.* at 655.

<sup>109</sup> For those unfamiliar with the New York state court system, the Court of Appeals is New York’s highest court.

<sup>110</sup> *Matter of Robert Paul P.*, 63 N.Y.2d at 234.

<sup>111</sup> *Id.* at 237 (citing N.Y. DOM. REL. LAW §§ 109, 110 (McKinney 2007)).

<sup>112</sup> See discussion, *supra* note 60.

distortion of the function of adoption.”<sup>113</sup> The Court’s rhetoric continues, stating: “Nor is it a procedure by which to legitimize an emotional attachment, however sincere, but wholly devoid of the filial relationship that is fundamental to the concept of adoption.”<sup>114</sup> Finally, while acknowledging the dissent’s main point that “there are no special restrictions on adult adoptions under” the New York statute, the Court says plainly that the “Legislature could not have intended that the statute be employed ‘to arrive at an unreasonable or absurd result.’”<sup>115</sup>

Besides the hotbed of New York case law, one other court has rejected an adoption based on incest or quasi-incest principles.<sup>116</sup> Duncan Clinton Fraser, a married thirty-year-old sought to adopt his twenty-year-old lover Karen Mary Jones, who was also married at the time of the Supreme Court of Rhode Island’s decision.<sup>117</sup> To be clear, Fraser and Jones were not married to each other.<sup>118</sup> Fraser and Jones also allegedly had a child together, in addition to Fraser’s two children born from his marriage.<sup>119</sup> The Court soundly rejected Jones’s argument that the lower court was “foreclosed from considering in any manner, shape, or fashion her past adulterous association with Fraser *and its potentially incestuous impact.*”<sup>120</sup> Though the Rhode Island statute was silent on the issue, the Rhode Island Court – much like the New York Court – used pointed rhetoric in upholding the denial of the adoption petition: “[A] statute will not be construed so as to achieve an absurd, meaningless, or patently inane result.”<sup>121</sup> The Court also referenced the lower court’s use of the “tragedy of Oedipus Rex”<sup>122</sup> and the Rhode Island statutes regarding incest,” quoting finally:

It may be that public morality in our community has reached a low ebb.

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<sup>113</sup> *Id.* at 237.

<sup>114</sup> *Id.* at 238.

<sup>115</sup> *Id.*

<sup>116</sup> *In re Jones*, 411 A.2d at 910.

<sup>117</sup> *Id.* at 717.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 718 (emphasis added). Note that Rhode Island has since repealed its incest law. See R.I. GEN. LAWS §§ 11-6-3, 11-6-4 (repealed 1989).

<sup>121</sup> *Id.*

<sup>122</sup> In Sophocles’ version of the Oedipus saga, Oedipus is blinded, his wife/mother commits suicide, and their four children die. The earlier Homeric version, though, heaps no suffering or punishment from either the gods or their self-knowledge upon either Oedipus or Jocasta. Bratt, *supra* note 11, at 258-59 (citing R. E. L. MASTERS, PATTERNS OF INCEST 235, 11 (1963)). The incest condemnation found in Leviticus, similarly, “is not visited upon Abrahams’ marriage to his half-sister, Sarah; to the contrary, the marriage was blessed.” Bratt, *supra* note 11, at 259. Bratt notes, in addition, that the story of Lot (who fathered a child by both of his daughters) is yet another example of biblical incest that was not condemned. *Id.* at 259 (citing *Genesis* 20:1-38).

However, it is the opinion of the Court that it has not yet descended to such a nadir as to require a probate or superior court judge to implement an adoption between persons whose relationship is essentially that of paramours. To suggest that the adoption statute requires such interpretation is to concede that the legislature of Rhode Island intended a sardonically ludicrous result. This Court cannot construe our adoption statutes in the light of any such intent.<sup>123</sup>

As one commentator noted, the case shows the court's role as "gate keepers of public policy, when silences in statutory language precipitate perverse attempts to distort legislative intent."<sup>124</sup>

By and large, though, most American courts that have been faced with the adoption petitions of lovers have acceded to the petition and not looked at the underlying relationship between the parties.<sup>125</sup> California, in particular, seems to grant petitions for adult adoption of gay and lesbian partners routinely, without a reported court case<sup>126</sup> (though they disallow spousal adoptions by statute).<sup>127</sup> This does not mean, however, that acceptance of the adoption would foreclose a criminal incest prosecution. Let us now explore that possibility.

#### IV. WHAT EXACTLY IS THE CRIME OF INCEST AND DOES IT REALLY COVER THE ADULT ADOPTION OF A LOVER?

##### *Is incest disgusting because it is harmful? Or does incest*

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<sup>123</sup> Bratt, *supra* note 11, at 259

<sup>124</sup> Note, *Annual Survey of Rhode Island Law: Adult Adoption – Probate Court has Discretionary Power to Deny Petition When One Adult Seeks to Adopt Another*, 15 SUFFOLK U. L. REV. 730, 734 (1981).

<sup>125</sup> See, e.g., Donaldson, *supra* note 20, at § 5[b]; *Greene v. Fitzpatrick*, 295 S.W. 896, 896 (Ky. 1927) (allowing wealthy bachelor to adopt a married woman and impliedly rejecting incest argument); see also *Bedinger v. Graybill's Executor and Trustee*, 302 S.W.2d 594, 596 (Ky. 1957), overruled on other ground by *Minary*, 419 S.W.2d at 340 (Ky. 1957) (rejecting an attempt to void a spousal adoption to allow spouse to take corpus of a trust as adoptor's heir at law because state incest statute defined incest to be only those marriages between persons who are of "kin to each other by consanguinity" in specified degrees construed to embrace only blood relationships); *Ex Parte Libertini*, 224 A.2d 443, 444 (1966) (lower court should have granted a hearing to a 56-year-old woman attempting to adopt a 35-year-old woman to allow inheritance; unless document plainly appears to the contrary, adopted person should be treated as an heir, issue, or its equivalent in a deed, grant, will or other written instrument).

<sup>126</sup> See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbigeay Adoptions*, 3 AVE MARIA L. REV. 561, 596 (2005) (citing Snodgrass, *supra* note 61, at 75; see also Urban, *supra* note 43, at n.23 ("It has been estimated that somewhere between two and three hundred adult adoptions in California are granted each year, and that about 30-40% of these adoptions are lesbian or gay adult adoptions.)) Now that California Supreme Court has ruled that same-sex couples have a constitutional right to marry, there may well be a decrease in adult adoptions by California gays and lesbians.

<sup>127</sup> CAL. FAM. CODE § 9320(a) (2007).

*trigger revulsion even in the absence of harm?*<sup>128</sup>

*You can't just say the practice in question is icky. You have to state a principle and think through its implications. Often, you have to change your opinions on related issues in order to honor that principle, or you have to throw out the principle and change your mind about the original question.*<sup>129</sup>

Since the beginning, almost all cultures (except, most notably, ancient Persia) have outlawed at least some form of sexual relations and/or marriage between family members.<sup>130</sup> Written prohibitions can be traced as far back as the Levitical Codes.<sup>131</sup> Punished by the ecclesiastical courts of England as an offense against good morals, incest is not an indictable offense at common law.<sup>132</sup> It is, then, a statutory crime that has been around in America since colonial times,<sup>133</sup> and that varies considerably<sup>134</sup> in definition

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<sup>128</sup> Cahill, *supra* note 10, at 1568.

<sup>129</sup> William Saletan, *The Love That Dare Not Speak Its Surname*, Slate (April 10, 2002), available at [www.slate.com/toolbar.aspx?action=print&id=2064227](http://www.slate.com/toolbar.aspx?action=print&id=2064227) (last visited July 2, 2008).

