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# An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest

ZANITA E. FENTON\*

In 1830, the Governor of Virginia granted clemency to Peggy,<sup>1</sup> the slave and biological daughter of John Francis, for murdering her slave owner.<sup>2</sup> Peggy killed John Francis to end his abuse of her and his threats of rape.<sup>3</sup> Remarkably, the request for clemency was made by one-hundred (white) men of the county outraged by the repeated attempts of John Francis to have sexual relations with Peggy.<sup>4</sup>

Most revealing was that, even though at least two social/sexual taboos were in serious danger of transgression, no one made an effort to rebuke the conduct of John Francis or to protect Peggy prior to his death.<sup>5</sup> One may wonder whether these men perceived the greater offense as against the established taboos or against what those taboos protected: the white patriarchal order (and those symbolizing it). Indeed, the sequence of events demonstrates the strength of those social/sexual taboos, yet reveals an unstated imperative to protect the *actual* heir to power. Both the taboos and the apparent refusal to enforce them against those “intended” to hold power were central to maintaining the social structure.<sup>6</sup>

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\* Professor of Law, University of Miami School of Law. I thank Reginald Leamon Robinson for including my work in this important symposium and for always encouraging me to write.

1. See JOSHUA D. ROTHMAN, *NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861*, at 156-59 (2003).

2. *Id.* This recounts one story of the attempts at relations by John Francis, a white slave owner, with Peggy, his black slave and ostensibly his daughter. Peggy killed Francis to end his abuse and threats of rape in the face of her refusals.

3. *Id.*

4. *Id.*

5. *Id.* at 156.

6. See *id.* at 156-57.

The history of slavery and its effects within the United States, especially the impact on the black family and individuals who are African American, have been studied and postulated since before slavery formally ended.<sup>7</sup> What is less often discussed is the impact of slavery on white families<sup>8</sup> and the individuals who comprise those families, or generally the American family within society at large. For both the commission of incest or miscegenation, the event(s) were publicly condemned while simultaneously ignored and hidden, and thereby condoned. Despite the imperative for racial purity,<sup>9</sup> white men enjoyed a presumption of free access to slaves, as well as to freed women.<sup>10</sup> Indeed, because acts of miscegenation were so common, as was their denial, they occurred in *transparent obscurity*. Further, this white, patriarchal, sexual prerogative was unfettered and all but unchallenged,<sup>11</sup> even when such access resulted in an actual biological, incestuous coupling.<sup>12</sup> Thus, the convergence of the taboos, miscegenated incest/incestuous miscegeny, prompted the *hidden exhibition of incest*, first for relations between family members of “opposite” races, but also for any correlate relations within a “same” race family. Indeed, acknowledgment or exposure of incest between relatives of

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7. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 1075 (2d ed. 1962). See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988) (providing a comprehensive historical examination of the Reconstruction era life and politics); LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1981) (evaluating the ambiguities and tensions in the interactions between black ex-slaves and white former slaveholders during the Civil War and after emancipation); GEORGE WASHINGTON WILLIAMS, *HISTORY OF THE NEGRO RACE IN AMERICA, 1619-1880*, vol. 1 (1882) (acting as the first comprehensive, scholarly treatment of African American history); CARTER G. WOODSON & CHARLES H. WESLEY, *THE NEGRO IN OUR HISTORY* (10th ed. 1922) (acting as an essential text in African American history).

8. My intention here is to explore one of the continuing social consequences. In a more philosophical sense, it is also the case that injury also hurts the perpetrator. Discussion of this point in the context of torture is instructive. See, e.g., Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193, 212 (2003) (“To resort to judicially sanctioned torture as a means of preserving national security would be to abandon the most basic principles of democracy and capitulate to the goals of terrorism. Surely, this must not be allowed.”). See generally JEREMY WALDRON, *TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* (2010) (admonishing members of society to be attentive of the moral costs of acquiescing in the torture of human beings).

9. Indeed, the imperative extended almost exclusively to the maintenance of white racial purity and white supremacy. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 4, 6-7, 11 (1967) (discussing the structure of the Virginia miscegenation statute, other statutes identical to it, and how the statute's intention could only be understood as in support of white supremacy).

10. See, e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 162-82 (2003); Jennifer B. Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-23 (1983); ROTHMAN, *supra* note 1, at 133-63.

11. See *infra* notes 42, 84-85 and accompanying text.

12. See, e.g., *supra* notes 1-4 and accompanying text.

so-called opposite race challenged both the social construction of race and therefore the basis for social stratifications. In the least, it calls into question any alleged biological distinction and rationales for this stratification. Unfortunately, it may also be that the social construct of difference may have made these kinds of relations psychologically palatable because the relation could not be considered familial.

Nonetheless, once there was silent condonation for the liaisons between a white father and his reflection in brown, it must have become more psychologically plausible that such liaisons could also occur, with impunity, with his reflection in white. The commonsense progression within this power dynamic includes the unchallenged access of these same fathers to their white children.<sup>13</sup>

Incest taboos have the purpose of permitting the development of children in safe environments, free of sexual exploitation.<sup>14</sup> These taboos also make the interdependence of families within society necessary.<sup>15</sup> The strength of the incest taboo may, alone, be enough to prompt the intensity of the silence surrounding the subject, even in the face of strong indicators of its prevalence and the associated problems with its occurrence.<sup>16</sup> However, in the United States, the silence surrounding incest ought to be understood in tandem with the silence pertaining to interracial relations from the era of anti-miscegenation.

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13. In addition, the pursuit of power, in the guise of the normative, means black families, and all other American families, imitate the structure and realities of white families in power. This includes the structure and issue attendant to Patriarchal family. "Access to their children" was not limited to female children. Unfortunately, the historical record of first-hand accounts of same-gendered sexual abuse, incestuous or otherwise, is even more limited than those records indicating heterosexual forms of incest. Historian Trevor Burnard notes one first hand account in *Mastery, Tyranny, and Desire*. See TREVOR BURNARD, *MASTERY, TYRANNY, AND DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD* 216 (2004) ("Thistlewood notes two instances of this ('Report of Mr. Watt Committing Sodomy with his Negroe waiting Boy' and 'strange reports about the parson and John his man')"); see also Mary Frances Berry, *The Crime that Had No Name: Narratives of Gay and Lesbian Sex*, in *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* 49-78 (1999).

14. See Margaret Mead, *Anomalies in American Post-Divorce Relationships*, in *DIVORCE AND AFTER* 104-08 (Paul Bohannon ed., 1970).

