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THE CRIME OF INCEST

GRAHAM HUGHES

Professor Hughes is Senior Lecturer in Law in the University College of Wales, Aberystwyth. He is presently Visiting Professor of Law (1964–1965) in New York University, and for 1963–1964 he was Visiting Professor of Law in Stanford University. Professor Hughes studied law at the University of Cambridge, where he received the B.A. degree in 1948 and the M.A. degree in 1951. He also received the LL.B. degree from the University of Wales in 1950 and the LL.M. degree from New York University in 1960. The author has taught law in Britain, at the University of Wales and the University of Hull, and in the United States, at Yale University as well as New York University and Stanford University.

How do the laws of England, the United States, and other countries compare in their treatment of the crime of incest? How serious is the incidence of the crime? How can the genesis of the incest taboo be explained? What are the real harms produced by the crime? And, can the existing prohibitions regarding incest be defended on utilitarian grounds? Considering these and related questions, Professor Hughes critically analyses the existing law and proposes a "Model Incest Prohibition" designed to encompass the socially harmful aspects of incest without also comprising those relationships with which he finds the criminal law should not be concerned.—EDITOR.

In jurisprudential writing in the last few years there has been a continuing debate over the relationship between morality and the criminal law.¹ One of the topics that has come to be discussed is whether some of the existing prohibitions of the criminal law can be defended on utilitarian grounds or whether they reflect only deep feelings in society of repugnancy which may not be capable of utilitarian justification. A criminal offense often mentioned in this connection is that of incest, and it may therefore be worthwhile to examine the existing law of incest as a crime in the light of informed opinion on the effects of incest behavior as expressed in the writings of sociologists, anthropologists, psychologists, and psychiatrists.

THE STATE OF THE LAW

All common-law jurisdictions contain criminal prohibitions of incestuous intercourse. In England the offense was originally in the jurisdiction of the ecclesiastical courts and so has no history at common law. It was given a statutory form in the Punishment of Incest Act, 1908, and is now to be found in the consolidating enactment, the Sexual Offences Act, 1956.² Section 10 of this statute provides that it shall be a misdemeanor for a man

to have sexual intercourse with a woman whom he knows to be his granddaughter, daughter, sister, or mother. The section stipulates that the relationship need not be through lawful wedlock and that sister shall include half-sister. It may be noted that there is no mention of the uncle-niece relationship nor of the stepfather and stepdaughter relationship. Under section 11 it is an offense for a woman, if over the age of 16, to permit a man in the group of relationships previously listed in section 10 to have sexual intercourse with her by her consent. A curious feature of this definition is that no offense of incest occurs as between grandson and grandmother, though it does between grandfather and granddaughter. Under section 38 of the statute, if a man is convicted of incest with a girl under the age of 21 (or of an attempt to commit the offense), the court may divest him of all authority over her.

Under this English statute a prosecution for incest can be commenced only by the Director of Public Prosecutions or with the sanction of the Attorney General. Neither incest nor attempted incest is triable at Quarter Sessions but must be sent to the High Court. The maximum sentence for incest is generally seven years, but is life imprisonment in the case of incest with a girl under 13. The general maximum punishment for attempted incest is two years, but if the girl is under 13, the maximum for attempt has been raised to seven years by the Indecency with Children Act of 1960.³

¹ DEVLIN, *THE ENFORCEMENT OF MORALS* (1959); ROSTOW, *The Enforcement of Morals*, 1960 *CAMB. L.J.* 174; HUGHES, *Morals and the Criminal Law*, 71 *YALE L.J.* 662 (1962); HART, *LAW, LIBERTY AND MORALITY* (1963).

² 4 & 5 Eliz. 2, c. 69.

³ 8 & 9 Eliz. 2, c. 33.

In the United States incest is always a statutory offense.⁴ Sharing the English background of the punishment for incest being originally entrusted to ecclesiastical authorities, the crime never existed at common law in the United States and was created by statute at varying times in the different states. In Utah, where the Mormon community did not disapprove of incestuous relationships, incest did not become a criminal offense until a statute of 1892.⁵

The concept of incest as a crime in United States jurisdictions is generally much wider than in England. All the states add the grandmother-grandson and the uncle-niece and aunt-nephew categories to the list of relationships as found in England, and almost half the states include first cousins within the sphere of the crime.⁶ (In England marriage between first cousins is legal and in practice quite frequent.) In some states, although marriage between first cousins is prohibited, their cohabitation does not amount to incest (e.g., Louisiana).⁷ In a number of states relationship by affinity (i.e., through marriage) is sufficient to ground a prosecution for incest.⁸ So sexual intercourse between stepfather and stepdaughter (Georgia),⁹ between stepmother and stepson (Indiana),¹⁰ and even between brother-in-law and sister-in-law (Ohio)¹¹ may amount to incest. The relationship must exist at the time of the intercourse, though in Alabama it has been held that intercourse between a stepfather and stepdaughter amounts to incest even after the death of the latter's mother.¹² In 1944 it was held in Mississippi that an adopted child was not a daughter within the meaning of the incest statute.¹³ There was apparently no previous authority to be found on this point.