<sup>130</sup> See, e.g., Anonymous, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family"*, 119 HARV. L. REV. 2464, 2464 (June 2006); Bratt, *supra* note 11, at 258 & n.2 (1984) (describing the incest taboo as "present in almost every society" but noting ancient Persia as one exception); see also Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1523 & n. 30 (some civilizations "have had no incest taboo" including ancient Persia and a "dozen or so societies" that "countenance intrafamilial sex" most recently a 1982 revelation in Malaysia) (citing HERBERT MAISCH, INCEST 22 (Colin Bearn trans., 1972) (1968) and JAMES B. TWITCHELL, FORBIDDEN PARTNERS: THE INCEST TABOO IN MODERN CULTURE 11, 243-45 (1987)); Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 322, 326 (1964) ("Fragmentary exceptions are recorded as with the obligation of members of royal families in ancient Egypt, in Incaic Peru, and in Hawaii to contract incestuous marriages, and we are told that 'in Bali fraternal twins of opposite sex were permitted to marry, apparently on the theory that they had already been completely intimate in utero.' It may, however, safely be asserted that we are dealing here with one of the most unswerving and deeply held of human prohibitions."). Cleopatra, in fact, "was the issue of at least eleven generations of incest and was herself a sibling partner." Regan, *supra* note 18, at 1523 (citing Twitchell at 11).

<sup>131</sup> Michelle Murray, *Problems with California's Definition of Incest*, 11 J. CONTEMP. LEGAL ISSUES 104, 104 – 05 (2000) ("The Old Testament's prohibitions, for example, include the consanguineous relationships of parent-child, full siblings and half siblings, aunts/uncles and nephews/nieces, and the relationships-by-affinity of spouse's sibling, spouse's parent, spouse's child, parent's spouse, sibling's spouse, child's spouse, and aunt's or uncle's spouse." Citing *Leviticus* 18:6-18, 20:11-21). The author goes on to point out one other interesting tidbit:

Yet the Israelites' incest taboos admitted of exceptions, at least prior to their creation. The Israelites claim to descend from Abraham and Sarah, who were half-siblings; see *Genesis* 20:2-18. And Jacob, contrary to what would become the Levitical prohibitions, married two sisters who together bore him the twelve sons whose progeny became the twelve tribes of Israel; see *Genesis* 29-30. *Id.* at 105, n.5.

<sup>132</sup> *State v. Rogers*, 133 S.E.2d 1, 2 (1963) (citing Donaldson, *supra* note 20).

<sup>133</sup> Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, n.299.

<sup>134</sup> As one commentator notes: "Surely, an act against nature should not be so dependent on time and place for its definition." Bratt, *supra* note 11, at 288. Indeed.

from state to state.<sup>135</sup>

The “dark figure” of offenses<sup>136</sup> – incest – is rare in judicially-reported case law, and even those cases reported to law enforcement officials (that do not make it to judicially-reported case law) are likely only a small fraction of the actual incidents that occur.<sup>137</sup> Making things harder is the fact that national crime reports do not separate out incest from other sex offenses. Incest between consenting adults is a subset of these incest cases, and sexual relations between a parent and an adopted adult child is yet again an even smaller set. All of this makes studying this issue difficult.

For our purposes, though, the key distinction is what motivates a state legislature to outlaw certain sexual relations: biological considerations, or is there something greater at play that would include a broader definition of incest even where there is no chance of the parties producing abnormal children.<sup>138</sup> Generally, society has been confused on these issues throughout history and into present day.<sup>139</sup> Indeed, are we asking the wrong

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<sup>135</sup> 1A. AM. JUR. 2D *Incest* § 1 (2007). Incest has been criminalized by virtually “every literate society and many pre literate tribal groups;” see, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 880, 881 (Sanford H. Kadish ed., 1983) (“The Code of Hammurabi (c. 1750 b.c.), probably derived from Sumerian law (c. 3500 b.c.), specifies four prohibited acts of incest and establishes different penalties for each.”).

<sup>136</sup> Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 322, 324 (1964) (“with incest the ‘dark figure’ of offenses that never come to the attention of the authorities is incalculable but probably extensive”).

<sup>137</sup> Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1502 (1998). Summarizing the studies to date, one 1983 book estimated that incest affected the lives of “as many as twenty million Americans,” and that “incest is found at all social levels” of society and not just in what some might call the steerage class. GEORGE THORMAN, *INCESTUOUS FAMILIES*, v. (1983).

<sup>138</sup> See generally, Cahill, *supra* note 9, at 1569–77. Note that it is not relevant to this article whether incest covers relationships of affinity, *i.e.*, a nonblood relationship acquired through marriage. For completeness, know that a statutory prohibition defined in terms of consanguinity does not automatically extend to affinity relationships. See Neecheles, 42 C.J.S. INCEST § 16 (citing Com. V. Rahim, 805 N.E.2d 13 (Mass. 2004)). Incest statutes in some jurisdictions do, however, extend to relationships by affinity, including stepparent and stepchild, and between stepsiblings. *Id.* (citing *Grossenbacher v. State*, 197 N.E. 382, 382 (Ohio Ct. App. 1934); *People v. Armstrong*, 536 N.W.2d 789, 790 (Mich. Ct. App. 1995); *Dennis v. Com.*, 156 S.W.3d 759, 760 (Ky. Ct. App. 2004), *review denied*, (Mar. 9, 2005); *State v. Morgan*, 968 P.2d 1120, 1121 (1998)). Finally, courts have found sexual relations between stepgrandparents and stepgrandchildren, and the relationship of a spouse and the other spouse’s half sibling to be outside incest statutes. See *Id.* (citing *State v. Johnson*, 670 N.W.2d 802, 806 (Neb. Ct. App. 2003), *aff’d*, 269 Neb. 507 (2005); *State v. Handyside*, 711 P.2d 379, 380 (Wash. Ct. App. 1985), *declined to follow* on other grounds by *State v. Kitchen*, 730 P.2d 103, 104 (Wash. Ct. App. 1986), *aff’d*, 110 Wash. 2d 403 (1988); *State v. Dodd*, 871 S.W.2d 496, 496 (Tenn. Crim. App. 1993)).

<sup>139</sup> From present day, the movie “The Royal Tenenbaums” had, as a major plotline, a character that was in love with his adopted sister. Lines from the movie itself are confused as to whether this is somehow “wrong” or incestuous (Eli: “I did find it odd when you said you were in love with her. She’s married you know.” Richie: “Yeah.” Eli: “And she’s your sister.” Richie: “Adopted.”) Memorable Quotes for The Royal Tenenbaums, Internet Movie Database, <http://www.imdb.com/title/tt0265666/quotes> (last visited June 12, 2008). Even a review of the movie by the New Yorker magazine was confused on the subject. Anthony Lane, *Bloody Relations: The Royal Tenenbaums and The Business of Strangers*, NEW YORKER, 97 (Dec. 17, 2001) (reproduced in Cahn, *supra* note 78, at 1077, n.300) (“[t]his isn’t strictly incest, because Margot was adopted”). Though slightly off topic (but certainly well worth the space), my favorite movie quote involving sexual taboos is taken from the first Austin Powers movie:

Dr. Evil: The details of my life are quite inconsequential . . . very well, where do I begin? My father was a relentlessly self-improving boulangerie owner from Belgium with low grade narcolepsy and a penchant for buggery. My mother was a fifteen year old French prostitute named Chloe with webbed feet. My father would womanize, he would drink. He would make outrageous claims like he invented the question mark. Sometimes he would accuse chestnuts of being lazy. The sort of general malaise that only the genius possess and the insane lament. My childhood was typical. Summers in Rangoon, luge lessons. In the spring we’d make meat helmets. When I was insolent I was placed in a burlap bag and beaten with reeds – pretty standard really. At the age of twelve I received

question? Should the inquiry instead be case-by-case whether a true parent-child relationship exists rather than distinguishing between blood or adoption?<sup>140</sup> More to come later on these questions.

