

**A CRITICAL LOOK AT U.S. LAW APPROACH REGARDING CONSENSUAL ADULT****INCEST****Dr. Najla Mahmoud Jeaash <sup>1</sup>**

---

**ABSTRACT**

Incest is defined as a sexual activity between family members who are prohibited to marry due to their close kinship. Incest constitutes a crime in most countries and the United States is one of them. The U.S. approach regarding this crime, however, needs some reexamination. Yet, this Article is only about “consensual” and “adult” incest. Incestuous relation between adults and those under the age of consent is considered a form of child sexual abuse, and it is beyond the scope of this Article. So, when the author refers to “incest”, the author means consensual relationship between related adults by blood or marriage.

**INTRODUCTION**

The American Heritage Dictionary defines incest as “sexual relations between persons who are so closely related that their marriage is illegal or forbidden by custom” (The American Heritage Dictionary). The grounds of relatedness differ from one country to another, but in general they are consanguinity, affinity, adoption, and fosterage. Incest is considered a taboo in most societies and often prohibited by law. Incest is illegal in most

---

<sup>1</sup> -Staff member, Faculty Of Law, Tripoli University, Libya

countries such as Australia, Austria, Canada, Chile, Denmark, Germany, Greece, Indonesia, Ireland, Malaysia, New Zealand, Nigeria, Norway, Sweden, and the United States (Legality of incest, 2019). Nevertheless, there is an increasing number of voices against criminalizing incestuous conducts between consenting adults. In the story that has horrified Germany, a brother and sister, separated at birth and reunited years later, engaged in a sexual relationship and had four children, two of them are disabled (Elkins, 2007). Their relation is seen by some as a victimless crime (Hipp, 2008). According to the couple's lawyer, there is no moral or legal ground for incest to be a crime today (Elkins, 2007). Also, the German couple said: "We do not feel guilty about what has happened to us. We want the law which makes incest a crime to be abolished." (Elkins, 2007). The couple got no success in overturning Germany's ban on incest by the country's highest court which held that "the state was within its rights to protect 'family order' and prevent the serious genetic illnesses that could arise from incest" (German court upholds incest law, 2008).

In the U.S., a Columbia University professor, accused of having an affair with his adult daughter for three years (James, 2010). His lawyer stated: "It's OK for homosexuals to do whatever they want in their own home. How is this so different? We have to figure out why some behavior is tolerated and some is not" (James, 2010). He refers to the U.S. Supreme Court case, *Lawrence v. Texas* (2003). In fact, *Lawrence* decision which protects consensual sexual conduct between unrelated same-sex adults provides a good ground to

argue against consensual adult incest prohibition. The defendant was ultimately charged with incest in 2013 (Ivy League professor charged with incest after ‘three-year sexual relationship with his daughter’, 2013).

Exposed incest between consenting adults to question in the U.S. is a negative and serious sign with respect of facing this kind of act. Another sign is that not every state criminalizes all forms of incest by statute. Some incestuous relations are left out although the justifications of prohibiting incest are applied. Further, the language of U.S. incest laws fails to cover incest through reproductive technology.

Part II of the Article argues that criminalizing consensual adult incest should be more definitive. Part III proposes that framework of incest states’ laws should be inclusive to face such crime. Part IV discusses that it should not be allowed to get around incest prohibition by using reproductive technology.

### **CRIMINALIZING INCEST SHOULD BE DETERMINATE**

Unlike other crimes, incest between consenting adults has been questionable as a criminal act in the U.S. Incest laws are exposed to constitutional challenge especially after Lawrence case in 2003. Some arguments are made that all private sexual activity between consenting adults should be legal including incest, and criminalizing it is a violation of human rights.

**State's Interest in Regulation Incest Prevails so Far**

In a landmark United States Supreme Court case, *Lawrence v. Texas* (2003), the Court struck down Texas's law against sodomy, holding that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment. (*Lawrence* at 578). Justice Scalia in his dissent wrote, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are ... called into question by today's decision" (*Lawrence* at 590). Soon, it turns out his view was right.