⁴ See MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 44 (1961); WEINBERG, *INCEST BEHAVIOR* 26-28 (1955).

⁵ Utah Laws, ch. 7, §4 (1892).

⁶ Rhode Island specifically exempts Jews, who are permitted to marry within the degrees allowed by their religion. R.I. GEN. LAWS ch. 415, §4 (1938).

⁷ LA. CIV. CODE tit. 4, ch. 2, §95 (1932); LA. CRIM. CODE §740-78 (1943); *State v. Couvillion*, 42 So. 431, 117 La. 935 (1906).

⁸ E.g., OHIO REV. CODE §2905.07 (1953); *Grossenbacher v. State*, 197 N.E.2d 382, 49 Ohio App. 451 (1934).

⁹ GA. CODE 53-105, 26-5701 (1933); *Jennings v. State*, 79 S.E. 756, 13 Ga. App. 678 (1913).

¹⁰ IND. STAT. §10-4206 (1942); *Baumer v. State*, 49 Ind. 544, 19 Am. R. 691 (1875).

¹¹ *Stewart v. State*, 39 Ohio St. 152 (1883).

¹² *Tagert v. State*, 39 So. 293, 143 Ala. 88 (1905).

¹³ *State v. Lee*, 17 So. 2d 277, 196 Miss. 311 (1944).

In some states intermarriage is a sufficient *actus reus* to constitute the crime of incest without necessity for proof of actual sexual intercourse (e.g., California).¹⁴ Apart from this possibility, proof of actual sexual intercourse (i.e., penetration though not necessarily emission) is required, and proof of lesser acts of sexual gratification is not sufficient.¹⁵ Again, in some states proof of mutual assent is required to constitute incest, so that incest and rape are by definition mutually exclusive (e.g., Missouri).¹⁶ Other jurisdictions follow the English rule that the consent of the female is not necessary and that incest and rape may overlap (e.g., Illinois).¹⁷ Under most statutes knowledge of the relationship on the part of the accused is an essential element of the offense,¹⁸ but in some states knowledge is not necessary and incest thus becomes a crime of strict liability (e.g. Florida).¹⁹

In all states incest is a felony or, at the least, a high misdemeanor. The position with respect to punishment has been summarized by Weinberg:

"Though most states have one penalty for incest offenders, regardless of nearness or distance of the kin, some states have two penalties. Colorado, Nebraska and New Jersey impose a heavier sentence upon the father than upon other male incest offenders. In North Carolina male offenders who are in the immediate family are charged with a felony and are liable to imprisonment for not more than fifteen years. Male offenders in uncle-niece and aunt-nephew relations are charged with a misdemeanor and are liable to a far milder penalty which is subject to the discretion of the court. In West Virginia, cousin marriages are annulled but the participants are not punished.

"In most states the male only is punished for incest but in some states both male and female are punished. In Tennessee two distinct statutes pertain to male and female offenders; the woman is an accomplice if she allows the act to continue for several months. In Texas the daughter is an accomplice if she cooperates. In Oregon the female must consent or the man is charged with

¹⁴ *People v. MacDonald*, 76 P.2d 121, 24 Cal. App. 2d 702 (1938).

¹⁵ *State v. Glindemann*, 75 Pac. 800, 34 Wash. 221 (1904).

¹⁶ *State v. Eding*, 42 S.W. 935, 141 Mo. 281 (1897).

¹⁷ *People v. Arendarczyk*, 12 N.E.2d 2, 367 Ill. 534 (1937).

¹⁸ E.g., KY. REV. STAT. §436.060 (1953); *Maxey v. Commonwealth*, 9 S.W.2d 1001, 225 Ky. 663 (1928).

¹⁹ *McCaskill v. State*, 45 So. 843, 55 Fla. 117 (1908).

rape. In North Dakota the woman is an accomplice if she is not forced. In Indiana the male participant must be over sixteen to be subject to punishment.²⁰

Maximum punishments vary greatly.²¹ Incestuous rape is frequently punishable with life imprisonment. Incest, minus the rape element, carries a maximum sentence of 50 years in California²² and until recently carried the same penalty in New Mexico.²³ At the other end of the range Alabama,²⁴ Delaware,²⁵ and Missouri²⁶ have maximum sentences of seven years. The most typical maximum is ten years.²⁷ The Proposed Official Draft of the American Law Institute's *Model Penal Code* classifies incest as a felony of the third degree with a maximum sentence of five years. Under this proposed draft incest is confined to marrying or cohabiting or having sexual intercourse with an ancestor or descendant or a brother or sister of the whole or half blood. The uncle-niece and aunt-nephew relationships are appended in brackets to indicate, as the note puts it, "some doubt whether they belong in the category of felonious incest in view of the severity of the penalty and condemnation." The draft section stipulates that "the relationships referred to herein include blood relationships without regard to legitimacy and relationship of parent and child by adoption."²⁸