To date, there have been relatively few reported cases where an adult adoptor was prosecuted for incest for having sexual relations with his or her (so far exclusively *his*, to be precise) adopted child. Consistently, incest has received precious little attention from scholars throughout American history, with the non-core incest subcategory of adopted relationships receiving even less.<sup>141</sup> As one commentator noted: incest has “supplanted homosexuality as ‘[t]he love that dare not speak its name.’ There is no incest lobby in the halls of Congress, no incest legal defense fund, and no incest pride parade.”<sup>142</sup> Perhaps these sexual relationships have been, in a relative sense, under the radar screen of modern prosecutors, but they will not be for long as adoption of lovers increases in frequency.

Until late last century, the cases and statutes did not consider sexual relations with adult adopted children to be incest, mostly because the older statutes included only sexual relations with blood relatives within the definition and, in addition, because views about adopted children have matured.<sup>143</sup> The tale begins with Bishop’s 1873 definition of

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my first scribe. At the age of fourteen a Zoroastrian named Vilma ritualistically shaved my testicles. There really is nothing like a shorn scrotum . . . it’s breathtaking – I highly suggest you try it.

Memorable Quotes for Austin Powers: International Man of Mystery, Internet Movie Database, <http://www.imdb.com/title/tt0118655/quotes> (last visited June 12, 2008). The entire scene – complete with Carrie Fischer’s wonderful performance as the group psychologist attempting to help Dr. Evil and his son Scott – can be seen at <http://www.youtube.com/watch?v=hVaz8ZZxoxo> (last visited June 12, 2008).

<sup>140</sup> See, e.g., Cahn, *supra* note 78, at 1139 (“[T]he history of adoption and incest indicates, once again, the difficulties of applying existing law to emerging families, and of assuming that analogical reasoning is appropriate. Because courts and legislatures have focused on the differences between biological and adoptive families, rather than on the similarities of the parent-child relationships, they have not treated incest within adoptive families as punitively as incest within biological families.”).

<sup>141</sup> *Id.* at 1142.

<sup>142</sup> Brendan J. Hammer, *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 DEPAUL L. REV. 1065, 1065-66 (2007). There is an international, internet-based group called CUDDLE (“Cousins United to Defeat Discriminating Laws through Education”) that promotes an agenda to remove barriers to cousins being lovers or getting married. Nancy J. White, *Kissing Cousins; Stigma Attached to Marriage Between Relatives*, Toronto Star (July 3, 2004) (2004 WLNR 6137363). The CUDDLE website gets about 5,000 hits per month. *Id.* Their website points out that, in addition to the myriad ancient cousin marriages, Albert Einstein, Charles Darwin and Canada’s first prime minister, Sir John A. Macdonald, wed cousins. *Id.* Another website, [www.cousincouples.com](http://www.cousincouples.com), gets about 600 hits daily. *27 Million Ways to Live Your Life*, TORONTO STAR (Apr. 6, 2004) (2004 WLNR 6076618). Am I alone in seeing the Darwin marriage as a tad ironic? Finally: “You can’t appeal to Victorian morality; Queen Victoria married her first cousin. You can’t appeal to the Bible; in the Bible, God *commands* marriages between first cousins.” Saletan, *supra* note 7.

<sup>143</sup> See *State v. Lee*, 17 So.2d 277, 277 (Miss. 1944) (observing that the dictionary definition of “daughter” was the “the female offspring of a man or woman, or an immediate female descendant,” the court concluded that sexual relations between a father and an adult adopted daughter was not punishable via the state incest statute); see also *People v. Kaiser*, 51 P. 702, 702 (Cal. 1897) (the word “daughter” means “an immediate female descendant,” and not an adopted daughter); *State v. Rogers*, 133 S.E.2d 1 (N.C. 1963) (although “detestable,” incest statute is based on consanguinity and excludes sexual relations between parent and adopted child: statute subsequently amended to encompass adoptive relationships (N.C. GEN. STAT. § 14-178(a) (ii) (2007)); *State v. Youst*, 59 N.E.2d 167, 167 (Ohio Ct. App. 1943) (fact that lover was adopted “could not by the wildest stretch of the imagination constitute her the natural daughter of the accused”); Honorable Elmer D. Strickler, 50 W. Va. Opp. Atty. Gen. 236, 1963 WL 66310 at \*1 (Mar. 12, 1963) (West Virginia Attorney General Opinion that adoptive father could not be convicted of incest where relevant statute included only those related by blood); Cahn, *supra* note 78, at 302 (“The approach that incest is not a crime in the adoptive family, but only between

incest excluding adoptive relationships, wherein “unlawful carnal<sup>144</sup> intercourse, [between two parties who] are related to each other within the degrees of consanguinity of affinity wherein marriage is prohibited by law”<sup>145</sup> was embraced virtually uniformly well into the twentieth century.<sup>146</sup> None of the early criminal law treatises mention adoption at all, neither excluding sexual relations between adoptive parties from the incest definition, nor including it.<sup>147</sup> Finally, in 1952 (in a treatise that had been around since the early twentieth century), Clark and Marshall at last make a passing reference to adoption in the comments area of their incest discussion.<sup>148</sup>

Indeed, the first Model Penal Code draft that included within the definition of incest sexual relations between a parent and an adopted child was the proposed official 1962 version.<sup>149</sup> This represented, at last, a shift in underlying rationale for the incest statute away from genetics to something perhaps more primordial. The current Model Penal Code incest definition does still include adopted relationships.<sup>150</sup> The explanatory note yields the drafters’ policy reasoning:

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members of the original biological family, was the approach of most cases until the late twentieth century.”). The latter West Virginia opinion is not current law as the state changed their statute to include adopted relatives in the definition of incest. W. VA. CODE § 61-8-12(a) (2007). Some more recent cases also look to statutes that have not been changed to include adopted relationships within the definition of incest. *See, e.g., State v. Bale*, 512 N.W.2d 164, 165 (S.D. 1994) (“an adoption statute cannot erase lineal consanguinity and then create a new lineal consanguinity”).

<sup>144</sup> Easton’s 1897 Bible Dictionary defines carnal as:

Unconverted men are so called (1 *Corinthians* 3:3). They are represented as of a “carnal mind, which is enmity against God” (*Romans* 8:6, 7). Enjoyments that minister to the wants and desires of man’s animal nature are so called (*Romans* 15:27; 1 *Corinthians* 9:11). The ceremonial of the Mosaic law is spoken of as “carnal,” because it related to things outward, the bodies of men and of animals, and the purification of the flesh (*Hebrews* 7:16; 9:10). The weapons of Christian warfare are “not carnal,” that is, they are not of man’s device, nor are wielded by human power (2 *Corinthians* 10:4).

Webster’s defines carnal as “Of or pertaining to the body or its appetites; animal; fleshly; sensual; given to sensual indulgence; lustful; human or worldly as opposed to spiritual.” WEBSTER’S REVISED UNABRIDGED DICTIONARY (1998).