In *Ohio v. Lowe* (2007), the defendant, Paul Lowe, who was convicted of incest for sleeping with his 22-year-old stepdaughter, the biological daughter of his wife challenged the constitutionality of Ohio's statute that prohibits consensual sex with stepchildren. The statute states that: "(n)o person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: ... (t)he offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person" (OHIO REV. CODE ANN. (1997)). He argued that applying the incest statute to him violates the Fourteenth Amendment to the United States Constitution, which protects him against deprivation of "life, liberty, or property, without due process of law" (*Lowe* at 507). Lowe used *Lawrence's* decision to claim that the Constitution protects his right to engage in a private consensual sexual conduct with his adult stepdaughter (*Id.* at 511). On the other hand, the state

argued back that Lawrence is limited to consensual sexual conduct between unrelated adults (Id.). Also, since Lowe has no fundamental right in this case, and the state has a legitimate interest in protecting the unit and relationships of the family by criminalizing incest, the rational-basis test should apply (Id.). Ohio Supreme Court held that Lawrence's privacy protection does not apply (Id.). The court agreed with the state that Lawrence did not make all consensual adult sexual conduct a "fundamental" right (Id. at 511–12). Besides, protecting the family unit was the reason behind criminalizing incest in Ohio (Lowe at 512).

Yet, Lowe's holding was not unanimous (it was 5 to 3 votes), and did not persuade everybody. The next section will show how much criminalizing consensual adult incest could be arguable based on privacy ground and other grounds.

### **Possible Constitutional Challenge to Incest Laws**

Consensual adult incest is still illegal. Until now, no success has been made in challenging incest prohibition. However, there will be always good ground on the Constitution to argue in favor of decriminalizing incest among consenting adults. Since the liberty rights are not defined specifically in the U.S. Constitution, the argument about the meaning and the limit of these rights will be always common. However, maybe arguing about if people have the right to have incestuous relationship should not be that common.

First, Lawrence's decision has opened the door to challenge all other laws regulating sexual behavior. In incest law regard, many think that the Constitution's guarantee of liberty in Lawrence covers incestuous conduct. Some scholars suggest that incest, at least when it is a private consensual conduct between adult couples, should be seen the same as private consensual conduct between same-sex

couples (Cahill, 2005, 1609; Eskridge, 2005, 1057). Dean Carro, the lead lawyer for the defendant in Lowe case said, “Our view of Lawrence is a fairly narrow one, that there is a Constitutional right under the 14th Amendment’s due process clause that says private consensual activity between adults cannot be criminal” (Lindenberger, 2007).

Comparing incest to homosexuality will always arise the following question: Why is incest different whereas nothing is wrong for homosexuals to do whatever they want in their own home? Some scholars have answered this question by explaining that the main difference between sodomy and incest is the strong gay movement that supports sodomy (McDonnell, 2004, 26). In other words, there has been no such movement for incest. Otherwise, it could be possible for people who engage in incestuous relationship to win their challenge against incest law.

Moreover, it could be one of state’s justifications for regulation incest the risk of genetic defects for the babies of incestuous relations. Nevertheless, it is hard to justify prohibiting same sex incest, stepchildren, or adopted children where there is no genetic problem (Zhou, 2016, 234). Also, sometimes the Court ignores the public health as a legitimate state interest as it did in sodomy that helps spread sexually transmitted disease (Id.).

In addition, protecting the unit and the relationships of the family is the goal of incest law in Lowe. This goal could be called into question when the members of the family have never lived together as a unit.

Another ground has been brought to the dissection about incest in *Israel v. Allen* (1978). Colorado Supreme Court affirmed a decision of the district court holding that the law that prohibits the marriage between brother and sister by adoption is unconstitutional due to the violation of equal protection (Israel at 265–66). Colorado law states: “The following marriages are prohibited: . . . (b) A marriage

between an ancestor and a descendant or between a brother and sister, whether the relationship is by the half or the whole blood or by adoption; . . .” (COLO. REV. STAT. (2005)). The district court found that there is no compelling or even rational state interest to justify the unequal treatment of adopted brothers and sisters under the statute (Israel at 265).