In Illinois, where a new Criminal Code came into effect on January 1st, 1962, the offense is now divided into aggravated incest and incest.²⁹ The aggravated variety consists of a male person having sexual intercourse or engaging in an act of deviate sexual conduct with a person whom he knows to be his daughter. Daughter here includes an illegitimate relationship and also includes a stepdaughter or adopted daughter under the age of 18. The penalty is imprisonment from one to 20 years. Incest generally consists of a person's having sexual intercourse or performing an act of deviate sexual conduct with another person whom he or she knows to be his or her mother or son or brother

or sister either of the whole blood or the half blood. The penalty for this is imprisonment from one to ten years. Illinois has thus severely curtailed the range of relationships within which the crime is committed, for under the earlier law the crime extended to all those within the prohibited degrees of relationship for marriage.

In those non-common law jurisdictions whose penal codes are now available in English translation, incest commonly features as a crime.³⁰ In France there is the general offense of an indecent assault committed by an ascendant relative upon a descendant who is not yet emancipated by marriage and an increased penalty for rape where the perpetrator is an ascendant of the victim. West Germany has a general incest offense of sexual intercourse between relatives in the ascending line, in the descending line, between brothers and sisters and also between relatives by marriage. There is also an offense of using for lewd purposes a person under 21 with whose guardianship or supervision the defendant has been entrusted. Norway has a battery of incest laws encompassing sexual relations with ascendant or descendant relatives, with brothers or sisters or relatives by marriage, another offense of indecent relations with relatives in the descending line (including stepchildren and foster children), and an offense of indecent relations with a person under 18 years of age who is subject to the defendant's authority or supervision. In Argentina there is no general offense of incest, but in the offenses of sexual intercourse with young persons and the corruption of minors there is an increased punishment where the defendant is a near relative.

THE INCIDENCE OF INCEST

Incest is a crime the incidence of which is extremely difficult to estimate. Professor Gerhard Mueller has said: "Statistics on incest are not available but its occurrence is extremely low".³¹ If this is taken to refer to offenses known to the police or brought to prosecution the statement is no doubt true, but with incest the "dark figure" of offenses that never come to the attention of the authorities is incalculable but probably extensive. In England and Wales the following figures can be

²⁰ WEINBERG, *op. cit. supra* note 4, at 27.

²¹ MUELLER, *op. cit. supra* note 4, at 81-83.

²² CAL. PEN. CODE. §285.

²³ Now, under N.M. STAT. §40 A-10-3 (1961 Supp.), incest is a third degree felony with a maximum penalty of ten years' imprisonment.

²⁴ ALA. CODE §14.325 (1940).

²⁵ DEL. REV. CODE §5257 (1935).

²⁶ MISS. REV. STAT. §563.220 (1959).

²⁷ See MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 81-83 (1961).

²⁸ MODEL PENAL CODE §230.2 (Proposed Official Draft, 1962).

²⁹ ILL. REV. STAT. ch. 38, §§11-10, 11-11 (1963).

³⁰ The information that follows is gathered from the AMERICAN SERIES OF FOREIGN PENAL CODES, edited by Professor Gerhard O. W. Mueller, Director of the Comparative Criminal Law Project at the New York University School of Law.

³¹ MUELLER, *op. cit. supra* note 4, at 44-45.

extracted from the annually published criminal statistics.³²

Incest		Persons for Trial				Annual Average		
1930-34	1935-39	1940-44	1945-49	1950-54	1955-59	1959	1960	1961
66	62	62	80	121	163	160	159	178

Incest		Offenses Known to the Police				Annual Average		
1930-34	1935-39	1940-44	1945-49	1950-54	1955-59	1959	1960	1961
91	91	101	144	237	293	291	286	335

The seemingly steep rise in the number of offenses in England and Wales in the last 15 years must be set beside the general rise in all crime, and sexual offenses in particular, in the same period. So, with respect to rape and other offenses against females, the annual averages of offenses known to the police are:

1930-39	1940-49	1950-54	1955-59	1959	1960	1961
2,788	5,224	9,222	11,694	13,977	14,412	14,513

Again, it cannot be known with any certainty how far this general increase reflects a real rise in the crime rate and how far it is explicable by more efficient or more zealous law enforcement. But it can scarcely be doubted that a substantially significant increase is indicated. Even so, it is apparent that the volume of incest offenses accounts for only a tiny percentage of sexual offenses known to the police, only, as can be seen from the above tables, a little over two per cent of sexual offenses against women known to the police. But here, too, an important caution must be entered. Incest overlaps in England and in most jurisdictions with rape and other offenses of unlawful sexual intercourse with young girls. Some incest cases may thus not appear as such in official statistics, because the offenders have been prosecuted for alternative offenses. Also it must be remembered that incest is not committed legally until proof of actual sexual intercourse is possible (or intermarriage in some American jurisdictions). Many situations of incestuous sexual familiarity falling short of actual