<sup>145</sup> Cahn, *supra* note 78, at 1142 (citing JOEL PRENTICE BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 465 (1873)).

<sup>146</sup> *Id.* at 1142 (citing WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIME 704-06 (2d ed., 1912) defining incest as “marriage or cohabitation, or sexual intercourse without marriage, between a man and woman who are related to each other within the degrees within which marriage is prohibited by law” and failing to refer to incestuous adoptive relationships).

<sup>147</sup> *Id.* & n312-24 (citing as examples Bishop, *supra* note 145, at § 502, at 307-08; Clark & Marshall, *supra* note 146, at 704-06 (defining incest as “marriage or cohabitation, or sexual intercourse without marriage, between a man and woman who are related to each other within the degrees within which marriage is prohibited by law” and failing to refer to incestuous adoptive relationships); 4 WILLIAM BLACKSTONE, COMMENTARIES 64 (noting that in 1650 incest was made a capital crime [good times!])). As Cahn wryly points out, Bishop’s treatise lumps the crime of incest into the same section as polygamy and selling and buying a wife. Cahn, *supra* note 78, at n312 (citing Bishop, *supra*, at 307-08).

<sup>148</sup> Cahn, *supra* note 78, at 1142 & n.315 (citing Clark & Marshall, *supra* note 146, at 688-89).

<sup>149</sup> *Id.* at 1140 (citing MODEL PENAL CODE § 230.2 at 188-89 (Proposed Official Draft 1962)).

<sup>150</sup> MODEL PENAL CODE § 230.2 (2007) (A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]. “Cohabit” means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.) (emphasis added).

The major policy to be effected by a law of incest is the protection of the integrity of the family unit, and it is primarily for this reason that the prohibition includes marriage and cohabitation and is extended to adopted children. Affinal relations are excluded, principally because there are situations where marriage between persons who are not related by blood should be permitted.<sup>151</sup>

So, until the 1960s or so, negative eugenics<sup>152</sup> was the underlying basis for incest laws,<sup>153</sup> but something broader runs through many modern statutes. By explicit statutory reference, at least twenty-five states and territories, representing over 140.8 million people (approximately 46.03 percent of the total population)<sup>154</sup> in the United States, are subject to statutory or common laws that include the adopted parent/adult child relationship within the definition of incest (which clearly would have no eugenics-type motive). Those states with relevant statutes are: Alabama, Arkansas, Colorado, Connecticut, Delaware, Guam, Illinois, Kansas, Kentucky, Mississippi, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Tennessee, Texas, Utah, West Virginia and Wyoming.<sup>155</sup> While other state statutes are silent on whether sexual relations between a parent and an adopted adult child or grandchild is included within the definition of incest,<sup>156</sup> other states, by common law,

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<sup>151</sup> MODEL PENAL CODE §§ 230.1 – 230.5 (Explanatory Note 2007).

<sup>152</sup> From the Greek meaning “well-born,” eugenics was coined by Sir Francis Galton, the so-called “father of the modern-day eugenics movement.” Bratt, *supra*, note 11 at n. 58 (citing Comment, *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. L. 280, 281 n.6 (1975)). Eugenics is the “study of or belief in the possibility of improving the qualities of the human species or of a human population, especially by such means as discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits (negative eugenics) or encouraging reproduction by persons presumed to have inheritable desirable traits (positive eugenics).” RANDOM HOUSE UNABRIDGED DICTIONARY \_\_ ( \_\_ ed. 2006).

<sup>153</sup> Cahn, *supra*, note 78 at 1140-41 (citing Wadlington, *supra*, note 19 at, 483. There has been much written about the terrible misconceptions relating to assertions of a strong correlation between consanguineous matings and genetically defective offspring. *See, e.g.*, Bratt at 267-81 (gathering and summarizing all the scientific statistical evidence, concluding that there is almost no statistically significant increase in the odds of a genetically defective child being born of even a core incestuous relationship, much less non-core).

<sup>154</sup> State and territory population estimated by the United States Census Bureau as collected during the year 2000 census. *See* Resident Population, *available at* <http://www.census.gov/population/www/cen2000/respop.html> (last visited July 3, 2008).

<sup>155</sup> ALA. CODE 1975 § 13A-13-3(a) (1) (Alabama 2007); ARK. CODE ANN. § 5-26-202(a) (2) (2007); COLO. REV. STAT. § 18-6-301(1) (2007); Con. Gen. Stat. 530.020 (2007); DEL. CODE ANN. 11 § 766(b) (2007); GUAM CODE ANN. 9 § 31.15 (2007); 720 ILL. COMP. STAT. 5/11-11(2) (2007); KY. REV. STAT. ANN. § 530.020(1) (2007); MISS. CODE ANN. §§ 97-29-5, 93-1-1 (2007); MO. REV. STAT. 568.020.1(1) (2007); MONT. CODE ANN. § 45-5-507(1) (2007); N.H. REV. STAT. ANN. § 639:2(I) (2007); N.C. GEN. STAT. ANN. § 14-178(a) (ii) (2007); OHIO REV. CODE ANN. § 2907.03(5) (2007); OR. REV. STAT. §§ 163.505(2), 163.505(2) (2007) (*see* State v. Buck, 757 P.2d 861, 862 (Or. Ct. App. 1988) (“marrying the natural or adoptive parent of a child creates the relationship that the statutory proscription against incest is intended to protect”); 18 PA.CON.S. STAT. § 4302 (2007); TENN. CODE ANN. § 39-15-302 (2007); TEX. PENAL CODE ANN. § 25.02(a)(1) (2007); UTAH CODE ANN. 1953 § 76-7-102(1) (2007); W. VA. CODE § 61-8-12(a) (2007), and WYO. STAT. ANN. § 6-4-402(a) (i) (2007). *See also*, RICHARD A. POSNER AND KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS, Ch. 10 (The University of Chicago Press 1996).

<sup>156</sup> Note that one state has no incest statute and another does not outlaw adult incest at all. Anonymous, *supra* note 130, at 2470-

have decided this issue in the affirmative, including Montana.<sup>157</sup> In Massachusetts and Georgia, strong dicta in related cases indicates that the definition of incest would include relationships by adoption.<sup>158</sup> There have been a few successful prosecutions for incest under these modern statutes.<sup>159</sup> Indiana has had an unusual line of cases relating to whether a man can be convicted of incest with his biological daughter, who had been adopted by another family as a four-year-old child, an issue that goes directly to the heart of the blood relation versus parent-child type relationship dichotomy found in current incest statutes (a notion Cahn refers to as the blood/function distinction).<sup>160, 161</sup>

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71, n.37, & n.39 (“Rhode Island repealed its criminal incest statute in 1989 [Act of July 5, 1989, ch. 214, 1989 R.I. Acts & Resolves 563] . . . and New Jersey does not punish acts committed when both parties are over eighteen years old [N.J. STAT. ANN. § 2C: 14-2 (West 2005)]”).

