SCOTTISH LAW COMMISSION

MEMORANDUM NO: 44

THE LAW OF INCEST IN SCOTLAND

April 1980

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1980. All correspondence should be addressed to:

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THE LAW OF INCEST IN SCOTLAND

CONTENTS

ABBREVIATIONS

(excluding standard law reports)

Alison	A.J. Alison, Principles and Practice of the Criminal Law of Scotland Edinburgh, 1832-33
Gordon	G.H. Gordon, The Criminal Law of Scotland Edinburgh, W. Green & Son Ltd., 1978
Hume	Baron Hume, Commentaries on the Law of Scotland Respecting Crimes Edinburgh, 1844.

SUMMARY OF PROPOSALS ETC

1. Incest should be retained as a separate crime (para. 6.11).

2. The crime of incest should not be constituted by intercourse between a person and the relatives of his spouse (paras. 6.17 and 6.24).

3. The prohibition against incest should extend only to the following relationships based on consanguinity:-
   (i) Parents and children;
   (ii) Brothers and sisters;
   (iii) Grandparents and grandchildren;
   (iv) Uncles and nieces, aunts and nephews; and
   (v) Half-brothers and half-sisters.
   (paras. 6.18-6.20)

4. The illegitimate child should be placed with regard to incest in the same position as the legitimate child. (para. 6.21).

5. Sexual intercourse between relations by adoption only should not be characterised as incest (para. 6.23).

6. Should the protection available under the provisions of the law directed against sexual offences other than incest be extended beyond the age of 16 in the case of a female adopted child or step-child? (para. 6.25).

7. Should increased penalties be available under such provisions in the case of the adopted child or step-child and, if so, should this be by way of removing or increasing statutory maxima? (para. 6.27).

8. The present penalty for incest should be retained (para. 6.28).

9. Incest should not be triable only in the High Court but should also be triable on indictment in the Sheriff Court (para. 6.31).

10. The present definition of incest, requiring penetration, should be retained and should not be extended to other forms of sexual misconduct presently covered by other offences (para. 6.32).

11. As an alternative to prosecution and punishment, provision should be made within the criminal process to secure help and treatment for the victim of incest and the other members of the victim's family. (para. 6.39).

INTRODUCTION

Terms of reference

0.1. On 9 February 1977 in exercise of powers under section 3(1)(e) of the Law Commissions Act 1965 the Secretary of State for Scotland asked the Scottish Law Commission -

> "To review the law of Scotland on incest, to consider what changes in that law may be desirable, to report their findings, and to make recommendations to the Secretary of State for Scotland on possible legislation to reform the law on incest."

Reasons for reference

0.2. The prohibition of incest in Scotland still derives from an Act of 1567[1] founding on the ancient Mosaic law as expressed in Leviticus Chapter xviii. When, in 1969, a committee under the chairmanship of Lord Kilbrandon considered certain aspects of the marriage law of Scotland, it expressed sharp criticism of the existing law on the forbidden degrees, both for marriage and incest.[2] The Marriage (Scotland) Act 1977 (c.15) remedied the situation in respect of marriage by providing a clear and comprehensible list of the relations who may not marry[3] but this Act does not directly affect the law of incest. Accordingly, while it will no longer be necessary to refer to "sources stretching from Leviticus through institutional writers to modern cases and statutes in order to justify statements about the forbidden degrees"[4] for the purposes of marriage, this remains the position with regard to the criminal law of incest.

0.3. The need for reform of the law of incest in Scotland has long been recognised. In an article in the Juridical Review 1914, the author wrote:

> "That Scotland should even have adopted part of the Mosaic law into the statute book is in itself sufficiently striking to justify inquiry into this branch of the law.

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[1] Incest Act 1567 cap. 14.

[2] Report of the Committee on the Marriage Law of Scotland (1969) Cmnd. 4011, para. 37.

[3] Section 2, Schedule 1.

[4] E.M. Clive, "The Marriage (Scotland) Act 1977", 1977 S.L.T. (News) 213.

> But that we should still be ruled by this same passage even nowadays is absurd, past belief, and cannot but draw on us the justifiable criticism of foreign lawyers."[1]

The fact that the law was still regulated by an Act passed in 1567 was also considered by Lord Salvesen to be an illustration of the "conservatism of Scottish jurisprudence in matters of crime"[2] and he called for a new and clear definition of the offence to be provided by statute that would be universally acceptable.[3] More recently, in an article dealing with the then Marriage (Scotland) Bill and the law of incest, W.D.H. Sellar has argued that -

> "... the law at present is unsatisfactory, uncertain, antiquated and absurd. Root-and-branch reform of both civil and criminal law is an urgent need."[4]

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[1] I.F. Grant, "The Law of Incest in Scotland", Juridical Review (1914) 26, 438-447.

[2] Solicitor-General v. AB 1914 S.C. (J.) 38 at p.48.

[3] HM Advocate v. Ryan 1914 S.C. (J.) 108 at p.110; see also "The Law of Incest in Scotland: A Long Overdue Reform", Juridical Review (1941) 53, 112-117.

[4] Forbidden Degrees of Matrimony", 1977 S.L.T. (News) 1 at p.4. We are grateful to Mr Sellar who, at our invitation, also prepared a paper which considered the law of incest and the forbidden degrees in the century after the Scottish Reformation. We have also benefited from the advice of Mrs A.M. McLean of the University of Glasgow, who at our request, read and commented on the pre-publication draft of this Memorandum.

PART I - GENERAL AND HISTORICAL BACKGROUND

Incest in a cultural context

1.1. The prohibition of incest is a trans-cultural and historical phenomenon and, as such, it has been studied extensively by anthropologists, sociologists and psychiatrists, commonly under the title of the "incest taboo". Its occurrence is recorded in all known societies with only very few, partial exceptions.[1] However, the prohibition itself has taken many forms, both with respect to the relationships proscribed and the mode of its enforcement, and there are many theories about its origins and functions. We, as a Commission, are not competent to assess the relative merits of these theories and we would not propose to discuss them in detail in this Memorandum.[2] However, it does seem to us that there is a core of theory associating the prohibition with the need to preserve the family, which, in this context, may extend beyond the nuclear family and is thought of primarily as a social and cultural entity rather than as a biological group. As such, it is the fundamental unit of all larger social groups[3] and the principal means of preparing the child to participate as a mature adult in the life of his community.[4] The problem of preserving the family is seen, on certain psychiatric premises, as one of controlling the potentially disruptive cross-sex attractions and rivalries engendered within it;[5] that is, of maintaining appropriate counter-attitudes - which, as one might suppose and as other studies seem to show[6], probably also arise just as spontaneously.

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[1] G.P. Murdock, Social Structure, at pp. 12-13.

[2] Appendix I contains a short bibliography of the principal sources consulted.

[3] L.A. White, "The Definition and Prohibition of Incest," American Anthropologist (1948), 50, 416-435.

[4] T. Parsons, "The Incest Taboo in relation to Social Structure and the Socialisation of the Child", British Journal of Sociology (1954), 5, 101-117;
J. Schwartzman, "The Individual, Incest, and Exogamy," Psychiatry (1974), 37, 171-180.

[5] F. Alexander, Fundamentals of Psychoanalysis, at p.152.

[6] A.P. Wolf, "Childhood Association and Sexual Attraction; A Further Test of the Westermarck Hypothesis", American Anthropologist (1970), 72, 503-515.

1.2. This natural rationality, implicit, as it were, in the primitive prohibition, may represent a value to be maintained whether or not other and possibly less rational elements are also present. Indeed, among the reasons advanced by legal writers and judges seeking to justify the particular prohibitions of Scots Law there can be found assertions akin to those we have just discussed. Thus, according to Hume, the source of the law against incest seems to be in the "native feelings of the human constitution, and not merely in those views of policy and discipline, though obvious and strong, which recommend the enforcing of such a restraint."[1]

1.3. There is little doubt, too, that the Protestant reformers responsible for the early legislation, though motivated by a more particular moral and religious interest, were concerned also to preserve and purify the institution of marriage as such and to restore respect for it, as well as to establish more generally a moral and religious way of life. In more recent times, Lord President Normand referred specifically to the "moral welfare" of the family as justifying the rules prohibiting connection between members of a family, or extended family. He explained it thus:

> "In the family there is a quasi-parental relationship between descendants and the brother or sister of the ancestor. Those in this relationship associate together on a footing of mutual trust and may often share common family life and home. This quasi-parental relationship may sometimes become in certain events the legal relationship of guardian and ward, but, even when that does not or cannot happen, it is important for the moral welfare of the family that it should be regarded as excluding the possibility of marriage between the members of the family bearing the relationship. It is in this sense that the prohibition may be called part of the law of nature, that it is enjoined for the welfare of mankind associated in the normal family."[2]

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[1] Hume, i, 446; see also Alison, i, 562.

[2] Philp's Trs. v. Beaton 1938 S.C. 733, at pp. 745-746.

Origins of incest as a crime in Scotland

1.4. According to Hume, incest was a recognised offence before the Reformation, though then regarded chiefly as an ecclesiastical offence.[1] The form of the offence has probably always been, as Hume described it, "carnal knowledge between persons who are near of kin".[2] Certainly, from the beginning, there was a close inter-relationship between incest and the rules prohibiting marriage on grounds of kinship as can be seen clearly in the legislative events of 1567 when a Marriage Act[3] was passed immediately after and, indeed, on the same day as, the Incest Act.[4] The former permitted marriage between those related in or outwith the second degree. The latter specified by reference to Leviticus Chapter xviii the relationships within which intercourse was proscribed as incestuous, relationships which have been described judicially as within the second degree.[5]

1.5. It is therefore in the consistorial doctrines of the pre-Reformation Church that the origins of incest as a crime are to be found and, in particular, in the rules of the Canon Law in which those doctrines issued. In the case of the impediment of cognatio (or kinship) the decrees of the Provincial Councils of the Church in Scotland make it clear that the rule of the Canon Law prevailing elsewhere applied also in Scotland from as early as the 13th century.[6] That rule prohibited marriage between parties related to each other in the fourth degree of consanguinity; that is, where the common ancestor stood in the relationship of great-great-

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[1] Hume, i, 446. See further Fraser, Treatise on Husband and Wife according to the Law of Scotland (1876-1878), i, 113; Johhne Craig and Margaret Mowat (1565) in R. Pitcairn, Criminal Trials in Scotland (1833), i, 459; H.M. Advocate v. M'Coll (1874) 2 Couper 538; H.M. Advocate v. Ryan 1914 S.C. (J.) 108 per Lord Anderson at p.13; H.M. Advocate v. McKenzie 1970 S.L.T. 81 per Lord Walker at p.85.

[2] Hume, i, 446.

[3] 1567, cap. 15 (now repealed). But see the Marriage (Scotland) Act 1977 c.15.

[4] 1567, cap. 14.

[5] H.M. Advocate v. Aikman and Martin 1917 J.C. 8 per Lord Johnston at p.11 and see para. 2.3.

[6] See Fraser, Treatise on Husband and Wife according to the Law of Scotland (1876-1878), at pp 109-110.

grandparent to the party further removed. The prohibition extended to relationships by affinity, so that the kin of one spouse were related to the other in the same degree. Moreover, affinity was established not by marriage but by intercourse. Thus, a man was not permitted to marry the blood relatives, to the fourth degree, of a woman with whom he had intercourse and intercourse with the woman in the prohibited categories constituted incest. In addition, the spiritual relationship between god-parents and god-children was a bar to marriage to the same extent. In considering any relationship no distinction was made between legitimate and illegitimate relationship.

1.6. This restrictive rule, which did not materially enhance the stability of marriage in the conditions of pre-Reformation Scotland[1], was not relaxed until the passing of the two Acts of 1567 referred to.[2] Moreover, even with this relaxation, the influence of the Canon Law continued to be apparent in the case law of the following century. Thus, in a number of cases the Canon Law concept of affinity as constituted by intercourse seems to underlie the decisions.[3] Similarly, certain early extensions of the crime to categories outwith the forbidden degrees specified in Leviticus Chapter xviii, as incorporated in the Incest Act 1567[4] may be explained on the basis of a continuing influence of Canon Law principles.[5] It seems likely, therefore, that the first interpretations of the Act were made always by reference to the enabling provisions of the Marriage Act 1567[6] and against the general background of

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[1] J. Irvine Smith, "The Transition to the Modern Law 1532-1560" in Stair Society, xx, An Introduction to Scottish Legal History, 25-43 at pp. 35-36.