³² CRIMINAL STATISTICS, ENGLAND AND WALES 1961, Cmnd. 1779.

sexual intercourse may thus come to be prosecuted as offenses of indecent assault, molestation, or impairment of morals.³³ For these reasons even the apparently precise figures of the criminal statistics for England and Wales do not give a full picture of incestuous relationships known to the police. A point of interest is the comparatively high percentage of incest cases that are not proceeded with by the police. In the Report of the Enquiry on Sexual Offenses conducted by the Department of Criminal Science at Cambridge it is pointed out that of all offenders in indictable sexual offenses covered by the scope of the inquiry, eight per cent were not proceeded against, but that in the case of incest the percentage rose to 13.5 per cent.³⁴ This is no doubt explicable by the need for the sanction of the Attorney-General to be obtained for the prosecution if it is not conducted by the Director of Public Prosecutions.

In New York City, the Mayor's Committee for the Study of Sex Offenses (1941) reported that in the decade 1930-1939 incest cases accounted for three per cent of crimes for which sex offenders were indicted (i.e., 98 cases of incest). The Report, however, points out that, in a number of cases of impairing the morals of a minor, sexual intercourse had taken place with a daughter, son, or some other close relative, so that there were numerous cases where a charge of incest was possible but where some other charge was in fact preferred.³⁵

The reasons why the actual incidence of incest behavior may greatly exceed that of offenses known to the police are not difficult to suggest. The offense commonly takes place within a close family circle in conditions of secrecy. The act is sometimes consensual in circumstances of strong affection between the offenders. Even where the incest is procured by duress, the victim is often a young girl who will not have the strength of will and initiative to shake off a father's domination and bring the offense to the attention of the authorities. There is, too, the possibility that both parties concerned may be legally culpable so that both have an interest in concealing the matter. Even where father-daughter incest is discovered by a mother or brother, the knowledge that to report it may result in the imprisonment of the father with consequent economic hardship for the family may be a strong influence

³³ SEXUAL OFFENSES, A REPORT OF THE CAMBRIDGE DEPARTMENT OF CRIMINAL SCIENCE 95 (1957).

³⁴ *Id.* at 39 *et seq.*

³⁵ REPORT OF THE NEW YORK (CITY) MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES 55 (1941).

in favor of concealment. Most important of all, perhaps, is the strength of the social taboo against incest, leading to a readiness to suffer the situation within the family circle rather than to expose the whole family, as it is felt, to shame. For all these reasons incest most often comes to the notice of the authorities when it has been detected by those outside the family, usually by neighbors or social workers. This occurs frequently when a daughter becomes pregnant as a result of an incestuous relationship with father or brother.³⁶

THE INCEST TABOO

In contemporary discussion about the relativity of morals, incest has become a fashionable example of a constant prohibition, of an invariant taboo to be found in all known cultures at all times. Margaret Mead has said in a recent article that an incest rule prohibiting relationships between son-mother, father-daughter, and brother-sister is a constancy in all known cultures.³⁷ Another writer has said,

"The one social phenomenon with which sexual regulation is associated in every known society is kinship. Intra-family incest taboos are absolutely universal. In none of the two hundred and fifty sample societies, nor in any other that I have ever read about, is either sexual intercourse or marriage considered permissible between father and daughter, mother and son or brother and sister."³⁸

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*."³⁹ It may, however, safely be asserted that we are dealing here with one of the most unswerving and deeply held of human prohibitions.

The genesis of the incest taboo has been variously explained. Dr. Hermann Mannheim has written of incest that "every possible theory has been put forward and disputed and the peculiar significance which it has assumed for psycho-

analysts had added to the heat of the discussion."⁴⁰ Westermarck put forward what might be regarded as the common sense explanation:

"There is a remarkable absence of erotic feelings between persons living very closely together from childhood. Nay, more, sexual indifference is combined with the positive feeling of aversion when the act is thought of. This I take to be the fundamental cause of the exogamous prohibitions. Persons who have been living closely together from childhood are as a rule near relatives. Hence their aversion to sexual relations with one another displays itself in custom and law as a prohibition of intercourse between near kin."⁴¹

A more exotic approach was initiated by Freud in his work *Totem and Taboo*. In his story of the primal horde Freud depicted the father or male leader of the group as driving out the other male members so that he might retain unrivalled possession of the women. The other males rebelled and slew the father figure but were then overcome by guilt and constructed the incest taboo as an assemblage. This may have as much historical foundation as the social contract theory, but, like the social contract theory, it is a powerful allegory of human relationships and has contributed much to the development of psychoanalysis and also to popular thought. In the form of the Oedipus complex the Freudian approach depicts the instinctual urge to possess the parent of the opposite sex coupled with instinctual rivalry with the parent of the same sex. Freud thus seems to have regarded the incest drive as a part of human biology and the incest taboo as having the deepest roots.