<sup>157</sup> See *State of Montana v. Leslie McQuiston*, 922 P.2d 519, 521 (Mont. 1996), overruled on other grounds in *State of Montana v. Herman*, 343 Mont. 494, 2008 WL 2221908 (2008) (conviction of incest between man and adoptive daughter upheld). Some incest statutes include in the definition of incest only sexual relations with an adopted child only when said child is below a certain age. See, e.g., 41 AM JUR. 2d Incest § 11. Courts have held that these laws create a defense for one accused of incest with an adult adopted child. *Id.*

<sup>158</sup> *Edmonson v. State*, 464 S.E.2d 839, 841 (Ga. Ct. App. 1995) (“The effect of this adoption was to create ‘the relationship of parent and child . . . as if the adopted individual were a child of biological issue . . . .’” “Because adopted individuals ‘enjoy every right and privilege of a biological child,’ they are statutorily protected from incest.”) (citing GA. CODE ANN. § 19-8-19(a) (2)). The *Edmonson* case is an imperfect analogy because the adopted child was a minor. *Id.* at 323. One Massachusetts case is indicative of what is likely to be the view of many states faced with this issue:

That “consanguinity” is a necessary element of the crime of incest is not inconsistent with the prosecution of incest between a parent and an adopted child. Although the issue is not presented in this case, we note that statutory language in the adoption statute, G.L. c. 210, § 6, specifically demonstrates the Legislature’s intent that adoptive children be treated as consanguineous for the purpose of the criminal incest prohibition. The adoption statute states that an adoption decree shall provide that “except as regards succession to property, all rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the [adoptive parent] and his kindred” (emphasis added in original). *Id.* Moreover, the adoption statute plainly anticipates that the criminal incest prohibition will apply to adoptive relationships when it states that “such decree shall not place the adopting parent or adopted child in any relation to any person, except each other, different from that before existing as regards marriage, or as regards rape, incest or other sexual crime committed by either or both” (emphasis added in original). *Com. v. Rahim*, 805 N.E.2d 13, 15 n.2 (Mass. 2004).

<sup>159</sup> *State of Connecticut v. George B.*, 785 A.2d 573, 576 (Conn. 2001) (incest statute encompasses “adopted as well as blood relatives”); *McQuiston*, 922 P.2d at 519 (Mont. 1996) (conviction of incest between man and adoptive daughter upheld).

<sup>160</sup> Cahn, *supra* note 78, at 1146 (“The struggle over the appropriate approach to incest and adoption shows that the blood/function distinction is deeply embedded in the development of adoption law. Whether adoption brings about the existence of a new family has been a critical issue. Subjecting adoptees to double-incest prohibitions recognizes both blood-based family ties and adoptive-based ties. Legal severance of the relationship between biological parents and their children cannot sever all such connections under all circumstances.”).

<sup>161</sup> *Id.* at 1145-46

[I]n *State v. Fischer*, [493 N.E.2d 1265 (Ind. Ct. App. 1986)], an Indiana court overturned the incest conviction of a man who had intercourse with his biological daughter who had been adopted by another family at the age of four. [*Id.* at 1266; see *State v. Burney*, 455 A.2d 1335, 1338 (Conn. 1983) (overruling the defendant’s conviction for sexual assault because the state failed to prove an essential element of the crime: “that the defendant was not responsible for the general supervision of the complainant’s welfare” (construing CONN. GEN STAT. ANN. § 53a-71(a) (4) (West 1983)).] The court reasoned that the adoption completely severed the biological relationship; the child’s parents were her adoptive parents. *Fischer*, 493 N.E.2d at 1266. In overruling this decision three years

Other countries have struggled in a similar way with these issues.<sup>162</sup> For example, in 1986 Parliament amended the English Marriage Act to disallow marriages between an adult and his or her adopted child in instances when said child “has lived in the same household [as the parent] and been treated by that person as a child of his family.”<sup>163</sup> The English approach, then, would seem to allow an adoption of an adult lover as long as there had never been a traditional parent/child relationship.

From a policy perspective, whether or not one believes adult adoption of a lover is incest seems to be quite instinctual, something we perhaps think about in an almost subconscious way somewhere in the murky base of our brain. The Supreme Court of Georgia, in a case about stepparents, and not adoptive parents (there is often a difference in the way they are treated so the cite is imperfect), hit upon this notion of “the cultural origin of the incest taboo” when it said that “being primarily cultural in origin, the taboo is neither instinctual nor biological, and it has very little to do with actual blood ties . . . . Georgia’s decision to include stepparents in its statutory proscription against incest is neither unreasonable nor out of keeping with the historical purpose and meaning of the taboo.”<sup>164</sup>

In sum, the states are currently split on whether someone who adopts a lover can be prosecuted for incest as well as on the related question of whether they would be allowed

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later, however, the Indiana Supreme Court observed that “the link of consanguinity cannot be erased by enactment” of the adoption statute. *State v. Bohall*, 546 N.E.2d 1214, 1215 (Ind. 1989). In *Bohall*, the Indiana Supreme Court upheld an incest conviction against a man who sexually molested his biological daughter, who had been adopted by another family, but who had returned to live with her biological father. *Id.* at 1215-16. Finally, in *State v. Sharon H.*, 429 A.2d 1321 (Del. 1981), a Delaware court allowed an incest prosecution to proceed against a half-brother and half-sister, who had the same mother. *Id.* at 1323-24, 1330. The sister had been adopted when she was ten days old, and her brother had been raised as a ward of the state. Although the adoption statute eliminated any ties between the biological parents and the children, the blood relationship continued. *Id.* at 1323-34.

*See also* *Hendry v. State*, 571 So.2d 94, 95 (Fla.App. 2 Dist. 1990) (defendants, who were father and daughter, could be charged with incest even though daughter had been adopted by third party prior to her marriage to her father; adoption statute, terminating all legal relations between adoptive person and natural parents, did not erase lineal consanguinity).

<sup>162</sup> Cahn, *supra* note 78, at 1145 (citing, *e.g.*, a 2000 New Zealand Law Commission that explained: “Case law demonstrates considerable confusion about whether [current law] means that both adoptive parents and natural parents are considered parents for the purposes of any enactment relating to forbidden marriages or the crime of incest . . . .” LAW COMMISSION, REPORT 65, ADOPTION AND ITS ALTERNATIVES: A DIFFERENT APPROACH AND A NEW FRAMEWORK 179, <http://www.lawcom.govt.nz/documents/publications/R65ado.pdf> (Sept. 2000) (last visited, June 12, 2008) (on file with the Duke Law Journal)).

<sup>163</sup> Margaret M. Mahoney, *A Legal Definition of the Stepfamily: the Example of Incest Regulation*, 8 BYU J. PUB. L. 21, 34 (1993) (citing Marriage (Prohibited Degrees of Relationship) Act 1986, § 1, *reprinted in* 27 HALSBURY’S STATUTES OF ENGLAND 562 (4th ed. 1987)). Two other examples: Sweden allows half-siblings to marry and France allows aunt-nephew and uncle-niece marriages. Regan, *supra* note 18, at 1523 (citing MARY A. GLENDON, STATE, LAW AND FAMILY 40 (1977)). Sweden also has relatively light maximum incest penalties: four years for an adult and child under age fifteen; two years for father-daughter; and only one year for siblings. *Id.* at 1527 (citing RICHARD A. POSNER, SEX AND REASON, 72 (1992)). Regan points out that Posner’s thesis is that the only regulations that can be rationally defended are those that are intended to prevent harm to others, and the United States overregulates laws relating to sex. *Id.* at 1526 (citing POSNER, *supra*, at 181-204)).

<sup>164</sup> Cahill, *supra* note 10, at 1609 (citing *Benton v. State*, 461 S.E.2d 202, 205 (Ga. 1995) (Sears, J., concurring)).

to adopt in the first instance. There have been no *Lawrence*-based challenges, though, to these proscriptive laws; so the jury is still very much out on whether the statutory and common law impediments to adopting a lover (or adopting a spouse) would withstand a full-on post-*Lawrence* constitutional attack.