15. See Claude Levi-Strauss, *The Family*, in *MAN, CULTURE AND SOCIETY* 261, 276-78 (Harry L. Shapiro ed., 1956).

16. See generally DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* (1986) (providing evidence and argument identifying the overwhelming prevalence of incestuous abuse, nationally).

The core issues underlying a discussion of the connection between incest and miscegenation are misogyny and racism.<sup>17</sup> In *Man's Most Dangerous Myth: The Fallacy of Race*, Ashley Montagu discusses the parallel between antifeminism and race prejudice:

In connection with the modern form of race prejudice it is of interest to recall that almost every one of the arguments used by the racists to 'prove' the inferiority of one or another so-called 'race' was not so long ago used by the antifeminists to 'prove' the inferiority of the female as compared with the male.<sup>18</sup>

Other prominent authors, such as Simone Beauvoir in *The Second Sex*<sup>19</sup> and Gunnar Myrdal in *An American Dilemma*,<sup>20</sup> have noted the similarities between the problems of race and gender. Myrdal observed that the myths perpetuating the inferior status of race and gender were almost identical;<sup>21</sup> the similarity was not accidental, but originated in the paternalistic order of society.<sup>22</sup> Correspondingly, the parallels between the taboos of incest and of miscegenation were at one time so close, that during the antebellum period they were, on occasion, understood as identical.<sup>23</sup>

This Essay is a "thought" piece, relying on historical texts concerning society, politics, and the development of psychoanalytic conventions. The analysis offered in this Essay relies often on the absence of text and direct evidence as a means to elucidate the apparent, yet veiled problem of modern-day incest. Part I discusses the political considerations and legal thought regarding the connections between incest and miscegenation, primarily from the Ante-bellum

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17. Both identify and describe the nature of power as situated by sex, with race implicit in the first and explicit in the second.

18. ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 181 (4th ed. 1964).

19. SIMONE DE BEAUVOIR, *THE SECOND SEX* 116, 297, 331, 714-15 (Parshley ed. & trans., 5th ed. 1964); see also Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 234 (1965).

20. MYRDAL, *supra* note 7, at 1075; see also Murray & Eastwood, *supra* note 19, at 234.

21. MYRDAL, *supra* note 7, at 1077.

22. *Id.* at 1075 ("[T]he fight in America for the liberation of the Negro slaves was, therefore, closely coordinated with the fight for women's emancipation . . . . The women's movement got much of its public support by reason of its affiliation with the Abolitionist movement."); see also Murray & Eastwood, *supra* note 19, at 234 (noting Myrdal's finding that the similarity of the two problems originated in the paternalistic order of society).

23. See *infra* Part III; see also *Ratcliff v. State*, 234 Miss. 724, 730 (1958) ("[D]ifferences in race cannot be deemed incestuous."). This case was a landscape altering case that analyzed the differences and relationship between incest and miscegenation, choosing not to construe as mis-drafted "and" to expand the definition of incest. 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, 1591 (2005).

South, which sustained the social order of the time. Part II discusses the prevailing family and its role in maintaining both patriarch and the racial social order. Part III identifies the parallels between the mythologies associated with incest and with miscegenation. It further discusses psychology as it affects an individual victim and situation. Part III closes by addressing the possibility of community-based psychology and mass hysterics contributing to the denial of existing social transgressions. The Essay concludes by suggesting how the various constructs identified have modern relevance.

### I. POLITICAL AND LEGAL AFFAIRS. . .

Incest is a by-product of plantation community ordering and a consequence of these de facto polygamous families.<sup>24</sup> Nonetheless, the power structure, enabling the continued existence of the institution of slavery, distorted the traditional incentive structure of incest taboos.<sup>25</sup> If one objective of the incest taboo was to ensure nurturance from “care-giving” adults for their biological children,<sup>26</sup> this social imperative was undermined by other social schema intended to formulate caste by dehumanizing those subjected to slavery, including their own offspring. This being the case, the secondary objective of the incest taboo, promotion of family interdependence,<sup>27</sup> becomes all but immaterial in the interactions of the power holders (white males) with members of the subordinated community (enslaved blacks). Miscegenation, while ostensibly prohibiting interracial sexual liaisons, simultaneously an important foundation fostering social stratification. In effect, white slave masters could enjoy unrestricted sexual access to their black children that breached the underlying objective of both the incest and miscegenation taboos: he could have relations with his biological child because she was not white; he was not be expected to interconnect (read: marriage / read: sex) with non-related individuals from the subordinated black slave community.<sup>28</sup> These improper rela-

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24. See, e.g., *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (“Most importantly, Utah’s bigamy statute serves the State’s interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.”). See generally Ryan D. Tenney, Tom Green, *Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 *BYU J. PUB. L.* 141 (2002) (discussing the legal issues arising along with unsanctioned polygamous unions).

25. See Mead, *supra* note 14, at 104-08; see also Levi-Strauss, *supra* note 15, at 276-78.

26. See Mead, *supra* note 14, at 104-08.

27. See Levi-Strauss, *supra* note 15, at 276-78.

28. *Id.*

tions, deemed incestuous independent of slavery and otherwise the subject of public condemnation, were tacitly accepted in a society that promoted the ownership of human beings:<sup>29</sup> “Human beings, often blood relatives, were—in the name of race—treated as objects, articles, or things; living beings were ‘naturally alienated,’ considered ‘socially dead.’”<sup>30</sup> That is to say, racial politics created the hidden exhibition of incest.

In the antebellum South, incest and miscegenation were inseparable and socially and politically synonymous.<sup>31</sup> The central focus on the “Patriarchal Family”<sup>32</sup> was the root of *both* patriarchy and white supremacy, making these two social power hierarchies so closely related *as to be incestuous*. “Religious and secular proslavery theorists alike forcefully insisted that all social relations—notably those of slavery—depended upon and were grounded in the natural and divinely sanctioned subordination of women to men.”<sup>33</sup> Essentially, sex and politics were often conflated, most especially in a society ascribing to miscegenation.<sup>34</sup>

The conflation of sex and politics, the terrorization of black men, the abuse of white women, and the violent condemnation of any behavior deemed morally transgressive—these were interlocking elements in the broader sexualization of politics in the Reconstruction South. Every form of power exercised by freedmen meant a parallel loss of power for white men. That included newfound authority over black women in the domestic sphere, as well as any invented or observed agency or aggression in relation to white women, whether

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29. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 35-36 (1982).