Following upon Freud a whole school of psychoanalysis has accorded the greatest importance to incestuous desires and has traced to such desires a whole complex of pathological sexual aberrations. Karpman has written,

"Incest as a severely prohibited psychosexual condition obtains only among humans. The patient, confronted with incestuous fixations on the one hand, the incest barrier on the other, compromises by indulging in other paraphilias which remove the activity from the implications of incest."⁴²

So, in Karpman's view, homosexual behavior is

³⁶ See *SEXUAL OFFENSES*, *op. cit. supra* note 33, at 519, and Warnat, *Die Blutschande*, 1961 *KRIMINALISTIK* 533.

³⁷ Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 *NATURAL L.F.* 51 (1961).

³⁸ MURDOCK, *The Social Regulation of Sexual Behavior*, in *PSYCHOSEXUAL DEVELOPMENT IN HEALTH AND DISEASE* 259 (Hoch and Zubin eds. 1949).

³⁹ GUTTMACHER, *SEX OFFENSES* 16 (1951).

⁴⁰ MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 77 (1946), quoted in Greenland, *Incest*, 1958 *BRIT. J. DELINQUENCY* 62.

⁴¹ 2 WESTERMARCK, *HISTORY OF HUMAN MARRIAGE* 192 (5th ed. 1921), quoted in WEINBERG, *INCEST BEHAVIOR* 237 (1955).

⁴² KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 338 (1954).

in most cases explicable as a flight from the opposite sex undertaken to escape the incest urge. The fetishist is renouncing women for the same reason (not of course a consciously held reason).

"Sadomasochism exhibits the flight from women, rooted in incestuous attraction. Incest is often of importance in exhibitionism and voyeurism. The problem of unconscious incest pervades intimately all neuroses, psychoses and paraphilias."⁴³

"Incest is so dreaded by modern man that any paraphilia may be used as a substitute, any act, in fact, including murder. Raskolnikov, in *Crime and Punishment*, killed the old woman who symbolized incest."⁴⁴

The Freudian view is by no means held with unanimity. Some psychoanalysts, though in the general Freudian tradition, advance alternative explanations. So in a recent article it has been suggested that the incest motive is not so much explicable as showing genital love for the mother and rivalry with the father, but rather as a defense mechanism in an anxiety state caused by rejection by the mother. This is, as it were, to place a more spiritual interpretation on the Oedipus theme.⁴⁵

Some writers minimize the biological aspects of the incest taboo and advance instead an explanation based on cultural, environmental, and educational factors. Wortis suggests that incest is considered harmful because it ties the individual too tightly to the family and thus is inimical to general social relationships.⁴⁶ Not only do incestuous activities thus pervert the individual's capacity for ordinary social relationships, but such activities also disorganize the family relationships themselves. Incest produces a confusion of roles within the family; the father or brother becomes husband or lover as well as father or brother. The daughter or sister becomes wife or mistress as well as daughter or sister. Confusion and tension are thus produced which lead to the destruction of the family unit on which society is based. The very kernel of the social complex, the family unit from which outgoing relationships are developed with others in society, is thus gravely threatened by the incest situation, and this, it is suggested, sufficiently accounts for the constancy of the incest taboo without positing built-in biological explanations. This may be evidenced by the way the legal

⁴³ *Id.* at 339.

⁴⁴ *Id.* at 506.

⁴⁵ Pellegrino, *Attempt at a New Interpretation of the Oedipus Myth*, 1961 *PSYCHE* 475.

⁴⁶ Wortis, *Sex Taboos, Sex Offenders and the Law*, 9 *AM. J. ORTHOPSYCHIATRY* 554 (1939).

prohibition on incest tends to contract as the family unit contracts socially, and in this sense the state of the law in most American jurisdictions would seem to lag behind social development.⁴⁷

The most forceful expression of the cultural explanation of the incest prohibition is to be found in White's celebrated article, *The Definition and Prohibition of Incest*.⁴⁸ White rejects the view that the anti-incest response is instinctive. If this were so then it is strange that it should be found necessary to pass such stringent laws to prevent incest. The presence of these laws might indeed suggest that the commission of incest is instinctive rather than the reverse. The biological degeneration theory is rejected by White on the ground that it is simply not supported by scientific evidence; and, even if it were now established, it would certainly have been beyond the comprehension of primitive peoples who held to strong incest taboos. Westermarck's simple explanation, noted above, is refuted by asserting that it is just not so that "propinquity. . . annihilates sexual desire, and if it did there would be no need for stringent prohibitions."⁴⁹