[2] para. 1.4.

[3] George Sinclair (1628) in Stair Society, xvi, Selected Justiciary Cases 1624-1650, 95-96; Hume, i, 451. Jeane Knox (1646) in Stair Society, xxviii, Selected Justiciary Cases 1624-1650, 690-692; Hume, i, 451. John M'Kennan and Mary M'Thomas (1673) in Stair Society, xii, The Justiciary Records of Argyll and the Isles 1664-1705, 21-22.

[4] cap. 14.

[5] John Weir (1629) in Stair Society, xvi, Selected Justiciary Cases 1624-1650, 121-122; Hume, i, 450. William Drysdale and Barbara Tannahill (1705) in H. Arnot, A Collection and Abridgement of Celebrated Criminal Trials in Scotland from A.D. 1536 to 1784 (1812) at pp. 345-350; Hume, i, 449.

[6] cap. 15.

the pre-established Canon Law, so that the problems of interpretation which afflicted later commentators[1] were probably in earlier times felt less acutely.

Patterns of incest in contemporary society

1.7. Incest in contemporary society has been viewed typically as a phenomenon associated with poverty or inadequate housing or with conditions of remoteness or social disorganisation[2]. While these features may characterise some cases of incest behaviour it is, nevertheless, wrong to assume that incest takes place only among the underprivileged. Their predominance among the statistics is probably more a reflection of the sampling procedures used in the studies than a true picture of what actually occurs. The studies are generally drawn from criminal and court records and it is accepted that the majority of persons appearing in criminal courts are of lower social position, borderline economic means and live in crowded living quarters. A sample of incest cases drawn from such a population is bound to reflect this bias. Certainly, Maisch found that 77% of the families in his study lived in comfortable financial circumstances, quoting for comparison the work of Gebhard and his colleages at the Kinsey Institute who discovered that the socio-economic status of 70 to 77% of their cases fell within the upper working class to upper middle class income group, with the majority coming broadly from the "middle classes."[3]

Incidence of incest

1.8. Incest is a crime the incidence of which is extremely difficult to estimate,[4] and a number of reasons can be advanced to explain why this is so. The fact that it is an

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[1] See, for example, Hume, i, 447-448.

[2] See Sonden's study cited in I.B. Weiner, "On Incest: A Survey", Excerpta Criminologica (1964), 4, 137-155 at p. 138; J. Renvoize, Web of Violence; C. Bagley, "Incest Behaviour and Incest Taboo", Social Problems (1969), 16, 505-519 and "The Varieties of Incest", New Society 21 August 1969, 280-282.

[3] H. Maisch, Incest at pp. 113-114.

[4] See G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p. 324.

intra-familial event makes its detection difficult. There may be some degree of shame and guilt experienced within the family which will lead to denial of its existence or concealment. There will almost certainly be a reluctance to report the event in the case of father-daughter incest where the father is the mainstay of the family's economic support, or where the removal of the father may be feared because it may lead to the total collapse of the family structure. The true size of the problem therefore cannot be measured by reference to available statistics since these are based on crimes made known to the police. It is almost certainly the case that the majority of cases go unreported or undetected by persons other than the immediate family of the participants.[1]

1.9. A telling pointer to the fact that incestuous intercourse is largely undetected is that, although it is generally accepted by researchers that the most commonly occurring form of incest is that between brothers and sisters, the most frequently reported is that between fathers and daughters.[2] This would appear to be explained by the nature of the sibling relationship which tends to be relatively transient and to produce fewer social and behavioural consequences.

Statistics

1.10. The number of cases of sexual assault made known to the police in Scotland for the period 1951 to 1978 and the number of persons proceeded against for incest together with the number of convictions are set out in the appropriate tables in Appendix II.[3] By comparison with the detection figures given

[1] Benward and Densen-Gerber consider it highly probable that the reported cases represent only a fraction of actual cases - see "Incest as a Causative Factor in Antisocial Behaviour: An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-340 at p.324. Lukianowicz set the incidence at 4% of the population - see "Incest", British Journal of Psychiatry (1972), 120, 301-313; and Renvoize reports an investigation of a group of students by Walters in America with an incidence of 17% experiencing, as children, some physical contact with adults - see Web of Violence at p. 175.

[2] See I.B. Weiner, "On Incest: A Survey", Excerpta Criminologica (1964), 4, 137-155 at p.150.

[3] Obtained from Criminal Statistics, Scotland 1951-1978.

for rape, assault with intent to ravish and indecent assault, it is evident that the rate of increase in crimes of incest made known to the police is substantially less than for other sex crimes.[1] Because of the nature of the offence (the identity of the offender(s) is obviously known) nearly all of the offences were "cleared up", and yet often less than half lead to a subsequent prosecution.[2] A similar finding in relation to England and Wales has given rise to the speculation that "considerable discretion is exercised by police and prosecutors in deciding whether or not to commence criminal proceedings."[3] Such a view is not borne out by an examination of the incest cases referred to the Crown Office in Scotland during 1975 and 1976[4] in respect of which no proceedings, or proceedings under non-incest offences were subsequently instructed. In general, the reason for not proceeding was a legal one; there was either insufficient evidence or the relationship between the parties was not incestuous according to the law of Scotland (for example, adoption). There were, however, some exceptions where discretion was exercised in the interests of family solidarity.

1.11. In order to obtain more detailed information on incest cases made known to the police in Scotland than that provided by the official statistics, permission was obtained to examine the records of some of the cases held by the Crown Office between April 1971 and December 1976. The results of that investigation are set out in Appendix II,

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[1] The position in England and Wales is similar. In the last 20 years the number of offences made known has each year been between 237 and 337 with a movement in more recent years back to the former total.

[2] See, for example, the analysis given by M. Noble and J.K. Mason, "Incest", Journal of Medical Ethics (1978), 4, 64-70 at pp. 66 and 67.

[3] J.E. Hall Williams, "The Neglect of Incest: A Criminologist's View", Medicine, Science and the Law (1974), 14, 64-67 at p. 64; see also V. Bailey and S. McCabe, "Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at pp. 749-751.

[4] In fact all cases of incest in Scotland are referred to Crown Office for consideration by Crown Counsel.

section 3[1]. The number of cases examined was 52 of which all but 7 led to a conviction for incest or attempted incest. In one of these 7 cases, pleas of guilty to charges of lewd, indecent and libidinous practices and behaviour were accepted by the Crown with the overall result that acquittals on all charges were obtained in only 6 cases. Whilst the percentage of acquittals is small in relation to the total number of cases, however, it is large in relation to those which went to trial viz., ten out of the total number examined; and a striking feature of these cases was the high number (26) in which pleas of guilty were tendered under the accelerated procedure under section 102 of the Criminal Procedure (Scotland) Act 1975 (c.21).

[1]It should be noted that the cases examined amounted to approximately 50% of the cases reported to the Crown Office and was subject to availability of records. The information obtained from the case records is based on Crown precognitions and consequently on information supplied by the "victims" and their relations. No scientific sampling method was used.

PART II - THE PRESENT LAW

Definition

2.1. Incest is the crime of sexual intercourse between persons who are related to each other within the forbidden degrees, both parties being equally guilty of the crime.[1] It is triable only in the High Court.[2] Sexual intercourse has the same meaning as in rape; that is, there must be penetration of the woman's body.[3] The Incest Act 1567[4] declares those degrees to be forbidden which are contained in Leviticus Chapter xviii. However, since it is a fundamental principle that intercourse cannot be incestuous where the parties, though related, are actually permitted to marry[5] reference must also be made to the Marriage (Scotland) Act 1977 in which the relationships barring marriage are specified.[6] It has also been emphasised that incest has a continuing common law element[7] and this may be of some significance so far as certain illegitimate relationships are concerned, since these would not fall within the statutory prohibition.[8]

Mens rea in incest

2.2. The mens rea required for the crime of incest is that the parties should know of the relationship that exists between

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[1] Gordon, para. 35-01 at p.896. A person may be guilty of incest art and part although not within the forbidden degrees - see Vaughn v. H.M. Advocate 1979 S.L.T. 49.

[2] Hume, ii, 59.

[3] Gordon, para. 35-01 at p.896; Alison, i, 566.

[4] cap. 14.

[5] Criminal Procedure (Scotland) Act 1938, 1 & 2 Geo. 6 c.48, s.13. The Marriage (Prohibited Degrees of Relationship) Acts, 1907 to 1931, referred to in s.13 were replaced by the Marriage (Enabling) Act 1960, 8 & 9 Eliz. 2 c.29 which, in turn, was replaced for Scotland by the Marriage (Scotland) Act 1977 c.15. See also H.M. Advocate v. McKenzie 1970 S.L.T. 80 per the Lord-Justice Clerk at p.84; E.M. Clive and J.G. Wilson The Law of Husband and Wife in Scotland (1974) at pp. 372-374; cf. para. 2.10.

[6] c.15, s.2, Schedule 1.

[7] H.M. Advocate v. Ryan 1914 S.C. (J.) 108 per Lord Anderson at p.113.

[8] H.M. Advocate v. McKenzie 1970 S.L.T. 80 per Lord Walker at p. 85.

them. It is not necessary that they should recognise that such a relationship is incestuous. Hume says nothing as to the burden of proving knowledge of the relationship, but Alison suggests that the accused must prove his ignorance of the relationship, because, "in dubio, it is not to be presumed that anyone was ignorant of his connection with relations who stand in the forbidden degrees".[1] Macdonald states that knowledge of the relationship is presumed in the absence of counter-proof.[2] Gordon submits that all these statements apply only to the evidential burden, which means that the burden of raising the defence is on the accused, but once that evidence is produced, the persuasive burden of proving that the parties did have the requisite knowledge remains with the Crown.[3]

The forbidden degrees

2.3. The Incest Act 1567[4] specifies the forbidden degrees of relationship by reference to Leviticus Chapter xviii:

> "... quhatsumever persoun or personis they be that abusis thair body with sic personis in degre as Goddis word hes expreslie forbidden ... as is contenit in the xviii Cheptour of Leviticus salbe puneist..."

The difficulty of reconciling the requirement of an express prohibition with the elliptical expression of that Chapter led initially to conflicting views on the method of interpretation which should be adopted when construing the Act.[5] However, the following general principles of interpretation were eventually laid down in the Full Bench case of H.M. Advocate v. Aikman and Martin[6]:

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[1] Alison, i, 565.

[2] Sir J.H.A. Macdonald, A Practical Treatise on the Criminal Law of Scotland (1948) at p. 89.

[3] "The Burden of Proof on the Accused", 1968 S.L.T. (News) 29, 37 at p.40. This view appears to have been adopted in the case of Lambie v. H.M. Advocate 1973 S.L.T. 219.

[4] cap. 14.

[5] Gordon, para. 35-02 at pp. 896-897.

[6] 1917 J.C. 8 per Lord Johnston at pp. 10-11.

(i) "The passage [that is, the relevant passage in Leviticus Chapter xviii] is confined to verses 6 to 17, as determined by this Court's recent judgment in A v. B";[1]

(ii) "Verse 6 prohibits generally intercourse between a man and 'any that is near of kin to him' ...";

"... the 7th to the 17th verses inclusive give a series of examples of the relationship more generally expressed in verse 6...";

"... these examples are not intended as a limiting and exhaustive specification of the cases to which the prohibition of verse 6 is to apply, but as merely illustrative examples...";

(iii) "... where a relationship by consanguinity is mentioned, the corresponding relationship by affinity is meant to be covered...";

(iv) "... where a relationship between a man and a woman is expressed, the corresponding relationship between a woman and a man is implied."

Applying those principles Lord Johnston goes on to describe the proscribed relationships in general terms, founding his description on an analysis of the examples given in Leviticus Chapter xviii:

> "The relationships are either between the direct ascendant by consanguinity or affinity and one removed one or two degrees from him or her by descent, as mother and son and grandfather and granddaughter; between those

[1] This probably refers to Solicitor-General v. AB 1914 S.C. (J.) 38. (another Full Bench case). This case also determined that the authoritative text of Leviticus Chapter xviii was that contained in the Geneva Bible (1562), a translation, which should be interpreted in the light of the circumstances in which the 1567 Act was passed, and without reference to Biblical criticism of the nineteenth or twentieth centuries - per Lord Johnston at p.46.