30. Werner Sollors, “*Never Was Born*”: *The Mulatto, An American Tragedy?*, 27 *MASS. REV. INC.* 293, 297 (1986) (citing Orlando Patterson, *Slavery and Social Death: A Comparative Study* 35-76 (1982)); see also FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (2011) (highlighting the common practice of white slave owners raping slave women, both to satisfy their sexual hungers and to expand their slave populations).

31. See Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 *J. NEGRO HIST.* 274, 309-20 (1949).

32. See Elizabeth Fox-Genovese, *Family and Female Identity in the Antebellum South: Sarah Gayle and Her Family*, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900*, at 15, 19 (Carol Bleser ed., 1991) (“Family figured as a central metaphor for southern society as a whole—for the personal and social relations through which individuals defined their identities and understood their lives.”).

33. *Id.*

34. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 146-48 (1955).

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in the form of marriage, cohabitation, fornication, adultery, familiarity, brazenness, harassment, sexual assault, or rape.<sup>35</sup>

In the 1852 *Treatise on Sociology: Theoretical and Practical*, white supremacist Henry Hughes, asserted political rationales for why interracial and intra-familial sexual relations were *both* incestuous:

The black race must be civilly either (1), Subsovereign, (2) Sovereign, or (3), Supersovereign. If not subsovereign, they must be co-sovereign. The white race may also be subsovereign, sovereign, or supersovereign. If both races are *promiscuously* sovereign; that is co-sovereignty. The white race is now and has been sovereign; the black, subsovereign. Thus, the historical fact is. . . [that] the black race ought not to be admitted to co-sovereignty. It is wrong: it is in violation of moral duty. . . . These races must be either equal or unequal. They must be either superior or inferior. If superior, their ethnical progress forbids intermixture with an inferior race. But races must progress. Men have not political or economic duties only. Morality . . . which commands general progress, . . . prohibits this special regress. The preservation and progress of a race, is a moral duty of the races. Degeneration is evil. It is a sin. That sin is extreme. Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. *The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.*<sup>36</sup>

Of this passage and viewpoint, Americanist Werner Sollors states that “the hysteria that enveloped the discourse of slavery immediately before the Civil War” prescribed the “illogical and eventually ironic position” of making incest the inescapable alternative to interracial marriage.<sup>37</sup> One scholar notes that “the more restrictive the intrafamilial prohibition, the more likely that one would go outside her

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35. MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* 171-72 (1997).

36. Henry Hughes, *Treatise on Sociology: Theoretical and Practical* (1854), reprinted in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860*, at 259-60 (Drew Gilpin Faust ed., 1981) (emphasis added); see also Cahill, *supra* note 23, at 1588 (“Prior to *Loving v. Virginia*, incest was not only a feared result of the decriminalization of miscegenation, but was, in fact, used synonymously with that term.”) (emphasis added).

37. WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE* 298 (1997) (quoting David Lawrence Rodgers, *The Irony of Idealism: William Faulkner and the South's Construction of the Mulatto*, in *THE DISCOURSE OF SLAVERY: APHRA BEHN TO TONI MORRISON* 166 (Carl Plasa & Betty J. Ring eds., 1994)); see also Cahill, *supra* note 23, at 1591 (“In fact, it would appear that the incest prohibition, which functions in a positive way to ensure or compel marriage outside the family, would itself create the conditions that make miscegenation possible.”).



family to find a marital partner, sexual partner, or both. At the same time, the potent taboo against miscegenation—particularly in the rural South—made the threat of incest that much more real.”<sup>38</sup> This dynamic increased the threat of interracial rapes as well as incestuous abuses, sometimes being one and the same. Werner Sollors notes that “the possibility of sibling incest in a younger generation [often resulted] from the secrecy of miscegenation of [the prior generation of] elders.”<sup>39</sup>

One newspaper, the *World*, criticized the editorial publications of the *Tribune* for advocating miscegenation and negrophilism, likening these “abominations” to incest.

The *World* did ‘not propose to enter the lists with the *Tribune*, or any other advocate’ of miscegenation. . . . If marriage is recommended for a white man with a black woman begetting his children—then precisely the same solution ‘might be asked in relation to incest, or any other abomination which the *progressists* have not yet dubbed with a euphemistic name.’ Opinions of this sort were ‘the logical outgrowth of the extravagant negrophilism’ which had ‘its carnival of blood in this cruel civil war.’ ‘We cannot discuss these abominations,’ piously concluded the *World*.<sup>40</sup>

In addition, the general laws supported sexual misconduct with impunity. For example, in an attempt to give the law the appearance of consistency and fairness, Thomas Reed Rootes notes that, “[a]nother consequence of slavery is, that the violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass upon his property.”<sup>41</sup> Comparing this to the laws from prior slave societies, he suggests that, “[i]t is a matter worthy the consideration of legislators, whether the offence of rape, committed upon a female slave, should not be indictable; and whether, when committed by the master, there should not be superadded the sale of the slave to some other

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38. Cahill, *supra* note 23, at 1591.

39. SOLLORS, *supra* note 37, at 303; *see also* Cahill, *supra* note 23, at 1591 n.198 (“The secrecy surrounding miscegenation and the frequent denial of one’s paternity (or maternity) to a ‘mulatto’ child led to situations that supposedly raised the specter of incest and, particularly, sibling incest.”); *id.* at 1591 n.196 (“Sollors describes how the ‘fantasy of purity’ at the heart of antimiscegenation laws and rhetoric involved ‘both the need for the violent purging of impurity and the regression to the incestuously toned realm of origins alone.’”).

40. Kaplan, *supra* note 31, at 309 (“We merely record and call attention to the *fact* that the leading Republican journal of the country is the unblushing advocate of ‘miscegenation,’ which it ranks with the highest questions of social and political philosophy.”).

41. THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA: TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 99 (1999).

master.”<sup>42</sup> He goes on to justify differential treatment and enforcement of his proposed reform when he indicates “[t]he occurrence of such an offence is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote; yet, for *the honor of the statute-book*, if it does occur, there should be an adequate punishment.”<sup>43</sup>

From case law, rhetoric and results, it is evident that the effects of incestuous assault on victims were not the primary concern of the state in antebellum decisions. Sexual abuse apparently was only problematic for Southern judges because it undermined the ideology of the family as a means of social control. The existent intrafamily sexual abuse uncovered the coercive nature of patriarchal authority.<sup>44</sup> Indeed:

by isolating those men who undeniably abused their power to gain sexual satisfaction from females in their family and treating them as deviants rather than locating the source of incestuous behavior in the hierarchical nature of the household itself, southern jurists helped to preserve the patriarchal ideal and minimize state intrusion in the private sphere.<sup>45</sup>

For example, the Texas Supreme Court, in *Tuberville v. State*, declared in 1849 that incest is “so shocking to the moral sense of every civilized being, so degrading and humiliating to human nature, reducing man from his boastful superiority of a moral, rational being to a level with the brutal creation.”<sup>46</sup> One might wonder if the reference to the “brutal creation” is not intended to mean the stereotyped black male and foil to the assumptive stature of white male power-holders.<sup>47</sup> This court goes on to reverse a jury verdict convicting a (white) father of incest with his daughter as contrary to the evidence.<sup>48</sup> He insisted that only in the face of the “most indisputable proof” would the court ac-

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42. *Id.* at 99-100.

43. *Id.* at 100 (emphasis added).

44. Peter Bardaglio, “An Outrage Upon Nature”: *Incest and the Law in the Nineteenth-Century South*, in IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900, at 43 (Carol Bleser ed., 1991).

45. *Id.* at 34.

46. *Tuberville v. State*, 4 Tex. 128, 130 (1849).

47. See EMILY WEST, CHAINS OF LOVE: SLAVE COUPLES IN ANTEBELLUM SOUTH CAROLINA 117 (2004) (“[S]tereotyping served to rationalize interracial sexual liaisons in the minds of slaveholders, while removing the blame for sexual contact from white members of society (with the exception of poor white women). Stereotypical attitudes provide an important perspective from which to examine issues of sexual relationships and sexual abuse.”).

48. See *Tuberville*, 4 Tex. at 133, 137.

cept even the possibility that such a crime had been committed.<sup>49</sup> This Judge went to great lengths to find alternative explanations for that relied upon by the jury. The court found that there was not “the slightest legal proof that our *country* ha[d] been degraded by the commission of so loathsome, so heartsickening an offense in our midst” and awarded a new trial to a man indicted for committing incest with his daughter.<sup>50</sup> The court went on to say “it would only be when by open and habitual indulgence that it would become public scandal and be punishable as open lewdness.”<sup>51</sup> In a supreme form of denial, the state obscures the existence of incest as an offence and ignores the harms done to the child,<sup>52</sup> using rhetoric that makes allusion to the honor of the country being analogous to that of a father.

One discredited rationale for incest prohibitions is the belief that such unions will produce children with birth defects.<sup>53</sup> In fact, this likelihood is only slightly higher than for the general population (which is roughly 3-4%)<sup>54</sup> and is predestined by the taboos themselves.<sup>55</sup> The “corruption of blood” and the pseudo-science regarding the ill-effects on the quality of citizenship is just one of many parallel myths in the uses of incest and miscegenation taboos for the purpose of social control.

State and other important actors made efforts to protect the prevailing social order by using “science” as a justification of these taboos.<sup>56</sup> In a 1966 article bemoaning the use of such “science,” Walter Waddlington critiques *Loving v. Virginia*, pointing out, “it is more likely that the state would contend that the purpose of the [miscegena-

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49. See Bardaglio, *supra* note 44, at 43 (discussing *Tuberville*, 4 Tex. at 130).

50. *Tuberville*, 4 Tex. at 130.

51. *Id.* at 137.

52. See Bardaglio, *supra* note 44, at 43 (discussing *Tuberville*, 4 Tex. at 130).

53. See Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, Apr. 4, 2002, at A1 (“Contrary to widely held beliefs and longstanding taboos in America, first cousins can have children together without a great risk of birth defects or genetic disease, scientists are reporting today. They say there is no biological reason to discourage cousins from marrying.”).

54. See *id.* (“In the general population, the risk that a child will be born with a serious problem like spina bifida or cystic fibrosis is 3 percent to 4 percent; to that background risk, first cousins must add another 1.7 to 2.8 percentage points, the report said.”) (discussing Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97 (2002)).

55. See Mead, *supra* 14, at 104-08.

56. In addition to contending that the purpose of her miscegenation law is to assure the quality of her citizenry, Virginia might also argue that the law is intended to protect against racial tension. However, it is unlikely that the Court would agree since in simplest terms the thrust of this argument is that people’s prejudices must be preserved for the sake of social order. See *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 167 (1965).

tion] statute is to protect against a 'corruption of blood' which would 'weaken or destroy the quality of its citizenship.'"<sup>57</sup> Waddlington draws attention to a Louisiana statute prescribing blood transfusions from blood not labeled with the donor's race,<sup>58</sup> stating that "recent studies have seriously discredited the theory that a person of mixed blood is 'inferior' in quality to one of absolute racial purity."<sup>59</sup> The use of bogus science served the social goals of promoting the taboos against incest as well as against miscegenation; ironically, either could have been used for the protection of children; neither did so adequately.

## II. HISTORICAL SOCIAL ORDER

As several historians have noted, the dynamics of family life in Victorian society had a distinctly incestuous character. The new emphasis placed on the cultivation of affection and sentiment among family members combined with great concern about the need to control sexuality produced profound strains in the household. It should not be surprising, then, that the explosive nature of incest made its regulation a highly sensitive matter among Victorians, particularly in the South where the household was the foundation of the social order.<sup>60</sup>

There are accounts that suggest miscegenated incest was commonplace. In one news editorial, a soldier spoke with several ex-slaves, who were the children of a single planter, and wrote that one woman confessed to being that white planter's child. Her mentally challenged child stood nearby when he asked:

[I]f Mr. Scott, [the planter,] was [this child's] father . . . [t]he incestuous old beast! This idiot son—the child of his own daughter and grandfather to his own children! . . . Do you know how these skin aristocrats rave over the new theory of miscegenation . . . [here] was the very worst form of incestuous amalgamation.<sup>61</sup>

In another account, historian, Joshua Rothman, reports that:

Ex-slave William Thompson, born eighteen miles from Richmond, claimed that he knew a slave owner who had six children by one of his slaves. "Then there was a fuss between him and his wife,

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57. Walter Waddlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1217 (1966) (discussing *Naim v. Naim*, 197 Va. 80, 90 (1955)).

58. *Id.* at 1204 n.97 (citing LA. REV. STAT. ANN § 40:1296.1 (1965)).