Everything this article has discussed so far has related to the law of incest at the state level. But what about a federal prosecution of someone who has adopted an adult lover? One of the most famous (or infamous) federal criminal code sections is 19 U.S.C. § 2421, commonly known as the “Mann Act.” The Mann Act has been broadened quite a bit since its inception in the first half of the 20<sup>th</sup> century, when it targeted exclusively men who carried female prostitutes over state lines. Now, the Mann Act states:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in *any sexual activity for which any person can be charged with a criminal offense*, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.<sup>165</sup>

While no reported cases of Mann Act prosecutions for incest-related activities appear, it seems clear from the Act’s language that, in states where the incest statute covers sexual relations between a parent and an adopted adult, federal prosecutors could utilize the Mann Act (and/or conspiracy to violate the Mann Act) to prosecute the parties involved. This could lead to a federal court *Lawrence* showdown<sup>166</sup> similar to the state court arena showdown described above.<sup>167</sup>

#### V. AFTER *LAWRENCE*, ARE STATUTORY AND COMMON LAWS THAT CRIMINALIZE SEXUAL RELATIONS BETWEEN A PARENT AND HIS OR HER ADULT ADOPTED CHILD UNCONSTITUTIONAL?

*Since few opponents of homosexual unions are brave enough to admit that gay weddings just freak them out, they hide behind the claim that it’s an inexorable slide from legalizing gay marriage to having sex with penguins*

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<sup>165</sup> 19 U.S.C. § 2421 (emphasis added).

<sup>166</sup> From its inception, the Mann Act’s reach has been the subject of significant speculation given the unspecific nature of the Act’s text. See, e.g., Laura Elizabeth Brown, Comment: *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267 (2008).

<sup>167</sup> Note that being married is not a defense to the Mann Act under prior precedent. See *Pappas v. U.S.*, 241 F. 665 (9th Cir. 1917); see also *Whitt v. U.S.*, 261 F.2d 907 (4th Cir. 1959); *Cohen v. U.S.*, 214 F. 23 (Or. 1914), cert. denied 235 U.S. 696 (1914).

*outside JC Penney's. The problem is it's virtually impossible to debate against a slippery slope.*<sup>168</sup>

A vast, almost overwhelming, number of law review words have been penned in response to the 2003 Supreme Court decision in *Lawrence*.<sup>169</sup> When put together, from sex toys<sup>170</sup> to gay marriage, these analyses have peered into every conceivable legal and policy nook and cranny, with every conceivable viewpoint on display. I do not, then, plan to attempt to reproduce the sizable body of work relating to the constitutionality of traditional incest laws post-*Lawrence*. The body of work is literally too voluminous to cite.<sup>171</sup> Having read a great deal of it, I can assure the reader that the only thing We (the Royal We, of the Academy) are certain of is the uncertainty of how our post-*Lawrence* individual constitutional privacy rights world will play out.<sup>172</sup>

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<sup>168</sup> Lithwick, *supra* note 9.

<sup>169</sup> A Westlaw search revealed 338 law review and journal articles (as of April 15, 2008) with *Lawrence* in the title written after the date of the decision, June 23, 2003.

<sup>170</sup> I kid you not. Michael J. Hooi, *Substantive Due Process: Sex Toys After Lawrence*, 60 FLA. L. REV. 1065 (2008).

<sup>171</sup> Of the 338 law review and journal articles relating to *Lawrence* cited in note 168, 107 of those were articles that related in one way or another to incest.

<sup>172</sup> As mentioned, there are eminent scholars on both sides of the game of *Lawrence* interpretation. All professors are equal but some professors are more equal than others. Note Professor Sunstein's thoughts; "[I]t would be surprising if *Lawrence* were understood to require a careful inquiry into the adequacy of government justifications for banning (say) adult incest and bestiality." Sunstein, *supra* note 10, at 49. Professor Sunstein goes on later to make a finer distinction:

But somewhat harder cases are imaginable even here. Suppose, for example, that under a public university's sexual harassment policy, a teacher and a graduate student are banned from having a consensual relationship, even though the teacher is not (and will not be) in a supervisory position over the student. Or suppose that the incestuous relations are between adults—first cousins, let us say. In an “as applied” challenge, these would be genuinely difficult after *Lawrence*. If real consent is found in either case, a fundamental right might well be involved. But it would be possible to defend the broad sexual harassment prohibition as a way of reducing risks and introducing clarity for all. And it would be possible to defend the ban on incest among adults as a way of eliminating certain psychological pressures and protecting any children who might result from medical risk [citation omitted]. In neither case can it be said that the prohibitions run afoul of some emerging national awareness. These are far weaker cases for invalidation than *Lawrence*, but some of the underlying logic of the case seems to raise doubts in imaginable applications. Sunstein, *supra* note 10, at 61-2.

Sunstein continues to refine his thinking, starting to hint at a possible distinction between core versus non-core incest:

As I have noted, fully consensual incest is a somewhat harder case. In the case of adult brothers and sisters, it might be urged that the goal is to prevent harms to any children who might result, or psychological difficulties that would predictably produce and accompany any such relationships. Certainly the ban on sexual relations within the family cannot be said to be anachronistic. There is no “emerging public awareness” that such relations should be accepted. But imagine, for example, that sex is banned among first cousins, in circumstances in which any harms are highly speculative. Rational basis review would be satisfied. But *Lawrence* does not apply rational basis review, and in some applications, the ruling would seem to throw legal prohibitions on incest into considerable doubt. Sunstein, *supra* note 10, at 64-5.

As you can tell from this excerpt, even top constitutional minds can be a bit wishy-washy when predicting how the Court's wind will blow.

With regard to incest laws in particular, the median viewpoint seems to me to be represented quite well by a 2004 article simply and relevantly entitled *Is Incest Next?*<sup>173</sup> Using both formalistic and realist inquiries, the Professor McDonnell concludes that it is unlikely that the Court would protect “core” incest “any time soon.”<sup>174</sup> (Again, sexual relations involving minors are off the table; there is no chance that a state will be kept from regulating said behavior.) This view is supported by the only post-*Lawrence* federal appellate case testing the constitutionality of core incest: the Seventh Circuit (with the petition for a writ of *certiorari* denied) did not extend *Lawrence* protection to two adult married siblings who had been successfully prosecuted for incest, though one complicating factor was the fact that the conviction had preceded *Lawrence* and so the case did not directly address the question of whether incest prosecutions are constitutionally permissible post-*Lawrence*.<sup>175</sup> [As one commentator correctly noted: “The *Muth* decision may not garner much public sympathy; it is unlikely anyone will recall *Muth* as the *Dred Scott*<sup>176</sup> of the sexual realm.”<sup>177</sup>] Three post-*Lawrence* state court opinions – two in Ohio – relating to core incest convictions held that *Lawrence* did not apply.<sup>178</sup>

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<sup>173</sup> McDonnell, *supra* note 10, at 337. This work was produced as part of a symposium entitled “Privacy Rights in a Post *Lawrence* World: Responses to *Lawrence v. Texas*.”

<sup>174</sup> *Id.* at 338.