> who are both in the first degree of descent from a common stock, as brother and sister; and between those, one of whom is descended in the first and the other in the second degree from the common stock, as aunt and nephew."

2.4. Accordingly, in determining whether a particular relationship is proscribed by the Incest Act 1567[1] what is important is the degree of the relationship, although this is subject to qualification in the case of direct ascendants and descendants[2], and the significant degree is the second degree.[3] For the purposes of marriage the forbidden degrees have now been reformulated using only the terms father, mother, son, daughter, brother, sister, husband and wife.[4] However, in the case of incest it is still necessary to establish the degree of the relationship and it is the method of computation adopted in the Canon Law which is used:

> "Degree means in this collocation [in the Incest Act 1567[5]] distance from the common stock; as thus, for example, brother and sister are related in the first degree, their children, as cousins, in the second degree."[6]

This method of computation, as exemplified in the quotation, is to count the number of the generations from the descendant to the ancestor or common ancestor, including the latter but excluding the former, and in the case of unequal descent to count from the descendant further removed.[7] Thus uncle and niece, for example, would be related in the second degree.

Ascendants and descendants

2.5. The only express prohibitions contained in Leviticus Chapter xviii in respect of ascendants and descendants are

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[1] cap. 14.

[2] See para. 2.5.

[3] H.M. Advocate v. Aikman and Martin 1917 J.C. 8 per Lord Johnston at pp. 10-11 and see para. 1.4.

[4] Marriage (Scotland) Act 1977 c.15, s.2, Schedule 1.

[5] cap. 14.

[6] H.M. Advocate v. Aikman and Martin 1917 J.C. 8 per Lord Johnston at p.11.

[7] Fraser, Treatise on Husband and Wife according to the Law of Scotland (1876-1878), i, 107-108.

directed against intercourse between mother and son[1] and between grandfather and granddaughter.[2] Hume's view, somewhat tentatively expressed, was that "the other modes and more remote degrees of the direct relation" were to be held as properly included under the terms son, daughter, father and mother.[3] However, since marriage is no longer prohibited in the ascendant and descendant lines outwith the relation of great-grandparent and great-grandchild,[4] incest must now be regarded as correspondingly confined.[5]

Collaterals

2.6. Express prohibitions in respect of collaterals are contained in Leviticus Chapter xviii in the case of brother and sister of the full-blood[6] and of the half-blood[7] and aunt and nephew.[8] To these must be added uncle and niece[9] and all other relations of the half-blood in those degrees within which intercourse between the corresponding relations of the full-blood is prohibited.[10] The prohibition was extended by the institutional writers to the case where one of the parties was a brother or sister of a direct ascendant of the other, though they stood outwith the second degree, as in the case of

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[1] Verse 7

[2] Verse 10

[3] Hume, i, 448; see further E.M. Clive and J.G. Wilson, The Law of Husband and Wife in Scotland (1974) at pp. 87 and 91 and authorities cited.

[4] Marriage (Scotland) Act 1977 c.15, s.2 and Schedule 1.

[5] See paras. 2.1 and 2.10.

[6] Verse 11.

[7] Verse 9.

[8] Verses 12, 13.

[9] H.M. Advocate v. Aikman and Martin 1917 J.C. 8.

[10] Gordon, para. 35-04 at p.898 and authorities cited there. For the purposes of marriage, also, relationship of the half-blood is assimilated to relationship of the full-blood - see Marriage (Scotland) Act 1977 c.15 s.2(2)(a).

great-uncle and great-niece.[1] The ascendant was, in such cases, regarded as in loco parentis of his descendant. However, marriage between such persons is now permissible,[2] so that the criminal offence should again be considered as having been elided.[3]

Relationships by affinity

2.7. The following relationships by affinity are expressly proscribed as incestuous in Leviticus Chapter xviii, namely, paternal aunt by marriage and nephew[4], father-in-law and daughter-in-law[5] and brother-in-law and sister-in-law (brother's wife)[6]. Intercourse is also expressly prohibited between step-mother and step-son[7], between step-brother and step-sister[8] and between step-father and step-daughter and step-grandfather and step-granddaughter[9]. In earlier Scots law these categories were generalised so that where a natural relationship fell within the forbidden degrees, the corresponding relationship by affinity did so also.[10] However, as a result of the legislative changes affecting the law of marriage during the present century the prohibition now extends only to relations between parents-in-law and children-in-law, step-parents and step-children, grandparents-in-law and grandchildren-in-law and step-grandparents and step-grandchildren.[11]

2.8. Relationship by affinity is constituted on the basis of a consummated marriage and can no longer be considered as

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[1] E.M. Clive and J.G. Wilson, The Law of Husband and Wife in Scotland (1974) at p.91 and authorities cited there.

[2] Marriage (Scotland) Act 1977 c.15 s.2 and Schedule 1.

[3] See paras. 2.1 and 2.10

[4] Verse 14.

[5] Verse 15.

[6] Verse 16.

[7] Verse 8.

[8] Verse 9.

[9] Verse 17.

[10] E.M. Clive and J.G. Wilson, op. cit. at p.91; H.M. Advocate v. Aikman and Martin 1917 J.C.8 per Lord Johnston at p.11.

[11] Marriage (Scotland) Act 1977 c.15 s.2 and Schedule 1; see also paras. 2.1 and 2.10.

arising from sexual relations outside wedlock.[1] A spouse can only be related by affinity to the blood-relations of the other spouse and not to the relations by affinity of that spouse.[2]

Adoptive relationships

2.9. There has been a growing tendency in recent years to confer on adopted children the status of children born within the family and this is reflected in the extension of the prohibition of marriage to the case of adoptive parent and adopted child. This first emerged in the Adoption of Children Act 1949[3] and the current form of the provision is contained in Schedule 2 of the Children Act 1975[4] -

> "1-(1) In Scotland, a child who is the subject of an adoption order shall, subject to the provisions of this Schedule, be treated in law -
>
> (a) where the adopters are a married couple, as if he had been born as a legitimate child of the marriage (whether or not he was in fact born after the marriage was constituted);
>
> (b) in any other case, as if he had been born as a legitimate child of the adopter (but not as a child of any actual marriage of the adopter),
>
> and as if he were not the child of any person other than the adopters or adopter.
>
> (2) .....
>
> (3) Sub-paragraph (1) does not apply in determining the prohibited degrees of consanguinity and affinity in respect of the law relating to marriage or in respect of the crime of incest, except that, on the making of an adoption order, the adopter and the child shall be deemed, for all time coming, to be within the said prohibited degrees in respect of the law relating to marriage."

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[1] E.M. Clive and J.G. Wilson, The Law of Husband and Wife in Scotland (1974) at pp. 91-92.

[2] ibid. at p.92.

[3] 12, 13 & 14 Geo. 6 c.98 s.11(1) - later consolidated in s.13(3) of the Adoption Act 1958, 7 Eliz. 2 c.5.

[4] c.72. This provision has again been consolidated in sections 39 and 41 of the Adoption (Scotland) Act 1978 c.28 which comes into operation on a date or dates to be appointed.

The Marriage (Scotland) Act 1977 correspondingly prohibits marriage between adoptive mother (or father) or former adoptive mother (or father) and adopted son (or daughter)[1] and those terms are presumably to be read in light of the meaning carried by the term "adopter" in the quoted provision of the 1975 Act.

2.10. There is nothing in Chapter xviii of Leviticus or the Incest Act 1567[2] to suggest that adopted and adopter might come within the forbidden degrees therein laid down. However, in the case of HMA v. McKenzie[3] where the relationship involved a man and his adopted daughter (who was also the illegitimate daughter of his wife) the Crown argued that, as far as the forbidden degrees were concerned, the law of marriage and the law of incest exactly corresponded, being two sides of the one coin. It followed, therefore, that intercourse between persons who were within the forbidden degrees of marriage was necessarily incestuous; the test was the same in respect of both. This argument was rejected by the Court. The Lord Justice-Clerk stated that while it was the case that legislation, permitting marriage between persons previously considered to be within the forbidden degrees, had the effect of repealing the criminal law to the same extent, the converse was not always true. He continued:

> "Clear language is required for the creation of a criminal offence, particularly when it can carry a sentence of life imprisonment. The provision founded upon by the Crown debars marriage, but I am unable to see how it creates a criminal offence by bringing adopter and adopted within the ambit of the law of incest."[4]

Illegitimate relationships

2.11. The case of HMA v. McKenzie[5] also gave the court the first opportunity to decide whether incest could arise between illegitimate relations. In holding that intercourse between a

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[1] c.15 s.2 and Schedule 1.

[2] cap. 14.

[3] 1970 S.L.T. 81.

[4] ibid at p.84. This decision is not affected by the legislation referred to in para. 2.9.

[5] 1970 S.L.T. 81.

man and his wife's illegitimate daughter was not incest, the Court was simply confirming the rule laid down by the institutional writers that there could be no incest between illegitimate relations.[1] Some doubt still remains in the case of intercourse between an illegitimate child and his mother and Lord Walker has expressed the view judicially that this may well be a crime at common law.[2] Alison does not recognise the exception and Hume appears to doubt whether this is incest in the statutory sense.[3] Certainly it can be said the Scots tradition firmly denies any benefit of family life to the filius nullius.[4] Thus a woman's legitimate child by a previous husband is legally protected against her subsequent husband, while her illegitimate child is not, although the "closeness of degree" is the same. This anomaly was commented on by Gordon:

> "It is difficult to imagine that a "marriage" between a man and his bastard child ... would be recognised as valid, and if such a marriage is void for consanguinity, the connection should be regarded as incestuous."[5]

Since the expression of that view the Marriage (Scotland) Act 1977, for the purposes of marriage only, has assimilated illegitimate and legitimate relationship with regard to the forbidden degrees[6] but on the principle enunciated in HM Advocate v. McKenzie[7] this would not necessarily create any new criminal offences.

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[1] Hume, i, 452; Alison, i, 565.

[2] HM Advocate v. McKenzie 1970 SLT. 81 at p.85.

[3] Hume, i, 452.

[4] Hume wrote at i, 452 that "since the law so utterly disregards this sort of filiation, as to deny the child any of the privileges or advantages of blood: so there seems to be some difficulty of applying a sanction like that in question, which has been created by positive statute, beyond what the law of nature may seem to require".

[5] Criminal Law (1st ed.) at p.842.

[6] c.15, section 2(2)(b); and see Gordon, para. 35-07 at p.900.

[7] 1970 SLT. 81 at p.84; see paras. 2.1 and 2.10.

Attempted incest

2.12. Where there is not the penetration of the body required to constitute incest sexual misconduct may be charged as attempted incest,[1] although it would appear that such a charge is rare[2]. In our study of cases between April 1971 and December 1976, 3 such cases were noted, and in others, pleas to attempted incest were accepted in lieu of the major offence.

Lewd, indecent and libidinous practices

2.13. What is more frequently charged in these circumstances is lewd practices, both at common law and under statute. Such a charge does not require any attempt at sexual intercourse, that is, penetration of the woman's body, and covers a wide range of indecent practices towards children under certain ages.

2.14. At common law it is a crime to use lewd, indecent and libidinous practices and behaviour towards children under the age of puberty with or without their consent. In practice this charge will be brought where the victim has not yet attained the age of 12.[3] As a common law offence, there is no penalty fixed by law. Further, section 5 of the Sexual Offences (Scotland) Act 1976[4] provides that anyone who uses such practices and behaviour towards a girl of or above the age of 12 and under the age of 16, whether the girl consented or not, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or on summary conviction to imprisonment for a term not exceeding three months.

Other relevant statutory offences

2.15. Unlawful sexual intercourse with girls under the age of 16, where there need be no element of relationship, is prohibited under statute. Scots law makes a distinction,

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[1] Criminal Procedure (Scotland) Act 1975 ss. 63(1), 312(e).

[2] Gordon, para. 35.09 at p.900.

[3] Gordon, para. 36.09 at p.903. The relevant age for a boy would be 14.