White suggests that the growth of incest taboos is explicable as a device to ensure economic development and security in the sense that by marrying out of a family unit wider bonds of kinship and mutual relationships develop so that larger and more viable cooperative units are formed. Inbreeding within the family would tend to contract the circle of relationships and to lead to economically weak and physically indefensible units. He quotes the remark of the nineteenth century anthropologist, Tylor:

"Again and again in the world's history, savage tribes must have had plainly before their minds the simple practical alternative between marrying-out and being killed out."⁵⁰

The actual incidence of incest is generally described as evidencing profound disorganization of the inter-family relationships, coupled with a psycho-pathological condition in the incest initiator. Weinberg, in his invaluable study, suggests

⁴⁷ See Walter, *Wie entstand das Inzestverbot?* 1962 *SCHWEIZERISCHE ZEITSCHRIFT FÜR PSYCHOLOGIE* 53; Hersko, Halleck, Rosenberg & Pacht, *Incest; A Three Way Process*, 1961 *J. SOCIAL THERAPY* 22; WEINBERG, *INCEST BEHAVIOR, passim* (1955).

⁴⁸ White, *Definition and Prohibition of Incest*, 50 *AM. ANTHROPOLOGIST* 416 (1948).

⁴⁹ *Id.* at 420.

⁵⁰ Tylor, *On a Method of Investigating the Development of Institutions; Applied to Laws of Marriage and Descent*, 18 *J. ANTHROPOLOGICAL INSTITUTE* 245, 267 (1888).

that incest tends to occur most frequently either in the family which is so ingrown that its members find it impossible or difficult to achieve good social relationships outside the family circle, or, conversely, in families which are so loosely organized that the individual members have never absorbed conventional feelings of rejection of sexual activity within the family.⁵¹ He classifies the male participant in incest situations as belonging to one of three types. He is either of an extreme endogamic orientation (i.e., cannot easily achieve relationships outside the family), or he will have a tendency to extreme sexual promiscuity, or he will have strong paedophilic desires. In his study of two hundred cases of incest Weinberg found that father offenders averaged between 40 and 45 years of age, that they often came from rural communities and from marginal socio-economic groups, and were of dull to normal intelligence.⁵² The daughter participant averaged about 15 years of age and was usually not promiscuous but was passive and coerced. In sister-brother incest cases the average age of the sister was 19, and she tended to be promiscuous and often initiated the incest with her brother. Overcrowded housing conditions patently contributed to incest situations, and in the father-daughter incest situation development was often contributed to by the weak personality of the mother.⁵³

Weinberg's analysis is confirmed by a recent study by Warnat, who points out further that incest offenders are often marked by some general psychic defect. They are often feeble minded or psychopathic, may be alcoholics or heavy drinkers or professional criminals or old men suffering from arteriosclerosis.⁵⁴ There is in the various surveys a good deal of evidence of the relationships between incest and other forms of delinquency. Ellis and

Brancale examined 300 sex offenders, 11 of whom had been guilty of incest. Of these 11, eight were alcoholics and seven were below-average intelligence. They all suffered from severe emotional immaturity, and six had suffered emotional deprivation in childhood. One was a psychopath, two suffered from organic brain impairments, one was a border-line psychotic, two were severe neurotics, and the remaining five were mild neurotics.⁵⁵ Of the 30 cases of incest contained in the group of sex offenders covered by the study conducted by the Cambridge Department of Criminal Science, 29 were convicted of a sexual offense for the first time, but ten of these offenders had a previous non-sexual conviction.⁵⁶ The New York City survey included 98 incest offenders. Forty-two of these had a previous criminal record, but in only ten of these cases were there convictions for previous sexual offenses. This, however, was a higher percentage of sexual recidivism than for most sex offenders.⁵⁷

TRAUMATIC EFFECTS OF INCEST

The most popular concept of harmful consequences resulting from incestuous relationships is probably the eugenic one. The scientific literature in this area, however, reveals a good deal of disagreement. Weinberg, after surveying the literature, offers the following summary:

"Human inbreeding even among the nearest kin merely accentuates the recessive traits of the parents. Two closely related parents who have healthy dominant traits but defective recessive traits would pass on their recessive traits to their offspring. Parents who are closely related and who have defective dominant traits but healthy recessive characteristics would pass on the healthy recessive traits to their progeny. This hypothesis seems to be corroborated by various experiments and has gained the assent of many research biologists and genetecists."⁵⁸

It would seem, therefore, that not too much should be made of the eugenic argument in assessing the social harm done by incestuous relationships.

The harmful consequences to members of the family and particularly to the daughter participant in father-daughter incest or father-stepdaughter incest can, however, hardly be exaggerated.