<sup>175</sup> *Muth v. Frank*, 412 F.3d 808 (2005), *cert. denied*, *Muth v. Frank*, 546 U.S. 988 (2005) (*Lawrence*, holding that states could not enact laws that criminalized homosexual sodomy between consenting adults, did not announce a new rule proscribing state laws that criminalized incest between consenting adults or announce existence of constitutionally protected fundamental right of adults to engage in all forms of private consensual sexual conduct, including incest, and thus did not entitle petitioner whose state-court conviction for incest preceded Supreme Court’s issuance of *Lawrence* decision to writ of habeas corpus). As is sometimes tragically true in criminal incest prosecutions, the *Muth* siblings had spent their entire respective childhoods apart in a dizzying variety of foster care, orphanages, and adoptive families, and by all accounts had never met until Patty Muth’s graduation when she was eighteen years old and Allen Muth was thirty-two. Daniel Voll, *An American Family*, *ESQUIRE*, July 1998, at 124-25. [The *Esquire* article is an absolutely gripping, well-written tale of the Muths from start to finish. I highly recommend it.] Until they fell in love, Allen and Patty were not aware that they were full siblings, though their relationship continued, including producing additional children, even after learning the truth. Mary Beth Murphy, *Brother, Sister Lose Parental Rights to Son*, *MILWAUKEE J. SENTINEL*, Feb. 11, 1997. Noting that the Muths were prosecuted despite not knowing the truth of their blood relationship until after falling in love, one commentator pointed out that cases like *Muth* “could lead to manifestly unjust results in more factually sympathetic cases, such as those involving artificial reproductive technology (ART) and multiple-father births.” Hammer, *supra* note 142, at 1096. Out-of-wedlock births – currently around 35 percent of all births – are also relevant. *Id.* at n.257 (citing Centers for Disease Control statistics from 2003). The point is that, because of a number of factors, the odds of adults falling in love, unknowingly, with a close relative will be significantly greater in the future.

Patty even agreed to be sterilized (and in fact was sterilized) in an unsuccessful plea for leniency as both Muths were sent to maximum-security prisons. Voll, *supra*, at 145. One final note: none of the Muths’ four children were disabled or deformed in any way, which is in line with modern scientific thinking and statistics.

This decision was criticized in Hammer, *supra* note 142, at 1065 (2007) (arguing that all criminal incest statutes should be held unconstitutional even under a rational basis review standard). As discussed, the latter-cited article appears to be slightly left of the mainstream of the many articles written on this issue post-*Lawrence*.

<sup>176</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>177</sup> Hammer, *supra* note 142, at 1095-96.

<sup>178</sup> See *State v. Freeman*, 801 N.E.2d 906 (Ohio Ct. App. 2003) (rejecting *Lawrence*’s application to core incest where there was uncertainty as to the consensual nature of the sexual act); see also *Beard v. State*, No. M200402227CCAR3PC, 2005 WL 1334378, at

Despite Professor McDonnell's reservations for *Lawrence* protection of core incest, he goes on cogently to argue that there is "some chance" that non-core incest should receive said protection.<sup>179</sup> While none of the articles speak directly to the issue of the current constitutional protection of a parent and an adult-adopted child to engage in sexual relations, the clear implication is that the further away from "core" incest the facts of a case get, the more likely that *Lawrence*-type protection will be afforded. Let us think about just how far away from "core" incest this type of activity really lies.

One noted post-*Lawrence* article outlined a large handful of factors that the *Lawrence* majority looked to in protecting the actions of John Geddes Lawrence and Tyron Garner; (1), the sex involved only two people; (2), it was not polyamorous; (3), both were of the age of majority (so no chance of minor/minor sex or adult/minor sex); (4), the sex was consensual and not coercive; (5), the acts occurred in a home, not in public; and (6), there was not an economic exchange as in prostitution.<sup>180</sup> Look at these factors. Each could equally apply to a prosecution for incest for an adult who adopts an adult lover or an adult spouse who adopts the other adult spouse. Perhaps the scenario presented in this article fits quite nicely into the protections afforded by *Lawrence*? Or perhaps the fact of the adoption, where the government must give formal recognition to the relationship at issue, is a distinguishing factor here?<sup>181</sup> Let us take a closer look.

In one sense, sexual relations between a parent and an adult-adopted child is quite a distance from the same activities between a parent and his or her biological child. Certainly, concerns relating to abnormal offspring<sup>182</sup> are present in one case, and completely irrelevant in the other. But a closer look is warranted. Two other issues are at play that could bring these two fact patterns closer, rather than farther apart.

The first inquiry might be whether a true parent/child relationship existed while the child was a minor. Assume the parent raised the child as he or she would have raised a biological child, with all the attending attachment and power discrepancy issues present. In this instance, one might query whether consent could truly be obtained – even after the

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\*2 (Tenn. Crim. App. June 7, 2005) (Lawrence decision does not establish a new constitutional right that protects core incest); *State v. Lowe*, No. 2004 CA00292, 2005 WL 1983964, at \*3 (Ohio Ct. App. Aug. 15, 2005) (Lawrence does not render core incest laws unconstitutional because of a "legitimate interest in protecting the family unit.").

<sup>179</sup> McDonnell, *supra* note 10, at 338.

<sup>180</sup> Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 759 (2006).

<sup>181</sup> *Id.* at 759 ("Finally, and perhaps most significantly, the relationship [in *Lawrence*] did 'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Lawrence and Garner, in other words, never sought to formalize their relationship as a marriage.") (citing *Lawrence*, 539 U.S. at 578); *see also* Meyer, *supra* note 73, at 891-92 ("a privacy claim to formal recognition by the state – in the form of a marriage license, for example – would represent something fundamentally different: a claim on government not to get out of the way, but rather to involve itself by lending its affirmative assistance in fulfilling a couple's relational ambitions").

<sup>182</sup> If a court or legislature addressing adult incest is primarily interested in negative eugenics, then "ironically, adult homosexual incest may be protected because the secular justification for precluding heterosexual incest is not present in regard to homosexual incest." Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 171 (2003).

child reached the age of consent – given what might be a very strong authority figure towering over someone with potentially less bargaining power: power being the key word here. This is akin to the undue influence concept in challenging wills and contractual instruments.

Because societal norms and views are still probably relevant to the Court’s inquiry, the second question might ask whether society really views sexual relations between a parent and a child as equally repugnant if the relation were biological or adoptive. Perhaps society as a whole makes no meaningful distinction between the two. Though it probably goes without saying, there appear to be no empirical studies that might reveal societal views on this point.

So, are there case-by-case differences, then, that might be important here? Might the crucial inquiry be whether or not there ever existed a true parent/child relationship? This speaks directly to consent.<sup>183</sup> If not, what are we really worried about? Or does the whole varied lot seem wrong for some reason we cannot really put a finger on: wrong for some reason buried deeply inside our consciousness? And what of adopting one’s spouse? Certainly no parent/child relationship ever existed, and there is presumably no blood relation, but is it just too much to be a spouse and a child of someone at the same time? (Or perhaps it is the greedy motive behind the adoption we dislike?)

Many tough questions, few easy answers. Let us, though, get back to the scenario at the core of this article: one adult adopting another adult who is a lover or spouse, neither of whom (let us assume) were ever in any sort of parent/child-type relationship, for the main purpose of better ensuring that the adoptee will inherit from or through the adoptor. This scenario allows us to strip out several arguments, including all genetic arguments, all consent-based arguments (because no true parent-child relationship ever existed, which would in turn disallow the consent argument), with the remainder being simply a societal, perhaps subconscious, “ick” factor<sup>184</sup> that is hard to pin down or put into meaningful words. This would seem to be the farthest orbit around “core” incest: farther than sex involving any minor; farther than sex between more distant relations; and certainly farther than sex between stepparents and their adult stepchildren. In each of these latter situations, the parties are either related by blood or they had some sort of parent-child relationship prior to sexual relations, neither of which is present in the

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<sup>183</sup> See, e.g., Anonymous, *supra* note 130, at 2484 – 85 (“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.”) (citing generally, Martha Albertson Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)). The Anonymous author goes on to say that in a statute “organized according to nonconsent,” that adoptive parents (along with biological parents, stepparents, guardians, custodians, and person *in loco parentis*) would be subject to prosecution for incest. *Id.* at 2485. Presumably, however, the author speaks of a traditional adoptive relationship where there was a “true” parent/child relationship at some point. This Article speaks to the dissimilar situation where no “true” parent/child relationship ever existed between the adult who adopts his or her lover. Therefore, the Anonymous author’s rubric should not embrace this situation.