[4] c.67.

based on the age of the victim, which is relevant to the penalty that may be imposed, and the question of whether a defence is available to the accused. Section 3 of the Sexual Offences (Scotland) Act 1976[1] provides for a "strict liability" offence of "unlawful sexual intercourse with any girl under the age of 13 years" punishable by life imprisonment[2] and an offence of attempted unlawful sexual intercourse, again punishable by imprisonment[3]. Section 4 provides that it is an offence for any person to have, or attempt to have, unlawful sexual intercourse with a girl of or above the age of 13 and under the age of 16. The offence is punishable by 2 years' imprisonment on conviction on indictment and 3 months on summary conviction[4]. A defence is permitted to the accused of "reasonable cause to believe that the girl was his wife"[5] or, if he is under the age of 24 years and has not previously been charged with "a like offence", of "reasonable cause to believe that the girl was of or above the age of 16 years."[6]

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[1] c.67.

[2] Section 3(1).

[3] Section 3(2). The penalty is imprisonment for a term not exceeding 2 years on conviction on indictment and not exceeding 3 months on summary conviction.

[4] Section 4(1). The prosecution must be commenced within one year of the date of commission of the offence.

[5] Section 4(2)(a).

[6] Section 4(2)(b).

PART III - THE GENETIC EFFECTS OF INCEST

The genetic argument

3.1. Since we consider that the genetic effects of incest are of fundamental importance, we begin our discussion of the effects of incest by examining the argument from inbreeding which is frequently, and we think rightly, used to justify the prohibition of incest.[1] This argument can be simply stated: intercourse between certain related persons should be prohibited because the offspring of such persons are more liable to exhibit physical and mental abnormalities.

Principles of heredity[2]

3.2. Hereditary characteristics are transmitted from generation to generation by chromosomes of which man has 46, grouped in 23 pairs. The operative units in the transmission are called genes. Each paired chromosome has one of a pair of genes which refer to the same genetic characteristic, one of which is derived from the father and one from the mother, and the gene pairs are known as alleles. If the allelic genes are the same, the individual is said to be homozygous for that particular factor and, if they are different, the individual is said to be heterozygous for that factor. In the heterozygous state, one gene will express itself and be said to be dominant; the other gene which does not demonstrate its presence is said to be recessive - it is still present for transmission but is overshadowed by its dominant partner.

3.3. Every human being carries potentially harmful (mutant) genes. In general, however, they fail to express themselves by virtue of their being paired with normal healthy dominant

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[1] Legal writers and judges as well as scientists have invoked the argument - see H. Arnot, A Collection and Abridgement of Celebrated Criminal Trials in Scotland from A.D. 1536 to 1784 (1812) at p.348; Philp's Trs. v. Beaton 1938 S.C. 733 per Lord Normand at p. 748 and Lord Moncrieff at p.748.

[2] For a brief and intelligible account of these principles, see J.K. Mason, Forensic Medicine for Lawyers, chapter 18 at p.211 et seq.; H.J. Walls, Forensic Science, chapter 11, pp. 140-144; G.C. Hewitt, "Inbreeding, Incest and Marriage Law in New Zealand Law", [1976] The New Zealand Law Journal, 12-17.

genes. This is not so, however, where the same harmful genes are inherited from both parents, and the result of such an occurrence will be the harmful manifestation of these genes in the child.[1] The genetic argument supporting the prohibition of incest, therefore, is that the chances of two members of the same family carrying the same recessive harmful gene are obviously greater than two non-related persons.

3.4. The chances of bringing together identical genes inherited from a common ancestor can be quite easily calculated. Brothers and sisters have, on average, half their genes in common. The same is true of fathers and daughters but the fractions become smaller as the relationships grow more distant. Thus, grandfather and granddaughter, uncle and niece and half-brother and half-sister have, on average, one quarter of their genes in common, and first cousins have one-eighth of their genes in common as do grand uncles and grand nieces. The proportion of genes in common for second cousins is one in thirty-two.

The effects of inbreeding

3.5. It has been argued that both experience and experiment indicate that "the offspring of closely related animals tend to be less energetic than other animals, to have a lowered rate of successful reproduction and to have a higher rate of congenital abnormalities."[2] There is also convincing medical evidence to show that these deleterious consequences of inbreeding are repeated in humans.

Physical abnormalities

3.6. Information on the effects of inbreeding is provided by studies of first-cousin marriages, which are permitted in many countries including Scotland. Various studies have suggested that the infant mortality rate in such marriages is significantly higher than in unrelated marriages or that the offspring of first-cousin marriages may be

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[1] The diseases inherited in this way are known as recessive diseases.

[2] See G.C. Hewitt, "Inbreeding, Incest and Marriage Law in New Zealand Law", [1976] The New Zealand Law Journal, 12-17 at p.13.

significantly worse in school performance, neuromuscular tasks, physical dimensions and the onset of speech development.[1]

3.7. Studies of the offspring of closer inbreeding are also available. In America, Adams and Neal compared the offspring of brother-sister and father-daughter incest with control offspring and found a greater incidence of early death and major defects in the incestuous unions.[2] Carter, in Britain, has also reported findings from similar incestuous unions[3]. Of the 13 children involved in his study, only five were normal and of the three deaths one (due to cystic fibrosis) was "certainly" "autosomal recessive and attributable to the incest", another (due to progressive cerebral degeneration) was "probably" so attributable and the third (due to Fallot's tetralogy) was "possibly" so attributable. Carter concluded that the case of severe subnormality which he encountered "may also have been due to an autosomal recessive condition" and that "inbreeding may have contributed to the instances of educational subnormality but much of this mild mental retardation may be due to the low level of intelligence of most families in which incest occurs."

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[1] G.C. Hewitt, "Inbreeding, Incest and Marriage Law in New Zealand Law", [1976] The New Zealand Law Journal, 12-17 at p.15, quotes a study of infant mortality rates in the USA for children 0-10 years, 1920-1956 for total samples of 167 children of unrelated marriages where the rate was 2.4% and of 209 children of first-cousins where the rate was 8.1%. A. Smith, The Body at p.263 cites a French study which gives a rate of 3.9% for unrelated marriages as opposed to a rate of 9.3% for first-cousin marriages. W.J. Schull and J.V. Neal, The Effects of Inbreeding on Japanese Children, investigate various deleterious effects of inbreeding. It should be noted that these differences, although significant, were considered to be small and as not sufficient to be "any contraindication to adoption or to the marriage of cousins, provided no recessive condition is known in the immediate family", per a leading article of 4 May 1968 in British Medical Journal at p.257.

[2] M.S. Adams and J.V. Neal, "Children of Incest", Pediatrics (1967), 40, 55-62; see also E. Seemanova "A Study of Children of Incestuous Mating", Human Heredity (1971), 21, 108-128 discussed further at para. 3.10.

[3] Letter in The Lancet, 25 February 1967, at p.436.

Mental retardation

3.8. Carter's comment that some of the observed effects such as mild mental retardation may be due to the low level of intelligence of the participants is interesting because such a view tends to be generalised by those who question the major proposition that inbreeding does have these effects on humans.[1] However, the assumption that overt incest is committed only by people of low intelligence is very doubtful. Maisch, summarising research from 1953-1965, concludes that "the 'weak-witted' type was in no way dominant amongst those who committed incest",[2] and, in any event, in the study by Adams and Neal[3], I.Q. scores and social class levels were available for the mothers, and most of them were intellectually normal[4].

3.9. An association between the degree of inbreeding and the frequency of mental retardation among the inhabitants of Tristan da Cunha has also been reported. Roberts analysed the extensive records that are available for the population of this island where there is considerable intermarriage and concluded that, just as physical dimensions, performance in neuromuscular tests and other quantitative characteristics could be adversely affected by inbreeding, "mental capabilities may well be particularly susceptible to the effects of inbreeding".[5]

3.10. A study carried out in Czechoslovakia by Seemanova concluded that the data provided showed "an unmistakable

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[1] See, for example, G. Zellick, "Incest", [1971] The New Law Journal, 715; R Card, "Sexual Relations with Minors", [1975] Criminal Law Review 370-380 at p.375.

[2] H. Maisch, Incest at p.126.

[3] See para. 3.7.

[4] Hewitt (see para. 3.6) quotes a Minnesota Study on mental retardation showing that, with a 1 in 4 chance of genes being homozygous by descent, 60% of the surviving children are mentally retarded, with a 1 in 8 chance, one-third are mentally retarded and, with a 1 in 16 chance, 8.6% of the surviving children are mentally retarded, the total being 10.2% of the surviving children.

[5] D.F. Roberts, "Incest, Inbreeding and Mental Abilities", British Medical Journal (1967), 4, 336-337.

effect of inbreeding on infant mortality, congenital malformations and intelligence level".[1] A group of 161 children born to women as a result of sexual intercourse with their fathers or brothers (and in one case a son) were compared with a control group of 95 children born of the same mothers but with unrelated fathers. The study showed that pre-natal, neonatal and infant mortality was higher among children from incestuous unions.[2] Mental retardation was far more frequent amongst the "incest" children; 40 of those children suffered from imbecility or idiocy while none of the control group was so affected. Congenital malformations, single and multiple were also far more frequent.[3] The differences in the two groups of children with respect to the abnormalities mentioned are described by the author as being highly significant.[4]

3.11. Bashi, in a study of an Arab population in Israel in which first cousin marriages are very common, attempted to demonstrate the effect of inbreeding on intelligence.[5] This particular survey group is interesting not only because thirty-four per cent of marriages within the population were

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[1] E. Seemanova, "A Study of Children of Incestuous Mating", Human Heredity (1971), 21, 108-128 at p.118. Seemanova concedes, however, that due to factors such as the level of intelligence of the parents of the children of incest and the stresses accompanying an incestuous pregnancy, it is "hardly possible" to make a direct comparison with data from legally permitted consanguineous unions.

[2] 91.8% of the "incest" children survived after the first year compared to 94.7% of the control group.

[3] One conspicuous feature noted was that multiple congenital malformations were found only among the "incest" children.

[4] So far as intelligence is concerned, G. Skanes ("Does Incest Depress Intelligence?", New Scientist (1978), 77, 424-425) points out that it is not clear whether Seemanova's data relate a lower level of intelligence to incest rather than to the congenital malformations in that she presents no evidence in respect of the intelligence of those children of incest who did not exhibit observable congenital malformations.

[5] J. Bashi, "The Effects of Inbreeding on Cognitive Performance", Nature, (1977), 266, 440-442. For a study of congenital abnormalities in newborns in a similar population see S. Naderi, "Congenital Abnormalities in Newborns of Consanguineous and Non-consanguineous Parents", Obstetrics and Gynaecology (1979), 5, 195-199.

consanguineous but some four per cent of the couples were more closely related, being double first cousins, that is, they shared both pairs of grandparents. Bashi tested 3203 children belonging to this population at two ages. He considered the socio-economic status of the persons and found that it differed little between the three groups - unrelated persons, first-cousin parents and double first-cousin parents. He found that the average I.Q. of the unrelated group was about 100 which is defined as the average I.Q. The children of first-cousin marriages averaged about an I.Q. point lower, and those of double first-cousin marriages about two points lower still. Although the differences were small and considered as not warranting changes in education policy, the conclusions could be considered more valid because of the very large sample. Bashi concludes that this inbreeding depression demonstrates the importance of a genetic component in cognitive performance.

Criticisms of the genetic argument

3.12. While we find the case for prohibiting incest on genetic grounds convincing, there are several criticisms of the argument from inbreeding which must be considered. These are -

(i) that it is contradicted by the researches of animal geneticists and the practices of animal breeders;

(ii) that it fails to take account of the fact that detecting and eliminating harmful recessive characteristics may be useful or that some recessive characteristics may be positively beneficial; and

(iii) that its importance is overestimated since more efficient contraception and more readily available sterilisation or abortion greatly reduce the risk of genetically defective children.

We shall consider each of these in turn.

Animal genetics

3.13. The main criticism of the inbreeding argument tends to be based on the researches of animal geneticists. Thus the National Council for Civil Liberties in their evidence to the English Criminal Law Revision Committee concluded that "recent studies in human reproduction do not give much support to this theory [that is, that inbreeding has undesirable genetic consequences] and it is in direct contradiction to the practices of successful animal breeders."[1] However, in our view, the practices of successful animal breeders are not at all helpful when dealing with the human situation in that animal breeders attempt to reduce the harmful effects of inbreeding by only breeding from animals which are more energetic and have a reasonably good record of reproductive success.[2] They also slaughter animals with genetic characteristics which they consider undesirable.