59. *Id.* at 1218 (citing OTTO KLINEBERG, *CHARACTERISTICS OF THE AMERICAN NEGRO* (1944); UNESCO, *THE RACE QUESTION IN MODERN SCIENCE: THE RACE CONCEPT* 10 (1952)).

60. See Bardaglio, *supra* note 44, at 33.

61. Kaplan, *supra* note 31, at 320 n.65.

and he sold all the children but the oldest slave daughter. Afterward, he had a child by this daughter, and sold mother and child before the birth . . . . Such things are done frequently in the South.<sup>62</sup>

Rothman nonetheless opines that incest across the color line was unusual; befittingly, this assertion is hidden in a footnote.<sup>63</sup> From his perspective, we are led to believe that interracial, intra-family, same-gender liaisons were quite limited; we might also believe that and homosexual abuse was non-existent. Because of the lack of first-hand sources, both assertions are plausible.<sup>64</sup> However, an alternative interpretation of this lack of first-hand sources, acknowledges the strength of the taboos, lessening the likelihood of revealing first-hand accounts. In addition, the most likely victims of such transgressions crossing the color-line were not permitted to write, unable to find someone who would do so on their behalf, or otherwise uneducated and unable to do so for themselves.<sup>65</sup> Rothman also mentions period literature that discusses incestuous encounters. He dismisses these as fantasy and literary device, not as based in any semblance of truth.<sup>66</sup> However, period literature is routinely understood as a representation of reality and a manner of divulging truth,<sup>67</sup> while obscuring the identity of real people.

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62. ROTHMAN, *supra* note 1, at 285-86 n.63.

63. *Id.*

64. The lack of sources concerning the even greater taboo of same-gender liaisons, consensual and otherwise, support this view that the strength of the taboo contributed to the non-acknowledgement and the lack of sources. See BURNARD, *supra* note 13, at 216; BERRY, *supra* note 13, at 49-78.

65. See, e.g., EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561-67 (1974).

66. ROTHMAN, *supra* note 1, at 285 n.63. ("A number of contemporary authors have pointed out the recurring appearance together of incest and miscegenation themes in nineteenth-and-twentieth-century fiction, probably most famously in William Faulkner's *Absalom! Absalom!* (citation omitted). For an exploration of the conjunction of incest and miscegenation themes in literature, see Sollors, [*supra* note 37, at 298 (quoting David Lawrence Rodgers, *The Irony Of Idealism: William Faulkner And The South's Construction Of The Mulatto*, in *THE DISCOURSE OF SLAVERY: APHRA BEHN TO TONI MORRISON* ch. 10 (Carl Plasa & Betty J. Ring eds., 1994))]."). On southern attitudes towards incest in the nineteenth century, see Bardaglio, *supra* note 43, at 32-51.

67. Sir Philip Sidney suggests that literature creates a "golden world," a better, truer, and nobler reality, whereas discourses that convey facts deal in baser truths. See generally SIR PHILIP SIDNEY, *AN APOLOGY FOR POETRY* (Mary R. Mahl ed., 1969) (asserting that literature and fiction have the capacity to teach and demonstrate virtue most effectively). In this context, one would imagine that fiction may never represent the harshness of reality, yet does represent a piece of that reality.

The rape of slave women by white men marked the distinct convergence of racial, sexual, and economic systems.<sup>68</sup> Coercion and rape of slave children, adolescents, and adults, who were probably the child (or half-sibling) of the slave master, was unfortunate further convergence of these structures. The additional power differential generally present between parent and child, the social pressure to hide the breach of taboo, and the psychological trauma often suppressed by the victim, make these encounters especially pernicious.

Historians and legal scholars acknowledge the existence of numerous interracial sexual unions. Liaisons between black men and white women, frequently consensual, "were bound up with politics in dialogues about Klan violence."<sup>69</sup> Black women also had consensual unions with white men, but were not usually the target of public violence.<sup>70</sup> However, black women were routinely subjected to rapes, though rarely acknowledged as such.<sup>71</sup> The presumptive authority of white slave-masters predetermined the legal framework whereby rape of an enslaved, or even emancipated, black woman was not legally cognizable.<sup>72</sup> The lack of choice on the part of black slave women in their sexual encounters sustained the presumption of their immorality.<sup>73</sup> Not only were the rapists of black females not prosecuted, black women were lynched on occasion.<sup>74</sup> This harsh and stark reality ought

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68. VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* 5 (1992).

69. HODES, *supra* note 35, at 171.

70. See Patricia Hill Collins, *Introduction* to IDA B. WELLS-BARNETT, *ON LYNCHINGS* 11–12 (2002).

71. See KENNEDY, *supra* note 10, at 217; BYNUM, *supra* note 68, at 109, 187 n.75 ("During the 1850s the courts of Granville, Orange, and Montgomery counties recorded only one indictment for a rape of a black woman and three indictments for rapes committed or attempted on white women. In April 1856, Sarah Ware Nuttall charged a 'slave boy' belonging to Mary Wagstaff with having raped her slave Rosa, described in the indictment as 'under the age of 10 years.'"). See generally RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001) (providing a comprehensive study of the history of interracial relationships and the legal regulation of such relationships). Also consider centuries of rape and sexual abuse without formal legal redress. See JUDITH LEWIS HERMAN & LISA HIRSCHMAN, *FATHER-DAUGHTER INCEST* 11 (1981); 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §924a (James H. Chadborn ed., Little, Brown and Company 1970) (1904).

72. BYNUM, *supra* note 68. Rapes of black women not documented in slavery, and in employers' kitchens once slavery ended did not precipitate lynching or formal action by the justice system. See Collins, *supra* note 70, at 11–12 (2002); Wriggins, *supra* note 10, at 117–20.

73. See Wriggins, *supra* note 10 at 120–21 ("These attitudes reflect a set of myths about [b]lack women's supposed promiscuity which were used to excuse white men's sexual abuse of [b]lack women.").