<sup>184</sup> What one author calls the “unnaturalness” of incest. Bratt, *supra* note 11, at 287.

scenario at the heart of this article. Perhaps the whole analytical process is summarized as follows:

Once you begin to think about which kinds of incest-like activities lack particular identifiable harmful consequences for particular identifiable participants, you begin to think about the unthinkable and about why some “incest” is harmless incest. As this process continues, the emotional force of the taboo, its force as a general deterrent, is eroded.<sup>185</sup>

Additionally, modern incest statutes, as my Property professor<sup>186</sup> argues well, are undoubtedly both under and over inclusive.<sup>187</sup> They are underinclusive because often times incest laws do not apply to parent/adopted child relationships, stepparent relationships, to non-family-member caretakers, or to forms of abuse not involving sexual relations: they are arguably overinclusive because they prohibit sexual relations between fully consenting adults and between fully consenting minors engaging in sexual relations (which may not “raise the specter of child exploitation in the way that relations between adults and children do).<sup>188</sup> As one author summarized quite rightly: “[W]hen incest sanctions are applied to private conduct of consenting adults, there is no legitimate state interest at stake and, therefore, no legitimate state interest is furthered.”<sup>189</sup> This can only give ammunition to those that would seek to overturn incest laws as unconstitutional because they are a rather “crude form of regulation.”<sup>190</sup>

Finally, let us circle back to what might be the best argument against *Lawrence*-based constitutional protection for incest in this case: The fact that the actors have affirmatively asked, and been granted, affirmative state action in the form of the adoption certificate. Like the marriage certificate very definitely not as issue in *Lawrence*, the state’s approval of the adoption perhaps gives the state some say over the actions of the parties. Much has been written about this point vis-à-vis same-sex marriage licenses (and the potential lack of *Lawrence* protection because of the state action involved).<sup>191</sup> This same line of

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<sup>185</sup> Regan, *supra* note 18, at 1526 (citing Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 99 (1988)).

<sup>186</sup> In the spirit of full disclosure, Property was my worst grade in law school (ironic, given that I teach the class now), though certainly no blame should be directed towards Professor Regan for what were clearly my failures (though even today I sometimes still do blame him, if only just a little, after a single-malt scotch or two).

<sup>187</sup> Regan, *supra* note 18, at 1525.

<sup>188</sup> *Id.* See also Bratt, *supra* note 11, at 290-291.

<sup>189</sup> *Id.* at 293.

<sup>190</sup> *Id.* at 1525.

<sup>191</sup> See, *supra* note 181.

argument will undoubtedly be employed when the sexual actions of adopted parties ripen into a criminal complaint.<sup>192</sup>

The counterargument in our very specific case is that the parties are not asking the government for anything because, by definition, the adoption has already been approved if incest charges have been brought. The defendants – post-adoption at this point – are simply asking for what John Geddes Lawrence and Tyron Garner were asking for: the right to be left alone in their own home. The state, in fact, might well be said to have sanctioned the whole deal when it approved the adoption, assuming the entity making the decision knew of the sexual relationship.

Who wins? Who knows? Supreme Court Justices are, in the minds of many, quite uncomfortable and unpredictable when adjudicating cases involving sexual issues.<sup>193</sup> It seems to me that, on balance, the stronger legal arguments favor constitutional protection against criminalization of sexual relations with one's adopted adult lover where no prior parent/child relationship ever existed, *i.e.*, *Lawrence* protection for this non-core behavior. I suspect that with the right set of facts, the right proponents, and a Court that takes *Lawrence* at its word, incest laws as they relate to adult adoption of lovers will fall, and fall relatively soon.

My view is that incest statutes may survive a facial attack under *Lawrence*, but should fall in a challenge as-applied to the non-core incest scenarios addressed in this Article. States wishing to avoid such a showdown loss (“red” states?) might adopt an Ohio-like statute allowing an individual simply to designate an heir, thereby relieving much of the incentive for adults to adopt other adults.

This whole mess, of course, can be easily remedied by state legislatures through the removal of sexual relations between a parent and his or her adopted adult “child” from the definition of incest if no true parent/child relationship was ever present. From a policy perspective, there is absolutely no rational policy argument – none at all – for criminalizing this category of non-core behavior. I would hope that jurisdictions will revisit their often-ancient incest laws to correct this obvious flaw. No incest: No need for *Lawrence* protection.

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<sup>192</sup> See, e.g., Meyer, *supra* note 73, at 894 (“The question of a constitutional right to public recognition of family relationships is by no means unique to marriage. Lower federal and state courts have relied on the same limiting principle suggested in *Lawrence* to conclude . . . that the right of privacy does not include a right to adopt children.”). *Lawrence* probably affords no protection to the right of someone to adopt one’s lover or spouse. As stated earlier, this is a markedly difference question than the one at the subject of this article. Do not confuse the two questions.

<sup>193</sup> One prominent voice expresses this sentiment as follows:

[J]udges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary – especially the federal judiciary, with its elaborate preappointment investigations .... This screening ... is a residue of the nation's puritan – more broadly of its Christian – heritage. Posner, *supra* note 155, at 1.

## VI. CONCLUSION

*“[L]ike those we hate, those who disgust us define who we are and whom we are connected with. We need them too – downwind.”*<sup>194</sup>

An adult who adopts his or her lover (neither ever having been in an adult/child relationship) would seem ripe for protection under *Lawrence*. This is happening with enough frequency that surely multiple cases will emerge over the next few years, very likely yielding differing results. This would make this issue primed for the Court to grant *certiorari* sooner rather than later, quite possibly the first post-*Lawrence* case<sup>195</sup> down Justice Scalia’s Teflon-coated slope. If, as I expect and hope, *Lawrence* is extended to protect against criminalization of this behavior, opponents and supporters will, in time, look back at this issue as *the* catalyst that spread the *Lawrence* wildfire. How much of the personal sexual privacy landscape that becomes enveloped by the protection of *Lawrence* is anyone’s guess, but perhaps no post-*Lawrence* legal issue is presently riper for review, making adult adoption of lovers the stealth bomber that Justice Scalia should fear the most.

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<sup>194</sup> Cahill, *supra* note 9, at 1608 (citing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST*, 251 (1997)).

<sup>195</sup> Justice Scalia, of course, also mentioned the following crimes as being subject to protection under *Lawrence*: bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity. *Lawrence*, 539 U.S. at 590. Same-sex marriage is the brass ring of the slippery slope, but that showdown will undoubtedly come at the end of the road, not the beginning. In addition, I cannot imagine prostitution ever being protected by a *Lawrence*-type argument. *See, e.g., State v. Thomas*, 891 So. 2d 1233, 1238 (La. 2005) (holding that Louisiana’s prostitution statute was constitutional because *Lawrence* did not address prostitution). Fornication is such an outdated legal restriction that those laws will continue to fall without the Court caring. *See Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005) (applying *Lawrence* to strike down Virginia’s fornication statute as unconstitutional because it subjected private consensual sexual conduct to criminal penalties). This leaves adultery, bestiality and obscenity, none of which are exactly hotbeds of prosecutorial activity.