Positive effects of inbreeding

3.14. Others would argue that, although there is a possibility, where there are unfavourable recessive characteristics in a family, of such characteristics appearing in the offspring of a union of persons from that family, this disadvantage may be offset by the consideration that, if these recessive characteristics are to be cleared up, they must be brought to light. The disadvantages may also be offset by the possibility of bringing out favourable characteristics which were recessive, because not all recessive genes are harmful.[3] However, it must be doubted whether the established disadvantages of inbreeding can be tolerated in favour of what can only be described as doubtful advantages. Clearing up the unfavourable recessive characteristics within human beings is clearly a desirable goal, but the price in individual and familial suffering may be too high if it involves the likelihood of producing

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[1] Report No. 13 at p.15. No reference is given to allow identification of those "recent studies".

[2] See G.C. Hewitt, "Inbreeding, Incest and Marriage Law in New Zealand Law", [1976] The New Zealand Law Journal 12-17 at p.12.

[3] H.H. Standskof, cited in Foote, Levy and Sander Cases and Materials on Family Law at p.212.

severely abnormal offspring. Apart from that, the whole basis of the claim that inbreeding may produce a superior strain or race of animals has been questioned.[1]

Role of contraception etc.

3.15. It has been suggested that wider availability of efficient contraception, sterilisation and abortion which greatly reduces the risk of genetically defective children, weakens the argument for incest laws based on genetics[2]. In our view, this argument -

(i) ignores the fact that, in spite of these measures, pregnancies do occur and children are born of incestuous unions; and

(ii) presupposes that one of the participants will be prepared for seduction, an assumption which may well have no basis in fact, and which also fails to take sufficient account of the possible role of alcohol as a triggering mechanism in the initial acts of incest.

These factors merit further consideration.

Pregnancies

3.16. In our study of cases reported to the Crown Office[3] there were 16 cases where pregnancies were alleged to have occurred.[4] Two of the cases involved stepfathers and their stepdaughters. Of the remaining 14 cases, pregnancy resulted from father-daughter incest in 11 cases;[5] brother-sister incest

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[1] G. Lindzey, "Some remarks concerning Incest," American Psychologist, (1967), 22, 1051-1059 at p.1055 states he is aware of no evidence which supports the claim and that bred animals "may be superior in regard to one or a few characteristics but they regularly suffer the general loss of fitness that is a dependable consequence of lowered genetic variability."

[2] National Council for Civil Liberties, Report No. 13 at p.15.

[3] See para. 1.11 and Appendix II, section 3.

[4] Paternity was not acknowledged in some of the cases although there was supporting evidence to create a reasonable belief that the party charged was responsible for the pregnancy.

[5] There were double pregnancies in 2 of these cases.

resulted in two pregnancies while uncle-niece incest resulted in one pregnancy. Paternity was acknowledged in ten of these cases.

3.17. Such findings are consistent with those made by Maisch as a result of his study of 78 cases which came before the German courts.[1] Thirteen of the girls in his study became pregnant, six of the pregnancies resulting from a relationship between a step-father and a step-daughter. However, it should be noted that Maisch's study dealt with only 34 cases of father-daughter incest and he in fact used an extended definition of incest to cover acts other than coitus or attempted coitus, for example, masturbation and oral-genital sexual contacts. Taking these factors into account, therefore, while it can be said that the percentage of pregnancies arising from father-daughter incest was about 20 per cent, the figure could conceivably be higher if a more restrictive definition of incest is used.

Alcohol

3.18. It is against the background of the role and effect of alcohol that the comments about efficient contraception have to be viewed. In the study of the cases reported to Crown Office[2], alcohol appears to have played a significant part in some of the cases, though it is not possible to draw any firm conclusions about its effect since in only a few cases was there any evidence, either medical or from the victim, of its role in the act charged. There are, however, at least 9 cases in the father-daughter category where it was alleged by the accused, usually in response to a police caution and charge, that the incest occurred only after drink had been consumed.

3.19. Maisch has argued that the "direct effects and role of alcohol have doubtless been over-emphasised".[3] Twenty per cent of the men in his study had drunk alcohol before the first incestuous act, although only 3 per cent committed the

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[1] H. Maisch, Incest at p.210.

[2] See para. 1.11 and Appendix II, section 3.

[3] H. Maisch, Incest at p.174.

act in a drunken stupor. Maisch nevertheless conceded that "alcohol may very well indirectly favour incestuous activities, namely when its influence reduces self-control." Other studies have emphasised the central role that alcohol plays on the part of the offender, in some studies amounting to one half of the cases.[1]

[1] M. Virkunnen, "Incest Offences and Alcoholism", Medicine, Science and the Law (1974), 14, 124-128 at p.124. He cites one study which "proved that the offences committed by alcoholics had often been started, at any rate, under the influence of alcohol and thus it can be concluded that this kind of releasing effect (inhibition-removing influence) is also present in incest cases."

PART IV - THE PSYCHOLOGICAL EFFECTS OF INCEST

The psychological effects of incest

4.1. Having considered the genetic argument, we now examine the evidence pointing to the existence of psychological harm arising from the incestuous relationship. Unfortunately, research, though abundant, has concentrated almost exclusively on the father-daughter relationship with the result that not a great deal is known about the other forms of incest, especially mother-son and brother-sister incest. Accordingly, the discussion in this part draws mainly on the literature of father-daughter incest, which in any event, would appear to figure most prominently in the criminal statistics[1].

Incest: the family situation

4.2. Drawing on a survey of the psychiatric literature on incest made by Weiner[2], Machotka and his associates concluded that incest usually occurs in an unbroken home following sexual estrangement between husband and wife and is protracted rather than episodic, being made possible and later perpetuated by the collusion of several members of the family, and marked by disturbed interpersonal relationships in both sexual partners.[3]

4.3. A similar analysis is presented by Maisch, who, in an extensive study, found that there were symptoms of disorganisation in 88% of the families concerned before the incest occurred.[4] Such disorganisation was caused, according to Maisch, by such factors as "the negative influence of the

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[1] See para. 1.11 and Appendix II, section 3. Other types of incest are discussed briefly at paras. 4.21-4.23.

[2] I.B. Weiner, "On Incest: A Survey", Excerpta Criminologica (1964), 4, 137-155.

[3] P. Machotka, F.S. Pittman and K. Flomenhaft, "Incest as a Family Affair", Family Process, (1967), 6, 98-116 at pp. 99 and 100.

[4] H. Maisch, Incest at p.138. The term "disorganisation" embraced not just the external social destruction of the family but also included marriages which were no more than a facade to the outside world with more or less overtly expressed hostilities and a family atmosphere of constant tension or in which there was complete interpersonal indifference of the partners one to the other. In 41% of Maisch's cases there had been no regular sexual intercourse before the start of the incest; in some cases (6%) there had been no physical contact for 1-4 years - see at p.144.

husband on the shaping of the marriage and the family in the first place"; a similar negative influence on the part of the wife;[1] violence and irascibility often associated with drinking on the part of the father;[2] and promiscuity, an unsettled way of life, drinking and drug taking on the part of the wife together with her physical illness often leading to absence from the home.[3] The daughters of these parents evinced symptoms of disturbed personality development either in the form of psychosomatic symptoms, dissociality (as, for example, truancy, running away from home, frequent lying, undesirable sexual relations) or neuroses and other behavioural disturbances (for example, anxiety symptoms such as fear of death, claustrophobia and suicidal tendencies) or depression.[4]

The initial act

4.4. Maisch also considers that the breakdown of the incest barrier can be identified with a number of factors. Alcohol he considers, may have an indirect effect in favouring incestuous activities when its influence reduces self-control and, similarly, lack of space in living conditions may also be a factor favouring incest although he considers it of no causal significance.[5] Of more importance are the chance circumstances which may increase the opportunities for incest to take place, such as the fact that a wife is seriously ill or confined to bed for a lengthy period or in hospital, or that the parents go to work at different times or the father, through unemployment, invalidity or sickness spends a large amount of time at home.[6] In some cases, these opportunities may be a sufficient stimulus to the incest but Maisch concluded that incest was more likely to occur if the daughter had

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[1] H. Maisch, Incest at p.139.

[2] ibid. at pp.127-8, 139-40.

[3] ibid. at pp. 134-143.

[4] ibid. at pp. 148-167.

[5] ibid. at pp. 174-176.

[6] In almost 70% of Maisch's case studies, such conditions, which he considered could give rise to situations of temptation, existed.

attained biological maturity and had thus become herself "a sexual stimulant for the man."[1]

Development of the incestuous relationship

4.5. Although not all participation is initially obtained by an ostensibly violent act on the part of the father, it is an open question whether, in such a situation, one can usefully talk in terms of the daughter's consent. Maisch considered that the emotional subjection of the daughter to the authority of the father in a disturbed family was a common condition giving rise to incestuous relationships[2] and found that the fact that only three girls in his series had actively resisted the attentions of the adult as not surprising "if one takes into account the fact that the young girl in an incest situation is subject to a completely different set of conditions regarding defence, tolerance, and participation from the child or maturing girl who meets a completely unrelated adult aggressor or a transient, perhaps even known sexual partner".[3]

4.6. Allen[4], drawing from a case study which came to the attention of the police only where the daughter was replaced in her father's affections by her younger sister, describes the typical development of such an incestuous relationship. At the outset the father, because he has lost control due to alcohol, assaults his daughter. Her silence is enforced through threats and, the prohibition broken, the behaviour tends to continue with the girl becoming more and more acquiescent until a relationship almost comparable to that of a normal marriage is established. However, once the behaviour

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[1] This is not to say that the girl herself played the role of seductress. Only four of the girls in Maisch's study were unequivocally sexually provoking in their behaviour - see at p.178.

[2] H. Maisch, Incest at p.172.

[3] ibid. at p. 178; cf. P.H. Gebhard, J.H. Gagnon, W.B. Pomeroy and C.V. Christenson, Sex Offenders: An Analysis of Types (1965) at p.207.

[4] C. Allen, A Textbook of Psychosexual Disorder at p.270.

becomes known to the others in the family, the relationship is upset and "the natural horror" expressed by those others produces a strong sense of guilt in the girl as a result of which she plays the part of the victim of the relationship "which she had not only endured but enjoyed."

4.7. The methods by which the incest relationship, once begun, is sustained are various; for example, by exhorting the girl to say nothing, by verbal threats and intimidation or by giving false information to the girl such as that it is she who will go to prison.[1] Some parents offer material gifts or other favours; some tend to isolate the daughter socially so that their extra-family interpersonal contacts are restricted. The situation indeed tends to breed jealousy and suspicion on the part of the father who will exercise strict control over his daughter and try to reinforce this control by groundless accusations and suspicions of a sexual nature. In general, it would appear that the relationship is sustained by means that can only increase the highly emotional and stressful situation of the child who is already the victim of disordered family relationships.[2]

Failure of mother's role

4.8. The psychological problems which can arise out of an incestuous relationship are well documented in the literature. The mother's collusion in the incest behaviour means that she is not fulfilling her basic social role to protect and "socialise" the child. In one study it was found that the mother was informed in only about one quarter of the cases and, when told, it was the rare mother who allied herself with the daughter by giving her emotional support or who took steps to protect the daughter from further incidents.[3] In general, mothers tended to disbelieve the child or to express

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[1] H. Maisch, Incest at pp. 183-185. It should be remembered, however, that in some cases the girls do actually encourage the breaking of the taboo.

[2] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55,322-331 at p.329.

[3] J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Antisocial Behaviour: An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-40.

considerable anger towards the girl but, in either case, took no active steps to intervene other than telling the daughter to stay away from the father.[1] Denial by the mother has its effect because the more inappropriate the response to the child, the greater the disturbance that will arise. The child thus tends to be deprived not only of the protection she needs but also the treatment that all writers consider essential. Benward and Densen-Gerber concluded that, because such cases went undetected outside the family, with no subsequent therapeutic intervention, "the result then could well be a second generation of inadequate persons who will produce subsequent generations of neglected children unless we develop the tools for prevention, detection and treatment of these families and their children."