74. There are recorded instances of the lynching of black women. See Kendall Thomas, *Strange Fruit*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 364, 370 (Toni Morrison ed., 1992) ("In addition to suffering rape and other forms of sexual terror, a number of black females lost their lives at the hands of lynch parties."); Collins, *supra* note 70, at 13–14, 24.

to be considered in the light of the non-prosecution of the rapists of white women; these offenses may have been legally cognizable, but were rarely acknowledged or prosecuted.<sup>75</sup> Rape for white women was originally offense trespass against the property interest of the father or husband as owner of the woman violated.<sup>76</sup> Furthermore, where there were formal laws regarding incestuous marriages written during the antebellum period, informal sexual behavior was only differentially enforced or punished.<sup>77</sup>

Correspondingly, while the volume of interracial relations, consensual and otherwise, miscegenation was the order of the day—gaining taboo status and prescribed by the state through a variety of statutory prohibitions.<sup>78</sup>

In those indictments of fornication aimed at punishing miscegenation, magistrates prosecuted primarily white women and black men rather than white men and black women. This uneven application of the law reflected the structure of gender and racial relationships. White males claimed the right to govern all women, regardless of race.<sup>79</sup>

In essence, the effect of miscegenation laws and social structures was to control sexual access to white women and limit the power/sexual freedom of black men. The implicit purpose of the laws was to maintain the white patriarchal family structure and the social supremacy of white men.

### III. HYSTERIA

In the treatment of both incest and miscegenation, there has been routine deference to the presumed benevolence of the power-holder, whether it is the father/“protector”<sup>80</sup> or “protective” slave master. So-

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75. BYNUM, *supra* note 68, at 118-19.

76. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 17 (1975); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 *LAW & SOC. INQUIRY* 941, 949 (1995) (“The wife who inherits no property holds about the same legal position as does the slave of the Southern plantation. She can own nothing, sell nothing. She has no right even to the wages she earns; her person, her time, her services are the property of another.”) (quoting Elizabeth Cady Stanton, *Address to the Legislature of New York on Women’s Rights, February 14, 1854*, in ELIZABETH CADY STANTON, SUSAN B. ANTHONY: CORRESPONDENCE, WRITINGS, SPEECHES 48 (Ellen Carol Dubois ed., 1992)); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 *HARV. L. REV.* 135, 142 (2000).

77. BYNUM, *supra* note 68, at 96.

78. See KENNEDY, *supra* note 10, at 214-23.

79. *Id.* (footnotes omitted).

80. “This disturbing fact, embarrassing to men in general and to fathers in particular, has been repeatedly unearthed in the past hundred years, and just as repeatedly buried. Any serious

ciety also uses stereotype to diminish the victim in both cases. At various times, society characterizes black women as the seductresses, sexually indiscriminate and prone to lying. Society has also believed that the victims of incest are the seductresses and deemed to lie.<sup>81</sup> Interestingly, and the sociological and political controversies regarding the significance of incestuous miscegenation<sup>82</sup> and the controversies that surround incest within the field of psychology appear to be parallel in that for both, members of society deny, or strongly question, the authenticity of such phenomena.

In roughly the same time-frame as the Antebellum South, Sigmund Freud conducted research regarding the causes of "hysteria"<sup>83</sup> in women and initially concluded that hysteria was caused by incestuous encounters and abuse by adult male figures, usually by fathers and occurring during the young and formative years of a woman's life. "In 1896, with the publication of two works, *The Aetiology of Hysteria* and *Studies on Hysteria*, [Freud] announced that he had solved the mystery of the female neurosis. At the origin of every case of hysteria, Freud asserted, was a childhood sexual trauma."<sup>84</sup> He later altered his conclusions and decided that the allegations of incest he studied were in fact fabricated.<sup>85</sup> Privately, Freud acknowledged the opposite.<sup>86</sup> Some scholars suggest that Freud was uncomfortable with his original findings "because of what it implied about the behavior of respectable family men. If his patients' reports were true, incest

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investigation of the emotional and sexual lives of women leads eventually to the discovery of the incest secret." HERMAN & HIRSCHMAN, *supra* note 71, at 7.

81. See Patricia Hill Collins, *Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. S14, S17 (1986); see also discussion *supra* notes 40-42 and accompanying texts; discussion, *supra* note 71.

82. See generally ELAINE WESTERLUND, WOMEN'S SEXUALITY AFTER CHILDHOOD INCEST (1992) (providing a research study on the sexual attitudes and practices of women with incest histories, including both statistical and anecdotal findings). For modern examples of this continuing phenomenon, see Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 927-29 (1994).

83. For a modern definition of "hysteria," see David S. Caudill, *Social Hysteria and Social Psychoanalysis: A Response to Brion's The Hidden Persistence of Witchcraft*, 5 L. & CRITIQUE 31, 32 (1994) ("[H]ysteria' disappear[ed] from official diagnostic usage, . . . now means a symptom in the absence of any disease [partly from] a feminist critique of the traditional psychoanalytic category ('conversion hysteria') as sexist, as the result of male-dominated institutional practice.")

84. HERMAN & HIRSCHMAN, *supra* note 71, at 9 (citing Sigmund Freud, *The Aetiology of Hysteria*, in 3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 191-221 (James Strachey trans., 1962)). See generally JOSEF BREUER & SIGMUND FREUD, *STUDIES ON HYSTERIA* (1957) (providing an analysis of emotional psychosis of women based on client accounts).

85. HERMAN & HIRSCHMAN, *supra* note 71, at 9-10.

86. *Id.*



was not a rare abuse . . . but was endemic to the patriarchal family.”<sup>87</sup> His later rejection of his seduction theory enabled him to conclude that “his patients’ reports of sexual abuse were fantasies, based upon their own incestuous wishes . . . . To incriminate daughters rather than fathers was an immense relief to him, even though it entailed a public admission that he had been mistaken.”<sup>88</sup>

Analyses of Freud’s reinterpretation of his own work are, without a doubt, controversial.<sup>89</sup> These analyses are, nonetheless, consistent with the dynamic enshrouding incest from a sociological and political standpoint. They allude to a strong psychological need for individuals within society to deny that which is contrary to expectations, even for analysts.<sup>90</sup> And, “[t]he link between hysteria and repressive cultural

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87. *Id.* at 9; see also JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: THE SUPPRESSION OF FREUD’S SEDUCTION THEORY* (1981) (uncovering the truth about Freud’s reversal and highlighting its enduring impact on the theory and practice of psychoanalysis).

88. HERMAN & HIRSCHMAN, *supra* note 71, at 10 (citing *THE ORIGINS OF PSYCHO-ANALYSIS: LETTERS OF WILHELM FLEISS, DRAFTS AND NOTES, 1887-1902*, at 215-17 (Marie Bonaparte et al. eds., Erich Mosbacher & James Strachey trans., 1954)).