⁵¹ ELLIS & BRANCALE, *PSYCHOLOGY OF SEX OFFENDERS* 65-67 (1956).

⁵² *Op. cit. supra* note 33, at 137-39.

⁵³ *Op. cit. supra* note 35, at 90-91.

⁵⁴ WEINBERG, *INCEST BEHAVIOR* 225 (1955).

⁵¹ WEINBERG, *INCEST BEHAVIOR* 4 (1955).

⁵² But see Cormier, Kennedy & Sangowicz, *Psychodynamics of Father Daughter Incest*, 7 *CANADIAN PSYCHIATRIC A.J.* 203 (1962), where it is suggested that incest occurs "as frequently in cities as in the countryside; overcrowding as a contributing factor appears to have been exaggerated . . . ; incest may be committed by men who cannot be called otherwise criminal, nor degenerate, nor sexually psychopathic." The conclusion that incest is largely restricted to low income groups of low intelligence from rural backgrounds or city slums may be an unjustified inference from concentration on those detected and convicted of the offense. See Weiner, *On Incest: A Survey*, 4 *EXCERPTA CRIMINOLOGICA* 137 (1964). This article contains a very valuable survey of the literature on incest.

⁵³ WEINBERG, *INCEST BEHAVIOR* 52-67 (1955); see also Rhinehart, *Genesis of Overt Incest*, 1961 *COMPREHENSIVE PSYCHIATRY* 338.

⁵⁴ Warnat, *supra* note 36.

Reference has already been made to the general disorganization of family relationships. The suffering caused to the wife who discovers an incestuous relationship between her husband and her daughter will be immediately obvious. The position of the daughter and the nature of the harm caused to her will depend on the precise nature of the relationship between her and her father or step-father. In rare cases there appears to be a deep love relationship between father and daughter. Situations of this kind may be moving and pathetic. Weinberg quotes the letter of a semi-literate Greek written from prison to his daughter with whom he had committed incest. "Nobody had ever this great love which I have for you and nobody ever write one—poet or anybody. . . . We have a new history in our hearts which nobody ever read. We have our secrets, father and daughter."⁵⁹ This kind of agonized incestuous love relationship, given literary expression in Ford's "*'Tis Pity She's a Whore*" and some of the short stories of Guy de Maupassant, will almost inevitably involve a traumatic legacy for the daughter. She will be cut off from normal relationships with boys and may seriously lose the capacity for entering into such relationships in the future.

More usual is the relationship in which the daughter is a passive and coerced participant. It is here that the real horror of incest lies, in the case histories of miserable physical and mental pressures exerted by fathers on daughters and step-daughters to secure their compliance.⁶⁰ Weinberg cites Hentig and Viernstein who describe the way in which the incestuous father seeks to isolate his daughter, to cut her off as far as possible from all outside relationships.

"Many incestuous fathers are inclined to torture their daughters, to suspect their every little pleasure and to suppress their every move towards independence."⁶¹ (This situation has now been afforded a supreme literary portrayal in Nabokov's *Lolita*.)

"The docile daughter usually submits except when the relationship becomes unbearable. But as the daughter gets older she often rebels against the father and becomes estranged from him."

"The father may lose his parental role when the

⁵⁹ *Id.* at 133.

⁶⁰ See Greenland, *Incest*, 1958 BRIT. J. DELINQUENCY 62.

⁶¹ HENTIG & VIERNSTEIN, *UNTERSUCHUNGEN UBER DEN INZEST* 192 (1925), quoted in WEINBERG, *INCEST BEHAVIOR* 125 (1955).

daughter participant loses her affection and her respect for him and/or undermines his authority. The daughter may be relegated to an inferior sibling position by resisting the father's incestuous advances or by associating with other boys. She may become the 'favorite child', however, when she submits to him. The other siblings, especially the brothers, often try to 'protect' the sister from the father but usually are unsuccessful."⁶²

Sister-brother incest relationships are less productive of obviously harmful effects. Warnat suggests that such relationships are usually explained by sexual curiosity at puberty and that they generally come to an end when other sexual partners are found.⁶³ Mother-son incest is a very rare phenomenon. Kempf writes:

"The mother who obtains a separation or divorce sometimes encourages the son to feel that he is his mother's hero. He enthusiastically responds with affection for her and prematurely seeks responsibility. This affection, as he matures, if not effectively sublimated, will be likely to express itself frankly, at first in dreams, and then in obsessive cravings in the form of sexual interest in the mother."⁶⁴

But it is very rare for this to be carried over into overt incestuous acts.