Acquiescence and prejudice

4.9. From the study carried out by them, Benward and Densen-Gerber concluded that it is the girls who passively consented to the sexual involvement who carry the greatest psychological burden.[2] Generally, these girls exhibited a "silent reaction"; they told no-one of the involvement, attempted to mask their true feelings and to act as if nothing had happened. They admitted, however, to feeling, at the time of the involvement, confused, humiliated, guilty and in a state of disbelief just as if they had had a bad dream from which they hoped to awaken. Where the girls "consented", their feelings were at the least ambivalent in that they found the situation stressful, and none of the girls in the series fully accepted her relationship without the attendant fears of discovery or the consequences. In general, whether

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[1] It was in such circumstances that the daughters tended to run away from what they considered to be an unmanageable situation in the home - see J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Antisocial Behaviour: An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-40 at p.334; cf. J.J. Peters, "Children who are Victims of Sexual Assault and the Psychology of Offenders", American Journal of Psychotherapy (1977), 398-421.

[2] J. Benward and J. Densen-Gerber, op. cit. at pp. 333-334.

participation was voluntary or not, anxiety and guilt which the children could not manage were significant and the child was unable to "integrate the experience in any constructive fashion."[1]

Delayed psychological harm

4.10. Another general problem evident from the studies is that the early experience of "sensual stimulation led to the premature development of sexuality without adequate means of coping with the sexual tension"[2]. Subsequently, at adolescence, the victim of incest is particularly prone to seeking outlets for her "inner turmoil by way of antisocial behaviour and relief through the use of drugs. Once the incest barrier is broken, it is easier to advance to other forms of deviant behaviour, particularly promiscuous sexual behaviour and the adolescent and adult female exhibits a marked inability to protect herself from self-destructive behaviour and relationships."[3]

4.11. This potential harm that can befall a girl involved in incest with her father is clearly seen in Lukianowicz's study in County Antrim[4]. Of the 26 daughters in the study, eleven developed character disorders; they became promiscuous and four of them later became prostitutes. In addition, they also had psychopathic traits, such as drug abuse or delinquency; five girls, after they married, developed frigidity and aversion to sexual relations with their husbands; and four girls showed some frank psychiatric symptoms. In one case

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[1] J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Antisocial Behaviour: An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-40 at p.338.

[2] ibid.

[3] ibid. at p. 339; cf. J.J. Peters, "Children who are Victims of Sexual Assault and the Psychology of Offenders", American Journal of Psychotherapy (1977), 398-421 at p.401.

[4] N. Lukianowicz, "Incest", British Journal of Psychiatry (1972) 120, 301-313; see also I. Kaufman, A.L. Peck and C.K. Taguin, "The Family Constellation and Overt Incestuous Relations between Father and Daughter", American Journal of Orthopsychiatry (1954), 24, 266-277; L.W. Heims and I. Kaufman, "Variations on a Theme of Incest", American Journal of Orthopsychiatry (1963), 33, 311-312; D.H. Browning and B. Boatman, "Incest, Children at Risk", American Journal of Psychiatry, (1977), 134:1, 69-72.

this was an acute anxiety neurosis precipitated by her father's threats of violence if she disclosed their clandestine relationship; three others developed depressive reactions with repeated suicidal attempts. Only 6 girls (23%) showed no apparent ill effects from their incestuous relationship.

Aberrant views

4.12. Whilst a large part of the psychiatric literature would appear to support the view, which we ourselves accept, that incest leads to psychological harm, nevertheless doubts have been expressed, even where the relationship involved is that between father and daughter. De Raskovsky and Raskovsky, for example, have suggested that consummated incest may, in certain circumstances, be less harmful than repressed incestuous desires; thus a person who has participated in such acts is in a better position to adjust to the external world.[1] Bender and Blau have argued that the experience of a child in sex relations with an adult does not always seem to have a traumatic effect.[2] They add that the experience seems to satisfy "instinctual drives" in a setting where mutual alliance with an omnipotent adult condones the transgression and suppresses prohibition; and secondly, that the act offers an opportunity to test out in reality an infantile phantasy the consequences of which are "less severe, and in fact actually gratifying to a pleasure sense. The emotional balance is thus in favour of contentment".[3] They cite in support the evidence of a Swedish study in respect of the long-term effects of such relationships.[4] However, they also concede that incest can

[1] M.D. De Raskovsky and A. Raskovsky "Consummated Incest", International Journal of Psychoanalysis, (1950), 31, 42-47.

[2] L. Bender and A. Blau, "The Reaction of Children to Sexual Relations with Adults", American Journal of Orthopsychiatry (1937), 7, 500-518.

[3] ibid. at p.516.

[4] 46 women out of 54 who had been involved in sexual relations between the ages of 9-13 were found to have suffered no harm. Sloane and Karpinski, however, thought it significant that the sexual relations took place when the girls were pre-adolescent and when the potential for psychological harm is less than for an older daughter because of the increased strength of the inhibiting forces in post-pubertal years - see "Effects of Incest on the Participants", American Journal of Orthopsychiatry (1942), 12, 666-673. They also considered that the childhood recollection may be repressed only to reappear in later life in the form of neurotic conflicts.

have harmful effects in personality defects and mental retardation.[1]

4.13. More recently, a study by Yorukoglu and Kemph, which we treat with reserve, has suggested that the negative effects of parent-child incest can be minimal.[2] In case studies involving both mother-son and father-daughter incest, neither of the children who had had prolonged sexual contact with a parent manifested any serious disturbance.[3] Maisch discovered that a number of the girls in his study did display symptoms of disturbed personality development but that these were no more frequent among the aggregate of the girls after the start of the incest than before.[4] He thought, nevertheless, that, although this could mean that the negative effect of the incest is no greater than that of other environmental factors independent of the incest, it did not rule out the possibility that the symptoms may not eventually be more serious.

Other factors

4.14. Accepting that there is psychological harm following upon incest, there is still the question of whether it may be partly attributable to -

(i) the criminal proceedings which follow on the disclosure of the relationship;

(ii) the reaction to the disclosure; or

(iii) the relationship.

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[1] Bender and Blàu, "The Reaction of Children to Sexual Relations with Adults", American Journal of Orthopsychiatry (1937), 7, 500-518 at p.516.

[2] A. Yorukoglu and J.P. Kemph, "Children not Severely Damaged by Incest with a Parent", Journal of the American Academy of Child Psychiatry (1966), 5, 111-124.

[3] The authors, however, concede that this may be because the children had attained a degree of maturity at the time of the incident which allowed them to cope, and that there may be long-term effects - see at p. 123.

[4] H. Maisch, Incest at pp. 168-169, 215; cf. V. Bailey and S. McCabe, "Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at p.754.

Effects of the criminal process

4.15. It has been argued that the added ordeal of a criminal process which involves medical examination and the repeated telling of the story of the relationship to the police at inquiry stage, the Procurator-Fiscal at the stage of precognition and to the court at any trial re-enacts in the child's mind the sexual offence itself and that this interrogation thereby reinforces any harm the act might have done.[1] As early as 1915 the psychiatrist Marcuse had expressed the opinion that the whole criminal process had negative effects for the daughter and the mother which were often psychologically unassessable and unquantifiable.[2] He blamed this on the "psychological poisoning" which it wrought and added that the legal prosecution often represented "only a violent assault on family harmony."

4.16. Similarly, Gligor, writing in 1967, took issue with those who argued that disorganisation and instability were to be found among incest families before the incest began and considered that these were reflections of the disorganisation brought about by the legal prosecution of the fathers involved.[3] The guilt, sexual acting-out and other behavioural problems found in the daughters, he argues, commence after the discovery of the incest and the break up of the home following intervention by the criminal authorities, prosecution and the imprisonment or detention in a psychiatric hospital of the father. Maisch agreed that "a serious intervention as a result of the legal proceedings can in many cases lead to a complete dissolution of the family with all the bitter consequences this entails" but expressed reservations necessarily arising from his own findings that family disorganisation existed prior to the start of the incest in 88% of the cases he studied.[4]

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[1] This submission was made to us by Father Michael Ingram, a Roman Catholic Priest and trained psychologist with experience as a child counsellor at St Thomas's Hospital in London and the Family Service Unit in Leicestershire.

[2] Cited in H. Maisch, Incest at p.82.

[3] Cited by D. Lester, "Incest", The Journal of Sex Research (1972), 8, 268-285 at pp. 272-3.

[4] H. Maisch, op. cit. at p.82.

4.17. The problem of child witnesses in sex cases was considered by the Thomson Committee in their Second Report.[1] Evidence was available to the Committee from psychiatrists and social workers who challenged the view that children could be harmed by their court appearance. They submitted that any harm that did occur arose prior to the court appearance and was due to delay and the multiplicity of questions over a long period (including those from parents) to which the child is sometimes subjected. The Committee rejected the proposal that someone other than the child should appear in court but expressed the hope that steps would be taken to avoid all unnecessary delay in bringing such cases to court, that parents involved in such cases receive expert child guidance and other help both before and after the trial and that "everything possible [would] be done ... to create an atmosphere of reassurance where children are being examined."

The reaction to disclosure

4.18. Although the criminal process may be regarded, generally, as an aggravation of the harm caused to the child it is difficult to say with any certainty whether the initial psychological harm is attributable to the incest itself or to the reaction to the disclosure of the incestuous relationship. It has been suggested that anxiety and guilt on the part of the parents are the crucial factors in determining the effects on children and Raphling and his associates state that the children involved in sexual relations with adults were found to be free of guilt feelings until they were exposed to censure from parents or the authorities.[2]

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[1] Criminal Procedure in Scotland (Second Report) (1975), Cmnd. 6218, paras. 43.31 and 43.32.

[2] D.L. Raphling, B.L. Carpenter and A. Davis, "Incest: A Geneological Study" Archives of General Psychiatry (1967), 16, 505-511 at p.506. The same point is made by Bender and Blau who discovered that although the children were unexpectedly free from fear, anxiety or guilt at first, they tended to develop feelings of guilt as they "were separated from their sex object and means of gratification and as they were exposed to the opinion of parents and court officials" - see "The Reaction of Children to Sexual Relations with Adults", American Journal of Orthopsychiatry (1937), 7, 500-518 at pp. 510-511.

4.19. Lukianowicz concluded, in respect of brother-sister incest, that where the parents adopt a permissive attitude towards the children (so that there is no scolding, no threats, no punishment), the children do not develop feelings of guilt and later find it easy to marry outside the family. The effect of this is that the children do not suffer any psychological harm.[1] Kaufman et al., in a study of daughters shortly after disclosure of incest, found that they were depressed, guilty and anxious not because of the incest itself but because it led to the break up of the home.[2]

The relationship

4.20. It has been suggested that too close a relationship between child and parent can cause problems even where there is no question of the relationship being incestuous[3] and insofar as incest represents an extreme example of a "too close relationship" it may be surmised that the effects may indeed be greater. Moreover, in the case of the collusive wife who in effect reverses family roles with her daughter it seems difficult to speak of parental guilt and anxiety as causing the harm. As has already been noted, the failure of the mother to fulfil her basic role - to protect and socialise the child - is seen by some to be the main cause of the child's subsequent problems.[4]

Other types of incest

4.21. In a parallel study of 29 cases of incest relationships other than father-daughter incest, Lukianowicz concluded that

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[1] Lukianowicz, "Incest", British Journal of Psychiatry (1972), 120, 301-313 at p.311.

[2] Kaufman et al, "The Family Constellation and Overt Incestuous Relations between Father and Daughter", American Journal of Orthopsychiatry (1954), 24, 266-277 at p. 274. See also B.M. Cormier, M. Kennedy and J. Sangowicz, "Psychodynamics of Father-Daughter Incest", Canadian Psychiatric Association Journal (1963), 7, 203-217 at p.214; and H. Maisch, Incest at pp. 217-218.

[3] J. Schwartzman, "The Individual, Incest and Exogamy", Psychiatry (1974), 37, 171-180 at p.176.

[4] See para. 4.8.

there were no grave psychiatric consequences.[1] In the case of brother-sister incest, Lukianowicz noted that the parents were generally unconcerned or even collusive in their attitude and this is confirmed by other writers.[2] Because of this permissive attitude, he concluded that such youngsters do not usually come to any psychological harm. The conclusions by Benward and Densen-Gerber, however, would appear to challenge those of Lukianowicz in that they considered that the involvements between a girl and her brother, step-brother or cousin were sexually stressful situations which produced ambivalent feelings in the girl.[3]

4.22. Lukianowicz's conclusions in relation to involvement with those who were in the parental generation are also challenged in the study by Benward and Densen-Gerber. Their conclusions that sexual contacts with men in the parental or an earlier generation led to greater psychopathological consequences applied without distinction to father, step-father, grandfather, uncles and in-laws of that generation. They also included members of what were termed the "quasi-family" which included parental and family friends.[4]

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[1] N. Lukianowicz, "Incest", British Journal of Psychiatry (1972), 120, 301-313 at p.312. The cases included (a) 15 cases of brother-sister incest (b) 5 of grandfather-granddaughter (c) 4 of uncle-niece (d) 3 of mother-son and (e) 2 cases of aunt-nephew incest.