89. We are troubled not by modern researchers asking reasonable questions about Freud’s writing and possible discoveries but by the certainty with which they claim to know the answers to these questions. Although we agree that the position that Freud truly made irrefutable discoveries of abuse is questionable and that the way his discoveries were made has been misrepresented in some historical texts, the conclusion that such discoveries were made has been misrepresented in some historical texts, the conclusion that such discoveries definitively never happened is unwarranted. There is a fair amount of evidence that some, if not all, of the discoveries were genuine. Furthermore, those who assert that the discoveries did not occur have supported their positions by either misrepresenting what Freud actually wrote or, ignoring evidence that contradicted their hypothesis, or failing to consider rather obvious and more plausible explanations for some of Freud’s behavior. This last explanation refers to political pressure, those written about by Mason (1984), which do indeed seem to still be alive and well more than 100 years after the fact.

David H. Gleaves & Elsa Hernandez, *Recent Reformulations of Freud’s Development and Abandonment of his Seduction Theory: Historical/Scientific Clarification or a Continued Assault on Truth?*, in *HISTORY OF PSYCHOLOGY* 324, 351 (1999). Alternatively:

[B]oth adult and infantile sexuality are ubiquitous phenomena, and can act as a potential cause of mental disorder; but to qualify as an actual—both sufficient and efficient—cause, it has to be clinically demonstrated in a given case. The same goes for aggression or any other dynamic motivational factor . . . . Therefore, sexuality does play a decisive role in many cases, but not uniformly in all cases.

. . . .  
Freud never gave up the seduction theory . . . . It was never an either/or proposition between a memory of an actual event or a fabrication of one, but the subtle interplay of perception and fantasy, impression and impulse, fantasy and memory, which happens to us all and in all ages.

Zvi Lothane, *Psychoanalytic Method and the Mischief of Freud-Bashers*, *PSYCHIATRIC TIMES*, Dec. 1, 1996, at 3; see also Erna Olafson et al., *Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression*, *CHILD ABUSE & NEGLECT*, Jan.-Feb. 1993, at 11 (“Although there is debate about his motives for doing so, surely it is now indisputable that Freud did indeed change his mind after 1896 and came to ascribe his patients’ accounts of ‘seduction’ to early childhood autoerotic fantasies.”).

90. Lara S. Brown, *Not Outside the Range: One Feminist Perspective on Psychic Trauma*, in *TRAUMA: EXPLORATIONS IN MEMORY* 100, 100-12 (Cathy Caruth ed., 1995).

structures highlights women as outsiders—deprived of power and voice, those to be feared and distrusted.”<sup>91</sup>

Freud identified three levels of hysteria, one of which was “mass hysteria,” affecting a group of persons.<sup>92</sup> In supposing such allegations to be false, mass hysteria is identifiable in community reactions to allegations of incest and sexual abuse.<sup>93</sup> “[C]ontemporary cases involving false accusations of child abuse can be viewed . . . as a matter of unacknowledged social and political disorder.”<sup>94</sup> Ironically, controversy regarding incest, amongst scholars in the field of psychiatry and psychology, revolves around an apparent collective need to deny or obscure even the potential that reality does not measure or comport with societal aspiration. Modern controversies concerning the work of Freud, which resurface at regular intervals,<sup>95</sup> may themselves be a form of mass hysteria.<sup>96</sup> Correspondingly mass hysteria is identifiable in racial contexts,<sup>97</sup> at emancipation, as well as during the civil rights reform efforts. For example, “[i]n the 1970s, judges observed ‘Southern White’ hysteria over civil rights progress.”<sup>98</sup> These parallels can-

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91. Caudill, *supra* note 83, at 43. There may also be a connection of this phenomenon to traditional psychoanalytic categories, such as “conversion hysteria,” which are sexist and result from male-dominated institutional practices. *See id.* at 32.

92. *Id.* at 36, 38.

93. *Id.* at 48.

94. *Id.* (discussing Brion’s analysis).

95. Olafson et al., *supra* note 89, at 10.

It can be argued that the very forces that prevented awareness of this issue in the past still obscure it today, for the sexual abuse of children has repeatedly surfaced into public and professional awareness in the past century and a half, only to be resuppressed by the negative reaction it elicits. The result has been a long history of cultural denial about criminal sexual behavior against children. As a society, we behave somewhat like those victims who protect themselves from their pain and terror by splitting off and sealing over all memory of childhood sexual traumas. There are some indications that this cultural disassociation is persisting in spite of substantial contemporary research on child sexual abuse.

*Id.* at 8 (citations omitted).

96. Psychiatric studies establish that “sociocultural forces account for many instances of clinical ‘hysteria.’” Caudill *supra* note 83, at 47 n.65.

97. The temporary anarchy that followed the collapse of the old discipline produced a state of mind bordering on hysteria among Southern white people. The first year a great fear of black insurrection and revenge seized many minds, and for a longer time the conviction prevailed that Negroes could not be induced to work without compulsion . . . . In the presence of these conditions the provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes. Some of them were intended to establish systems of peonage or apprenticeship resembling slavery.

C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 23 (2d ed. 1966).

98. Caudill, *supra* note 83, at 40 (quoting *Littleton v. Berbling*, 468 F.2d 389, 396 (7th Cir. 1972)); *id.* at 38 (“The three levels of hysteria identified by Freud reappear in judicial opinions, but with a slight modification . . . . The greatest danger, in this framework, is not the small group or mass hysteria handled successfully by judges, but a social hysteria in which the courts participate.”).

not be ignored; what unifies these reactions is that each is in defense of the established order, conscious or otherwise. After all, it was even Freud's "impression . . . that there could be powerful mental processes which nevertheless remained hidden from . . . consciousness."<sup>99</sup>

In modern psychoanalysis, the trauma associated with incest is a form of Post Traumatic Stress Disorder (PTSD).<sup>100</sup> Even though the symptomology is identical, the trauma experienced by incest survivors is not usually treated as someone experiencing PTSD, but as something quite different.<sup>101</sup> Other symptoms are

assumed to have contributed to her problem, in particular because of the interpersonal locus of her distress . . . ; the latter is almost always seen as the innocent victim of a random event. . . .  
. . . 'Real' trauma is . . . only that form of trauma in which the dominant group can participate as a victim rather than as the perpetrator or etiologist of the trauma.<sup>102</sup>

The rationales for sexual taboos for incest and those for anti-miscegenation were historically understood in parallel, yet intertwined, to the point of being one in the same. In the history of psychoanalysis, misogynistic, psychological misinformation about incest<sup>103</sup> contributes to the inadequate attention and care provided to its victims today. Additional layers of "otherness" (including race, poverty or same gender category) in this dynamic of social perception countenances the belief in its rarity as well as endorses social disinterest in its commission. In an effort to maintain the appearance of the social order, society protects the image and standing of fathers, especially white males with property, as the protector. Sexual stereotypes of black women<sup>104</sup> serve the purpose of blame, and those of black men serve as the foil<sup>105</sup>

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99. *Id.* at 50 (quoting SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 30 (A. Strachey trans., 1952)).