CONCLUSION

This brief survey of the literature on incest puts us in a better position to make a judgment on the existing criminal law. It can be seen that very real harmful effects are produced by incest activity both in the immediate impacts on members of the family circle and in the wider social sense of tending to destroy the family as a functioning social unit. It would thus be quite misconceived to view the criminal prohibition of incest as the punishment of immorality or vice *per se* and to fail to see utilitarian reasons for it. On the other hand the typical state of incest laws in common-law systems can be seen to be clumsy and imprecise in their impact on the evils produced by such behavior. It is clear that the primary need is for protection of the younger female members of the family circle. No protection afforded by the law can be very effective in the nature of incest behavior, but it is submitted that the miseries produced here can be so

⁶² WEINBERG, *op. cit. supra* note 61, at 132, 167.

⁶³ Warnat, *Die Blutschande*, 1961 KRIMINALISTIK 533.

⁶⁴ KEMPF, *PSYCHOPATHOLOGY* 99 (1920).

acute that the law must add what weight it can to the general social condemnation.

All systems of law of course offer protection to the young female from sexual attack and even make consensual sexual activity with her an offense. So in England any sexual activity with a girl under 16 is a criminal offense. It may be asked, then, whether the harm done by incest acts is not already adequately covered by other sexual offenses. It is suggested that this is not so, for in the case of the special family relationships covered by the incest concept, the female is in a position of dependency where protection should be extended to an age greater than 16 (to take the English example). Twenty-one is recommended as the age to which protection should be extended. This should apply to the relationship of father with daughter, granddaughter, step-daughter, or adopted daughter, and it is suggested that the offense should apply only to the father and that there should be no criminal liability on the daughter. This would bring incest into line with other offenses towards young girls where the girl, even though a consenting party, is not criminally liable. The English statute is defective in not including the relationship of father and step-daughter and father and adopted daughter and in imposing criminal liability on consenting daughters over the age of 16. It is suggested too that the offense should be broadened to include more than the act of intercourse itself and to extend to all sexual familiarities or indecent assault in the English way of putting it. A similar offense should exist with respect to mothers who initiate sexual intercourse or sexual familiarities with sons, stepsons, or adopted sons under the age of 18. With respect to brothers and sisters it has been seen that the probable harm involved is much less and that the sister may often be the initiator. The sister under the statutory age of consent is again of course already protected. It is a marginal question whether this protection needs to be extended in the case of the brother-sister relationship, but it is submitted that, if the general age of consent is 16, there is a case for extending the prohibition on sexual activity with a girl up to the girl's attaining the age of 18 when she is the sister of the defendant, and when the defendant is over 21. This would leave the wider categories of incest relationships prohibited by existing statutes in various jurisdictions—the uncle and niece, aunt and nephew, and first cousin relationships. With the typical contemporary

family structure in English-speaking countries, little utility can be seen in including these relationships in a criminal incest prohibition.

The thesis here advocated is, then, that the incest situation is one which causes harm of an identifiable kind which is a proper subject for criminal prohibition, but that existing criminal statutes obscure this by displaying unreflecting vestiges of primitive taboo attitudes and in not directing their prohibitions with sufficient precision at the evils that ought to be suppressed. The following is suggested as a model incest prohibition, based on the assumption that the general age of consent in the jurisdiction is 16 and that offenses of sexual intercourse with and indecent assault on young people below this age already exist.

"It shall be a misdemeanor, punishable with imprisonment up to two years, for a man to have sexual intercourse with or to assault sexually a female between the ages of sixteen and twenty-one whom he knows to be his daughter, granddaughter, step-daughter, adopted daughter or ward. The relationship may be taken to exist notwithstanding that it is not traceable through lawful wedlock. On a prosecution for this offense it shall not be a defense to show that the female consented to the acts.

"It shall be a misdemeanor, punishable with imprisonment up to two years, for a woman to initiate sexual intercourse with or to assault sexually a boy between the ages of sixteen and eighteen whom she knows to be her son, grandson, step-son or adopted son. The relationship may be taken to exist notwithstanding that it is not traceable through lawful wedlock. On a prosecution for this offense it shall not be a defense to show that the boy consented to the acts.

"It shall be a misdemeanor, punishable with imprisonment up to twelve months, for a man over the age of twenty-one to have sexual intercourse with or to assault sexually a female between the ages of sixteen and eighteen whom he knows to be his sister or half-sister. On a prosecution for this offense it shall not be a defense to show that the female consented to the acts."

This suggestion admittedly ignores the harm that may be done to the family unit and hence to society generally by incest relationships outside the age groups indicated in the proposed draft. This is because it is felt that sexual relationships entered

into in private between consenting adults are an area of human activity into which the criminal law cannot happily or profitably intrude. It also leaves untouched those many relations of partial dependency in which an adult can exert subtle and relentless pressure on a young person, over the age of consent, to have sexual relations with him. This could only be cured by a general provision, in the

manner of some of the European Codes noted earlier, aimed at those who take advantage in this way of positions of supervision and authority. Such a general measure is probably desirable, but the proposed draft is intended as a partial improvement of the incest laws within the present typical framework of sex offenses in common-law jurisdictions.