Last but not least, in others’ view, some incest is harmless, and it is a violation of the right to marry to prohibit some incestuous marriages (Metteer, 2000, 262).

Regardless of the validity of all foregoing arguments, they have provided a clear example for how much consensual adult incest can be subject to controversy. The responsible for that is the text of the Constitution itself and Lawrence’s decision. Thus, the only way to protect incest laws might be a declaring by the U.S. Supreme Court in a future case that Lawrence’s sexual liberty does not cover incestuous behavior.

Criminalizing incest in the U.S. has to be not only firm, but more extensive as well.

### **FRAMEWORK OF INCEST STATE STATUTES SHOULD BE MORE EXTENSIVE**

U.S. ban is not inclusive enough to face the incest crime. The framework of incest laws in U.S. could be criticized due to two matters. Some incest laws are restricted to some forms of incest. Also, in some states, criminalizing sex between in-law or step-relatives is conditional upon the existence of marriage at the time of incestuous act.

### **Forms of Incest Are Legal in Some States**

States statutes are different in facing the crime of incest. In both Michigan and New Jersey, incest is illegal only between people under 18, but not between adults (MICH. COMP. LAWS ANN. (2000); N.J. STAT. ANN. (1995)). Some forms of adult consensual incest are left out by this state law or that. For

instance, sex relationship between a brother and sister of the half or the whole blood is not a crime under Ohio incest law (OHIO REV. CODE ANN. (1997)). Also, Ohio with five other states which are Illinois, Kentucky, Montana, Washington, and Wyoming do not criminalize incest between uncles or aunts and nieces or nephews (Id.; ILL. COMP. STAT. ANN. (2007); KY. REV. STAT. ANN. (1996); MONT. CODE ANN. (2003); WASH. REV. CODE (2002); WYO. STAT. ANN. (2003)).

Sex involving step-parents with their step children is legal in many states because of the lack of blood relationship (e.g., ALASKA STAT. (2002); FLA. STAT. ANN. (2000); IND. CODE ANN. (1998); IOWA CODE (2000)). In Montana and West Virginia, consent is a defense in incest between step-parents and step children if both are 18 or older (MONT. CODE ANN. (2003); W. VA. CODE (2000)).

There is no mention in some incest laws to people related by adoption well as in-law relatives (e.g., ALASKA STAT. (2002); FLA. STAT. ANN. (2000); IND. CODE ANN. (1998); IOWA CODE (2000)). In Florida, the incest law prohibits only the sexual conduct between opposite-sex couples (FLA. STAT. ANN. (2000)).

Finally, the framework of some state incest laws gets even narrower. For example, Indiana statute makes an exception when the two family members who engaged in a sexual behavior are married to each other outside of Indiana, and their marriage is valid in that place (IND. CODE ANN. (1998)). Other states have a similar approach such as Louisiana (LA. REV. STAT. ANN. (2004)), Michigan (MICH. COMP. LAWS ANN. (2004)), and Ohio (OHIO REV. CODE ANN. (1997)).

To sum up, if justification of criminalizing incest applies to the each forgoing form, leaving out those incestuous forms by some state laws could not be justified. Also, marriage between relatives exception is conflicting with the approach of facing incest. So, such exception will probably weaken the



incest laws. Another matter which is left out in most states is sex activity between in-law or step-relatives by former marriage.

### **Sexual Relationships among Affinity-Related Persons by “Former” Marriage Is**

#### **Legal in Some States**

If engaging in a sexual conduct with a step or in-law relative is prohibiting by an incest law, should the marriage that creates affinity relation be only current or the prohibition covers even the former marriage case? Alabama law requires the existence of marriage while committing incestuous behavior, otherwise it would not be a crime (ALA. CODE (2005)). It states: “(a) person commits incest if he marries or engages in sexual intercourse with a person he knows to be, either legitimately or illegitimately ... (h)is stepchild or stepparent, while the marriage creating the relationship exists” (Id. Similar language is used in UTAH CODE ANN. (2003) and MO. ANN. STAT. (1999)).