[2] ibid. at p. 311; I.B. Weiner, "On Incest: A Survey", Excerpta Criminologica (1964), 4, 137-155 at pp. 150-151 cites Doshay's study of 13 cases in which parents were regularly found to have contributed to the incest through lack of supervision and guidance of their children.

[3] J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Antisocial Behaviour; An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-340 at p.333.

[4] The study by Browning et al. also included cases of uncle-niece incest and one case of multiple incest, including sibling incest, but their findings could be reconciled with those of Lukianowicz in that the uncles had assumed the role of the father who had abandoned the home and the multiple incest case was a special one - see D.H. Browning and B. Boatman, "Incest, Children at Risk", American Journal of Psychiatry (1977), 134:1, 69-72.

4.23. Weiner, in his survey of psychiatric literature on incest, comments that mother-son liaisons are the rarest form of incest and only a few scattered reports appear in the literature.[1] Consequently, there is insufficient data on which any attempt can be made to assess the psychological impact of this type of incest upon the participants.

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[1] I.B. Weiner, "On Incest: A Survey", Excerpta Criminologica (1964), 4, 137-155 at pp. 149-150.

PART V - THE LAW OF OTHER COUNTRIES

Variability of incest laws

5.1. Prohibitions against sexual intercourse or marriage between persons who are related are found in almost all societies known to us, but there are variations among these societies in the severity of the sanctions invoked for violations of these prohibitions and in the degrees of relationship to which the prohibitions are applied.

England and Wales

5.2. All jurisdictions derived from the English common law contain criminal prohibitions of incestuous intercourse.[1] In England incest was not a crime dealt with by the criminal courts at all until 1908, but was left exclusively to the ecclesiastical courts.[2] It was given statutory form in the Punishment of Incest Act 1908. The law is now to be found in the Sexual Offences Act 1956.[3] Section 10 provides that it is an offence 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. Under section 11, it is an offence for a woman, if over the age of 16, to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent. Once again, brother includes half-brother. It is perhaps anomalous that, although the offence can be committed between grandfather and granddaughter, there is no corresponding prohibition against sexual relations between grandmother and grandson. There is no mention of the uncle and niece, aunt and nephew relationships, nor of the step-parent and step-child relationship. Most strikingly, it is only relationships based on consanguinity that are proscribed. As in Scotland, incest cannot be committed between

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[1] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.322.

[2] Blackstone, Commentaries iv, 65.

[3] 4 & 5 Eliz. 2 c.69.

persons whose relationship is merely that of adoption. The prohibited degrees for the purposes of incest are narrower than the prohibited degrees for marriage as set out in the Marriage Act 1949.[1]

5.3. The penalty for completed offences is imprisonment not exceeding seven years, and in the case of an attempt, imprisonment not exceeding two years. However, if the incest is committed by a man with a girl under thirteen years of age, the penalty may be imprisonment for life.[2] There is a further provision in the 1956 Act (as amended by the Guardianship Act 1973[3]) that where a person is convicted of incest (or attempted incest) against a girl or boy under eighteen, the court may divest that person of all authority over the girl or boy.[4] Prosecutions may not be brought without the authority of the Attorney General unless they have been instituted by or on behalf of the Director of Public Prosecutions.

New Zealand and Canada

5.4. In New Zealand, incest was removed from the jurisdiction of the ecclesiastical courts, where the punishment was penance, some eight years before it was made a statutory offence in England.[5] The prohibited degrees of relationship are similar to those in England and Wales.[6] The provisions of the New Zealand Criminal Code have been held judicially to apply to illegitimate relationships,[7] and this has since

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[1] 12 & 13 Geo. 6 c.76.

[2] In the case of an attempt, it is imprisonment for a term not exceeding 7 years.

[3] c.29.

[4] Section 38.

[5] Adams (ed.), Criminal Law and Practice in New Zealand (2nd ed.) at p.274.

[6] Section 130 of the Criminal Code defines incest as sexual intercourse between (a) parent and child; (b) brother and sister, whether of the whole blood or of the half-blood; or (c) grandparent and grandchild. Under this final category, it may be noted that the relationship of grandmother and grandson is included.

[7] Minnis (1903) 22 NZLR 857.

been given statutory authority.[1] The Act has also been held to apply to the case of adoptive parent and adopted child. The penalty for someone committing incest, which is restricted to those of or over the age of sixteen, is imprisonment for a term not exceeding ten years.

5.5. In Canada, the prohibited relationships are the same as those set out in section 130 of the New Zealand Criminal Code.[2] The penalty for the offence is imprisonment for fourteen years, but no male person under the age of fourteen years can be convicted of the crime of incest.[3]

5.6. Both the New Zealand and the Canadian Criminal Codes make additional provisions to cover sexual intercourse with a girl under care and protection. Section 131 of the New Zealand Criminal Code makes it an offence for a man to have sexual intercourse with a girl, not being his wife, who is under the age of twenty years and who

(a) being his step-daughter, foster daughter, or ward, is at the time of the intercourse or attempted intercourse living with him as a member of his family; or

(b) not being his step-daughter, foster daughter, ward, and not being a person living with him as his wife, is at the time of the intercourse or attempted intercourse living with him as a member of his family and is under his care or protection.

The penalty is imprisonment not exceeding seven years. The prohibition in the Canadian Criminal Code is restricted to "illicit sexual intercourse" between a man and his step-daughter, foster daughter or female ward. The penalty is imprisonment not exceeding two years.[4]

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[1] Status of Children Act 1969.

[2] Section 150 of the Canadian Criminal Code provides that anyone commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

[3] Section 147. In general, see Crankshaw's Criminal Code of Canada (7th ed).

[4] Section 145(1)(a).

Australia

5.7. Not only do legal provisions relating to the crime differ between national jurisdictions but variation is also seen between the laws of different states in the same country. This is the case in Australia, and this led the Law Council there in 1964 to undertake the task of drawing up a Criminal Code which might serve "as a model for legislation in the Australian Territories"[1]. The draft code, which was published in 1969, provided in respect of the crime of incest that it would be an offence for any person to have carnal knowledge of a female person "who is his mother or other lineal ancestor, his sister, his daughter or other lineal descendant".[2] The term "daughter" was to include step-daughter and adopted daughter; the term "sister" was to include half-sister; and the term "mother" was to include step-mother and adoptive mother. There is a corresponding prohibition in respect of any female person.[3]

5.8. These provisions if implemented would extend the prohibited degrees in at least one state. In South Australia, for example, the prohibited degrees as far as incest is concerned are limited to persons who are related either as parent and child, or brother and sister[4]. Recently, however, the Criminal Law and Penal Methods Reform Committee in that state recommended, for reasons that are discussed hereafter, that in respect of these relationships, there should be no separate offence of incest.[5]

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[1] Draft Criminal Code for the Australian Territories 1969 - Parliamentary Paper No. 44.

[2] Section 114.

[3] Section 115. Both sections were based on the provisions of the Queensland Criminal Code.

[4] An adopted child stands in relation to an adoptive parent in the same relationship as he or she stands to his or her natural parents.

[5] Special Report on Rape and Other Sexual Offences prepared by the Criminal Law and Penal Methods Reform Committee of South Australia. The Australian Royal Commission on Human Relationships whose report was published in December 1977, made the same recommendation. The issues raised by the reports are considered in Part VI of this Memorandum.

United States of America

5.9. The lack of uniformity which is found in Australia, is even more marked in the United States of America. There the concept of incest as a crime is generally much wider than in other jurisdictions derived from the English common law.[1] In each state there is a fundamental ban on sexual relations between parents and children, brothers and sisters, grandparents and grandchildren, uncles and nieces, as well as between aunts and nephews. In some states, the ban is extended to first-cousins and in some to relationships by affinity. The object of the prohibitions is to promote domestic peace and social purity.[2]

5.10. Incest is ordinarily made a felony or high misdemeanour and maximum punishments vary greatly. Incestuous rape is frequently punishable with life imprisonment, and incest, without the element of rape, carries a maximum sentence of 50 years in California. The most typical maximum, however, is 10 years.[3]

5.11. 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 penalty of five years. Under this code, the prohibited relationships are restricted and incest is defined as marrying or cohabiting or having sexual intercourse with an ancestor or descendant or a brother or sister of the whole or half-blood. The Code is in some doubt, however, about whether the relationships of uncle and niece, or aunt and nephew ought to "belong to the categories of felonious incest in view of the severity of the penalty and condemnation" and, accordingly, they are included, but only in brackets. The Code stipulates that the relationships include blood relationships without regard to legitimacy and the relationship of parent and child by adoption.

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[1] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.323.

[2] 42 Corpus Juris Secundum, "Incest", paragraph 1.

[3] G. Hughes, op. cit.

France

5.12. Incest is not in itself an offence under French law. Relationship is, however, important in two respects. In the first place, an indecent assault committed without violence against an unmarried victim over the age of fifteen is an offence only if the offender is an ascendant of the victim. If the person involved is not an ascendant, there is no offence.[1] Secondly, although incest is never in itself an offence under French law, the punishment of an act which is an offence, irrespective of whether the offender is a relative or not (rape or indecent assault with violence[2]), is more severe when the offender is an ascendant of the victim.[3] It may be noted that the additional penalties are also liable to be visited on a person who is "entrusted with authority" over the victim, or a teacher, paid servant of the victim or a civil servant or minister of religion.

Belgium

5.13. Belgian law is similar and according to Professor F. Duncan, is prompted by the consideration that the criminal law should only "punish acts contrary to sexual morality if they are undoubtedly harmful to society such as when the victim was a child or when the consent of the victim was not complete."[4] Immoral sexual behaviour, within the family, he concluded, must accordingly be left to the sanction of social ethics or religion.

Germany

5.14. The law of incest in Germany has been subject to amendment in the years since the German Penal Code of 1871 was published in English translation in 1961.[5] Since,

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[1]Article 331 of the French Penal Code.

[2]Article 332.

[3]Article 333.

[4]For a comparison between the laws relating to sexual offences in Belgium and England see Sexual Offences - A Report of the Cambridge Department of Criminal Science.

[5]American series of Foreign Penal Codes, edited by Professor G.O.W. Mueller.

however, the definition of incest remains basically the same it is worth setting out the old section in full. Section 173 provided:-

> "1. Sexual intercourse between relatives in the ascending line shall be punished by confinement in a penitentiary for a term not to exceed five years; between relatives in the descending line by imprisonment for a term not to exceed two years.
>
> 2. Sexual intercourse between brothers and sisters shall be punished by imprisonment for a term not to exceed two years. Equally punished shall be any sexual intercourse between in-laws, in ascending and descending lines, if the marriage out of which the relationship arose is in existence at the time of the deed.
>
> 3. In addition to imprisonment, a loss of civil rights may be imposed.
>
> 4. Relatives and in-laws in descending lines shall not be punished, if they are under eighteen years of age.
>
> 5. In the case of sexual intercourse between in-laws, the court may forgo the imposition of a punishment if at the time of the deed the spouses did not cohabit as husband and wife. Prosecution of the deed shall not be continued if the marriage bar between the in-laws has been removed."

5.15. Two changes of substance have been made in the last sixteen years. In the first place, incest has been reduced from a "felony" to a "misdemeanour",[1] and secondly, incest based on relationships by affinity has been abolished. An alternative Draft to the Penal Code drawn up by German and Swiss leaders of thought in matters of criminal law recommended the abolition of the crime of incest where both parties were adults, but failed to attract support. Another change of importance was that the crime was reclassified. In the Code of 1871, incest was listed under the general heading of "Felonies and Misdemeanours against Morality and Decency". Reflecting the view that the offence is directed more against the health of the family, incest is now to be found in the section dealing with offences against matrimony, family and status.

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[1]The terms used reflect the translation of 1961 - see paragraph 5.14, footnote 5.