100. Brown, *supra* note 90, at 100-01.

To deny that [these] . . . experiences of trauma, are in fact traumatic, and to insist that only the disordered and diseased would respond to such treatment with severe distress, sends a message that oppression, be it based on gender, class, race, or other variables, is to be tolerated; that psychic pain in response to oppression is pathological, not a normal response to abnormal events.

*Id.* at 105.

101. *Id.*

102. *Id.* at 102 (citation omitted).

103. See *supra* Part III.

104. Cf. Wriggins, *supra* note 10, at 120-21 (discussing the sexual stereotypes of black women's promiscuity and the way in which their rapes by white men were largely ignored).

105. The rape of white women by black men has been the historical focus of rape in this country, grounded in concepts of power, fear, property and violence. See Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 1 (1993);

for the presumed stature and benevolence of the white male. Old legal prohibitions codifying “moral” codes, coupled with selective enforcement, enabled the actual exercise of power.<sup>106</sup> The protection of the ideals surrounding the patriarchal father is also one legitimate theory for interpreting Freud’s apparent change in understanding regarding hysteria. There is an apparent collective hysteria and denial surrounding the perpetration of incest, yet a simultaneous common knowledge and masked acceptance.

The persistent suppression of the awareness of sexual abuse has the most immediate detriments for individual victims. On a societal level, the collective denial and pathology serves the purpose of maintaining the social order and our perceptions of the truth. We are taught to buy into the correctness of the status quo and believe that those who hold power do so for the general welfare; thus, we often buy into our own victimization.<sup>107</sup> Regarding this collective denial, a scholar of psychology postulates:

We can be spectators, titillated by the thrill of risk, safe behind our imaginary psychic barriers; or we can watch in horror as trauma happens to others but reassure ourselves that we are not next because we are safe so long as we do not protest, do not stick out our necks and ‘make’ ourselves into the target. We can ignore the institutions of the society that appear to privilege us as long as we pretend that we will not be next.<sup>108</sup>

## CONCLUSION

Today, the “Jerry Springer”<sup>109</sup> vaudeville makes poverty/low-brow society into spectacle and entertainment such that we can publicly acknowledge the existence of incest (amongst the “great unwashed”) yet continue to ignore it. It has become a new and modern form of openly obscuring what may be real victimizations. Part of this

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Coramae R. Mann & Lance H. Selva, *The Sexualization of Racism: The Black as Rapist and White Justice*, 3 W. J. BLACK STUD. 168, 168 (1979); Wriggins, *supra* note 10, at 116-17.

106. See *supra* notes 69-81 and accompanying text.

107. See Brown, *supra* note 90, at 106 (“If we maintain the myth of the willing victim, who we then pathologize for her presumed willingness, we need never question the social structures that perpetuate her victimization.”).

108. *Id.* at 108 (citations omitted).

109. The Jerry Springer Show and similar shows, such as the Ricki Lake Show or the Maury Show, received high ratings in their prime for prominently exhibiting controversial topics, such as incest, and presenting them in a deliberately salacious manner.

new *transparent obscurity* is the “racing”<sup>110</sup> of poverty<sup>111</sup> and making whites without money, power, or influence into the “other.”

In a country so steeped in the myth of classlessness, in a culture where we are often at a loss to explain or understand poverty, the white trash stereotype serves as a useful way of blaming the poor for being poor. The term white trash helps solidify for the middle and upper classes a sense of cultural and intellectual superiority. . . . “white trash” is not just a classist slur – it’s also a racial epithet that marks out certain whites as a breed apart, a dysgenic race unto themselves.<sup>112</sup>

Jerry, in fact, deliberately stays “above the fray,” even making intellectual analyses and insights at the end of the show. Thus, we continue the public spectacle of incest that allows the collective denial of its prevalence.

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110. Annalee Newitz & Matt Wray, *Introduction* to WHITE TRASH: RACE AND CLASS IN AMERICA 1-2 (Matt Wray & Annalee Newitz eds., 1997) (discussing John Water’s statements about the social construct, “white trash”); Constance Penley, *Crackers and Whackers: The White Trashing of Porn*, in WHITE TRASH: RACE AND CLASS IN AMERICA 89, 90 (Matt Wray & Annalee Newitz eds., 1997) (“A Southern white child is required to learn that white trash folks are the lowest of the low because socially and economically they have sunk so far that they might as well be black.”).

111. One must also wonder if this dynamic is also what enabled, over a period of some years, Jerry Sandusky to allegedly abuse young, “underprivileged” boys; and perhaps subconsciously justify non-action on the part of Penn State or local authorities. See *Penn State (Sandusky Sex Abuse Scandal)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/p/pennsylvania\\_state\\_university/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/p/pennsylvania_state_university/index.html) (last updated Jan. 19, 2012). Some commenters believe the media’s use of “underprivileged” in the reporting of this story is code for black or African American. E.g., Jen Marshall Duncan, *Penn Scandal: Was Race a Factor?*, MULTICULTURAL FAMILIA (Nov. 12, 2011), <http://www.multiculturalfamilia.com/2011/11/12/penn-state-scandal-was-race-a-factor/>; Dr. Boyce Watkins, *How Many of Those Penn State Victims Were Black?*, NEWS ONE (Nov. 16, 2011, 6:10 PM), <http://newsone.com/newsone-original/boycawatkins/penn-st-molestation-victims-black/>; *Were Those Penn State Victims Black?*, BLACK YOUTH PROJECT (Nov. 17, 2011, 1:30 AM), <http://www.blackyouthproject.com/2011/11/jerry-sandusky-penn-state-black-victims/>; cf. Berry, *supra* note 13 at 49-78; BURNARD, *supra* note 13, at 57, 63 (discussing the sexual abuse of boys by adult males).

112. Newitz & Wray, *supra* note 110, at 1-2.