Ohio Supreme Court interpreted the incest statute in same way in *Lowe* by holding that “R.C. 2907.03(A)(5) bears a rational relationship to the legitimate state interest in protecting the family, because it reasonably advances its goal of protection of the family unit from the destructive influence of sexual relationships between parents or stepparents and their children or stepchildren. If *Lowe* divorced his wife and no longer was a stepparent to his wife’s daughter, the stepparent–stepchild relationship would be dissolved. The statute would no longer apply in that case” (*Lowe* at 518 (emphasis added)).

However, by criminalizing incest – only if the marriage linking the two people is not terminated by death or divorce – the family unit could be threatened too. Simply, the stepfather could divorce the mother to sleep with the daughter. So, the damage here will be not only the stepfather’s and mother’s marriage, but the mother/daughter relationship as well. The only relation that will be protected in this case is the

stepfather/daughter relation. Yet, it is not their familial relationship, but the sexual one. Incest law is supposed to face such relation. Limiting the prohibition to current marriage situation opens the door to get around incest statutes.

In addition, avoiding sexual attraction in stepparent/adult-stepchild relationships by incest law as a social policy applies to the former marriage case too. In other words, the incest ban should apply even if the stepparent divorces his wife, or becomes a widower (Volkh, 2007).

One more argument in favor of extending incest prohibition to cover former marriage case is avoiding the mess of lineages and the mix of familial roles. It is quite possible for the stepfather to have children from his stepdaughter besides his other children from the mother.

In addition to the limitation of the U.S. incest law, “incest” through artificial insemination has been ignored completely by that law.

### **IT SHOULD BE NO EXCEPTION FOR INCEST THROUGH ARTIFICIAL INSEMINATION**

If a woman uses her brother’s gametes to have a baby, is their relation which is created through reproductive technology considered incest? The definition of incest in states laws does not encompass this case. However, before criticizing the U.S. approach about that, it is very critical to know first if the “traditional” incest justifications do apply to that case.

#### **Are Traditional Incest Justifications Applicable to “Incest” Through Artificial Insemination?**

Variety of reasons justifies the ban of incest around the world. Religion, morality, social policy, and genetics could be the fundamental ones. If, we exclude the religious reason considering the recency of reproductive technology issue, incest justifications, in general, could be divided into social and health justifications. So, the issue here will be whether those two types of incest justifications are applicable to the artificial insemination between relatives.

Regarding incest social justifications, it could be true that the justification of cutting the roots of any sexual attraction among close relatives does not apply to their relation through the artificial insemination. Nevertheless, such relation is still inconsistent with the goal of the family unit.

According to the Ohio Supreme Court, protecting the family is a state's legitimate interest in regulating incest (Lowe at 513). Allowing someone to use another family member's gametes goes for sure against the protection goal. For instance, the mother has found out that her daughter used her step or even biological father as a sperm donor.

Aside from that, incest ban avoids the mix of familial roles. Family members' relationship through reproductive technology affects that without any doubt. Also, the children of incestuous parents are much more likely to see incest as acceptable act and to, therefore, engage in incest themselves in the future. Moreover, protecting the family includes children. The offspring of incest often suffer from rejection or mistreatment in society as well as from confusion about their identity. This applies to children of relationships either "sexual" or "through artificial insemination". Finally, having children out of incestuous relation is the worst stage could incest get to as a taboo or immoral behavior in the society. By saying that, sexual intercourse is not the only core of incest ban, but incestuous babies as well.

As for the health justification, the risk of genetic defects plays a great role in forbidding incest.

Applying social justifications of incest to artificial insemination relation between relatives could be questionable or arguable by some people. In contrast, application of genetic defect problems for babies as a potential result of incestuous relations cannot be denied as least among blood-related relatives.

Genetic rationale explains some states' approach in allowing incestuous relations between relatives who are incapable of producing. Arizona statute allows first cousins to marry only if they are both over 65, or one of them is sterile (ARIZ. REV. STAT. ANN. (1991)). The rule applies in Wisconsin, but if the woman is older than 55, or either of the couple cannot reproduce (WIS. STAT. ANN. (2001)). Florida law provides a different approach within the same justification. The only prohibited incest is the sexual conduct between opposite-sex couples (FLA. STAT. ANN. (2000)).

So, if genetic justification of incest does not apply to some cases such as relations based on affinity or adoption; or to old and sterile cousins, it definitely does to artificial insemination relation between close blood relatives.

In short, incest justifications are applicable to the artificial insemination relation. By saying that, using technology instead of engaging in an actual sexual relationship should not be a way to get around incest ban. The responsible for that is the definition of incest in the current statutes.

### **States' Laws Do Not Cover "Incest" Through Artificial Insemination**

No way to consider a certain act as crime, if it does not fit the definition of that crime. The language of current incest statutes does not cover the relatives relationships created through reproductive technology.

All states' statutes almost have a similar language in prohibiting the crime of incest. The ban includes marriage and engaging in a sexual intercourse with a family member. For instance, Arkansas law states: "A person commits incest if the person, ... purports to marry, has sexual intercourse with, or engages in deviate sexual activity with another person ..." (ARK. CODE ANN. (2008). See also, COLO. REV. STAT. ANN. (2004)). Legally speaking, using reproductive technology in the relation with a relative does not go under those statutes.

Guido Pennings thinks that because there is no sexual relationship between family members by using artificial insemination, the traditional definition of incest does not apply (Pennings, 2001, 13–15). He suggests that maybe it should be a reproduction issue, since reproduction is different from sexual intercourse according to medically assisted reproduction (Id.).

It has been requested by women in the U.S. to be impregnated with donor eggs fertilized with their brother's spermatozoa in order to have a genetic link with the baby (Sauer, 2001, 19–20). A 51-year old lesbian woman asked for that, and a successful singleton pregnancy was the result (Id.). Even though the sister was not the donor eggs in this case, some scholars argue that "(c)ases in which the brother (who is the genetic father) intends to raise the child together with his sister amount to (intentional incest) and should be therefore forbidden" (Pennings, 2001, 13–15).

Actually, artificial insemination could create another incest problem. Artificial insemination by anonymous sperm donors could lead to "accidental" incest. If two children have come from different mothers, and the same anonymous donor's sperm, they are clearly half-siblings. Unknowingly, a sexual relation could link them in the future. Such relation meets the elements of incest in many states (Murray,

2000, 105–07). Therefore, as a way to prevent “accidental incest”, some scholars call for restrictions on the number of offspring born from one individual’s gamete donor (Cahn, 2009).

Finally, leaving out incest through artificial insemination from the grasp of the law in the U.S. affects the effectiveness of incest ban, and provides a great chance to get around it. Thus, the law maker has to either change the language of incest statute to fit this act, or regulate the reproductive technology operation by setting a criminal sanction in the case of incest.

## **CONCLUSION AND RECOMMENDATIONS**

In order to face any crime successfully, the criminalized law should be free from shortcomings. With respect of facing incest between consenting adults, several sides of U.S. approach need some reexamination. First, after Lawrence, the door has been opened really well to argue that the Constitution’s guarantee of liberty in Lawrence applies to incestuous conduct. Therefore, the only way to protect incest laws might be a clear holding by the U.S. Supreme Court that Lawrence’s sexual liberty does not cover incestuous behavior. Next, In every state’s statute, engaging in a sexual relation should be forbidden at least with parents, children, ancestors, descendants, full or half siblings, aunts, uncles, nieces, nephews, step relatives, and in law relatives even after the termination of marriage by death or divorce. Finally, according to the context of current incest statutes, incestuous relationship between family members is legal by using artificial insemination. There are two ways to solve this issue. One could be extending the context to cover that act. The other way is to regulate the reproductive technology operation by setting a criminal punishment in the case of incest.

## **BIBLIOGRAPHY**

### **Journals:**

- Brett H. McDonnell, Is Incest Next, 10 CARDOZO WOMEN'S L.J. 1, 12 (2004),  
<http://ssrn.com/abstract=442520>.
- Christine McNiece Metteer, Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes, 10 KAN. J.L. & PUB. POL'Y (2000).
- 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 (2005).
- Michelle Murray, Getting Married: Problems with California's Definition of Incest, 11 J. CONTEMP. LEGAL ISSUES 104 (2000).
- Naomi Cahn, Accidental Incest: Drawing the Line—or the Curtain? – For Reproduction Technology, HARVARD JOURNAL OF LAW AND GENDER, (2009), <http://ssrn.com/abstract=1263980>.
- William Eskridge, Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion, 57 FLA. L. REV. 1011 (2005).
- Y. C. Zhou, The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy, 23 MICH. J. GENDER & L. 187 (2016),  
<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1057&context=mjgl>.

**Magazine and Newspaper Articles:**

- German court upholds incest law, BBC NEWS (March 13, 2008),  
<http://news.bbc.co.uk/2/hi/europe/7294022.stm>.

- Michael Lindenberger, Should Incest Be Legal? TIME, (Apr. 05, 2007), [http://www.time.com/time/nation/article/ 0,8599,1607322,00.html](http://www.time.com/time/nation/article/0,8599,1607322,00.html).
- Ruth Elkins, Tainted love: Are We Wrong to Treat Incest as a Taboo?, THE INDEPENDENT (March 4, 2007), <http://www.independent.co.uk/news/world/europe/tainted-love-are-we-wrong-to-treat-incest-as-a-taboo-438707.html>.

**Online Sources:**

- The American Heritage Dictionary Of The English Language, <https://www.ahdictionary.com/word/search.html?q=incest>.
- Susan Donaldson James, Professor Accused of Incest With Daughter, ABC NEWS (Dec. 15, 2010), <http://abcnews.go.com/Health/switzerland-considers-legalizing-consensual-incest-columbia-professor-accused/story?id=12395499&page=1>.
- Dietmar Hipp, Dangerous Love: German High Court Takes a Look at Incest, SPIEGEL ONLINE (March 11, 2008), <http://www.spiegel.de/international/germany/0,1518,540831,00.html>.
- Eugene Volokh, Why Might It Make Sense To Bar Stepparent-Adult-Stepchild Incest? The Volokh Conspiracy, (March 2007), [http://volokh.com/archives/archive\\_2007\\_02\\_25-2007\\_03\\_03.shtml#1172879754](http://volokh.com/archives/archive_2007_02_25-2007_03_03.shtml#1172879754).
- Guido Pennings, Incest, Gamete Donation by Siblings and the Importance of the genetic Link, Reproductive BioMedicine Online, (Oct. 2001), <http://www.rbmonline.com/Article/340>.
- Mark Sauer, Donor Eggs and Brother's Sperm: Creating Genetic Likeness in the Conceptus of an Unmarried Menopausal Woman, REPRODUCTIVE BIOMEDICINE ONLINE, (2001), [http://www.rbmojournal.com/article/S1472-6483\(10\)61958-X/abstract](http://www.rbmojournal.com/article/S1472-6483(10)61958-X/abstract).



- THE DAILY MAIL ONLINE (July 1, 2013), <https://www.dailymail.co.uk/news/article-1337416/David-Epstein-Ivy-League-professor-charged-incest-relationship-daughter.html>.
- Legality of incest, WIKIPEDIA (Nov.20, 2019), [https://en.wikipedia.org/wiki/Legality\\_of\\_incest](https://en.wikipedia.org/wiki/Legality_of_incest).

**Cases:**

- Lawrence v. Texas, 539 U.S. 558 (2003).
- State v. Lowe, 112 Ohio St.3d 507 (2007).
- Israel v. Allen, 195 Colo. 263 (1978).