Norway

5.16. The provisions on incest in the Penal Code of Norway were amended by a law of February 15, 1963. To facilitate understanding of the amendments, it will be useful to set out the previous law which was contained in sections 207 and 208 of the Code. These provide:

> "207 Anybody who has sexual intercourse with a relative in the descending line shall be punished for incest by... Anybody who has sexual intercourse with a relative in the ascending line, or with a brother or sister shall be punished for incest by ... Persons under 16 years of age and persons under 18 years of age who are related in the descending line, are not punishable. The same rule applies to persons under 21 years of age if they are seduced by a relative in the ascending line.
>
> 208 In-laws in ascending and descending lines who have sexual intercourse with each other shall be punished by ..."[1]

5.17. There is, in addition, an interesting provision relating to what in Scotland would in some cases amount to lewd practices. Section 199 is as follows:

> "199 Imprisonment ... may be imposed upon anybody who ... has indecent relations with a relative in the descending line, a step child, a foster child, a ward or a pupil, who is subject to his authority or supervision."[2]

This refers not to a completed act of intercourse but would refer to a person who abuses his position of quasi-parental authority over a child and is more in line with contemporary suggestions that the Scots law on incest should be amended to accord with the de facto family unit[3]. The changes brought about by the Act of 1963 are as follows:

(1) With regard to incest between ascendants and descendants[4] the present provision is only directed against the ascendant. As the reason for the change the report of the Penal Code

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[1] American Series of Foreign Penal Codes edited by Professor G.O.W. Mueller.

[2] ibid.

[3] cf. provision in Canadian and New Zealand Codes; para. 5.6.

[4] Section 207; see para. 5.16.

Commission briefly stated that it was considered unnecessary to punish the descendant. The maximum penalty is now five years for sexual relations not amounting to coitus[1] and 8 years in the case of coitus[2].

(2) The prohibition against intercourse between persons related by marriage contained in section 208[3] has been abolished. The reason given was that in this case there is no blood relation and not sufficient grounds for making such behaviour an offence under the criminal law.

(3) Incest between brother and sister in the form of coitus is still punishable with a maximum penalty of 2 years imprisonment, but the provision does not extend to persons under 18 years of age. The Penal Code Commission said in its report that this limit ought to be raised to 18, in order to correspond with the age limit of the Child Welfare Act, according to which measures against children and young persons are primarily a task for the Child Welfare Authorities.

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[1] Previously covered by s.199.

[2] As before.

[3] See para. 5.16.

PART VI - PROPOSALS FOR REFORM

Current proposals by others

6.1. A variety of proposals have been made for the reform of the law of incest ranging from its abolition as a separate offence to the narrowing of the relationships to be classified as incestuous. Those who advocate the abolition of incest as a separate offence frequently deny or regard as unproven the genetic arguments for the prohibition of intercourse between closely related persons. Packer,[1] for example, stigmatised incest as an "imaginary crime", stating the view, first, that incestuous relationships are rarely entered into for the purpose of procreation and, secondly, that inbreeding is not necessarily dysgenic. A variation of this approach was adopted by the Criminal Law and Penal Methods Reform Committee of South Australia, who argued that, because the civil law does not "intervene to prevent marriage and subsequent procreation of issue by persons who are not related but who both exhibit unhealthy traits, the criminal law should not use such grounds as justification for punishing intercourse".[2]

6.2. The National Council for Civil Liberties and the Sexual Law Reform Society on similar grounds have urged the abolition of the crime of incest and simultaneously called for a reduction in the "age of consent to 14", a figure which for them is a compromise since both, for similar reasons, would like to see the age of consent abolished altogether.[3] The critics of those proposals do not always recognise that, independently of incest, there exists a body of offences protecting the child against sexual abuse. Certainly, whatever view may be taken of such proposals, the abolition of

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[1] The Limits of the Criminal Sanction (1969), at p.315.

[2] Special Report on Rape and other Sexual Offences, March 1976, at para. 14.1. See also V. Bailey and S. McCabe, "Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at pp. 755-758.

[3] National Council for Civil Liberties, Report No. 13 at p.15; Sexual Law Reform Society, Report of Working Party on the Law in Relation to Sexual Behaviour, 5 September 1974.

incest as a crime would not remove the only deterrent against sexual exploitation in the family. It should also be recognised, in this context, that sexual conduct falling short of intercourse or attempted intercourse, which may be equally damaging psychologically, must at present be dealt with otherwise than by the law of incest.[1]

6.3. Some of those, however, who are sceptical of the genetic arguments for the retention of incest as a separate crime accept that its retention may be justified on the view that an incestuous relationship produces harmful effects "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".[2] Hughes who criticises the genetic arguments for the retention of the offence of incest, believes that its retention may be justified for the protection of the younger members of the family circle. He puts forward what he describes as a model incest prohibition based on the assumption that the general age of consent is 16 and that offences of sexual intercourse with indecent assault on young people below this age already exist.

6.4. Hughes' scheme would make it an offence for a man to assault sexually or have sexual intercourse with his daughter, step-daughter, adopted daughter, ward or grand-daughter whether illegitimate or not, when she is between the ages of 16 and 21. Consent would not be available as a defence. He reflects therefore the findings of such as Benward and Densen-Gerber[3] that sexual abuse, short of intercourse, is just as damaging to the female victim and adopts the view that protection of a female who is in a position of dependency should be extended until she is 21. A similar prohibition would apply to a woman

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[1] See paras. 2.12-2.15; cf. paras. 6.8-6.11.

[2] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.329.

[3] J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Antisocial Behaviour: an Exploratory Study", Contemporary Drug Problems (1975), 4, 323-340.

in respect of her son, grandson, step-son or adopted son when he is between the ages of 16 and 18, and with regard to a brother-sister relationship, he proposes that a brother should only be guilty of the offence if he is over 21 and his sister or half-sister is between the ages of 16 and 18. Hughes gives no reason for the age differentials in these types of unlawful intercourse and he excludes relationships such as uncle and niece, aunt and nephew and first cousins on the basis that little utility can be seen in prohibiting such relationships in view of the "typical contemporary family structure in English-speaking countries."[1] Such prohibitions apart, Hughes considers that adult consensual relations should not be prohibited because "sexual relationships entered into in private between consenting adults are an area of human activity into which criminal law cannot happily or profitably intrude".[2]

6.5. Card, who proposed a single comprehensive offence of "sexual relations with minors", also suggested an extension of the age for protection to 18, rather than 21, on the view that a girl is "less liable to exploitation and corruption once she approaches or passes the age of majority since her economic and physical dependence on her father will normally cease then".[3] His proposed prohibition would extend to a foster child and the proposals would apply mutatis mutandis to boy victims. In Australia it has been proposed that the prohibition should also extend to de facto husbands of the girl's mother[4] and that the liability of siblings to

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[1] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.330.

[2] ibid at p.331.

[3] R. Card, "Sexual Relations with Minors", [1975] Criminal Law Review 370 at p.376. This age was also proposed by the Criminal Law and Penal Methods Reform Committee of South Australia, although the Australian Royal Commission in their Report on Human Relationships suggested the lower age of 17. For proposals building on Card's, see V. Bailey and S. McCabe, "Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at pp. 761-763.

[4] Report of the Australian Royal Commission on Human Relationships, volume 5, chapter 17, para. 23.

prosecution should be limited to those who are roughly the same age, the Criminal Law and Penal Methods Reform Committee effectively recommending that a sexual relationship between brothers and sisters would only constitute incest where one party was under 18 and there was more than 5 years age difference between them.

Our approach

6.6. Historically, the law of incest in Scotland derives from the dominant religious views in Scotland in the immediate post-Reformation period.[1] However, our society now includes persons of various religious beliefs and of no religious belief. Punishment in these circumstances must be justified in terms of society's present ends. We would place high among those ends the strengthening of the fabric of the family and the protection of its members, especially children, from injury and molestation. Though it has been suggested that incest is merely an offence against a particular moral creed, we cannot accept this. Our examination of the subject persuades us that there are good reasons for retaining the crime of incest, though we propose to narrow the scope of its application to cases where the need for its specific sanctions is most apparent.

6.7. These reasons, we believe, include the following:

(1) the reduction of the risk of the birth of children with defects of a genetic origin;

(2) the prevention of psychological harm to children;[2]

(3) the maintenance of solidarity within the family; and

(4) the recognition of the opposition of significant numbers of the community to the idea of sexual intercourse between blood-relatives.

In our view, these considerations apply with full force only within the nuclear family. They do not apply to relationships by affinity and do not apply to all relationships based on consanguinity.

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[1] See paras. 1.4-1.6.

[2] We have not discussed the risk of gross physical injury to children arising from penetration but this factor should not be ignored.

6.8. It is arguable that incest should be assimilated to the general range of offences aimed at preventing sexual exploitation of the young and we have already drawn attention to various schemes of this kind.[1] Those offences and the penalties provided are as follows[2]:-

(i) at common law, the use of lewd, indecent and libidinous practices and behaviour towards a child under the age of 12(14), for which there is no fixed penalty;

(ii) under section 5 of the Sexual Offences (Scotland) Act 1976[3], the use of such practices and behaviour towards a girl of or above the age of 12 and under the age of 16, for which the penalty is imprisonment for a maximum term of 2 years;

(iii) under section 3 of that Act, unlawful sexual intercourse or attempted intercourse with a girl under the age of 13 years, for which the penalties are, respectively, life imprisonment and imprisonment for a maximum term of 2 years;

(iv) under section 4 of that Act, unlawful sexual intercourse or attempted intercourse with a girl of or above the age of 13 years and under the age of 16 years, for which the penalty is imprisonment for a maximum term of 2 years.

6.9. This approach would imply discontinuing the use of the term incest and to that extent may be considered by some as a departure, welcome or otherwise, from the long-standing social disapproval marked by the fact of having a separately named crime. More significantly, the existing range of penalties may then be regarded as inadequate to distinguish properly the greater variety of situations to be comprehended within the categories of offence available. This problem could no

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[1] See paras. 6.3-6.5.

[2] We have described these offences and the penalties in greater detail in paras. 2.12-2.15.

[3] c.67.

doubt be solved by removing the statutory maxima and thereby allowing the court a greater discretion in sentencing or alternatively by increasing the existing maxima.[1]

6.10. The most fundamental problem with this approach, however, is to determine whether separate provision would then be required for the case where consenting adults only were involved. In our view, to have no such provision would be to take less than proper account of genetic considerations and largely to ignore the deeply-rooted objection we believe many members of the community would still have to what could be seen as sanctioning sexual intercourse between blood relatives. If, then, such an incest provision will continue to be required, there may be little reason for reclassifying the offence where minor dependants are involved and the same features of close relationship and genetic risk also present.

6.11. For these various reasons, therefore, we provisionally propose that incest should be retained as a separate crime and we invite views on this proposal.

6.12. There is one final preliminary point of general application to which we think it right to draw attention before considering the specific relationships which ought to be characterised as incestuous. It has been suggested that the law should, in principle, assimilate the prohibitions relating to incest and those relating to marriage. This has been advocated on the view that it would introduce greater certainty into the law and because there seems little point in prohibiting parties from marrying while they are free to cohabit and raise a family as if they were husband and wife. We do not accept this argument. Incest traditionally has been regarded as a grave offence and it still renders a person liable to life imprisonment. Consequently, the application of the criminal law relating to incest should be limited strictly to those cases where genetic and social arguments for its retention are strongest. The rules relating to the prohibition of marriage can be wider. Marriage stamps the relationship of the parties with the approval of the civil law and a relationship, though

[1] Cf. paras. 6.25-6.31.

not attracting such approval, need not be characterised as incestuous. This applies very clearly in the case of adoptive relationships. Here the prohibition relating to marriage can be justified on the basis of the potentially harmful effects that tolerance of marriage between adopter and adopted might have "on the institution of adoption as a whole, and hence on the whole pool of potential adopters"[1] but it would be going too far in our view to visit with the sanctions of incest a relationship, say, between a former adoptive father and his adopted daughter. In our view, the criminal sanction can be justified only in so far as it is necessary to protect the young child while he or she is in a state of dependency, and this is already achieved outside the law of incest.[2]

6.13. It has also been asked why related persons should be prohibited from marrying or having sexual intercourse on genetic grounds when the law does not intervene to prohibit marriage and subsequent procreation of children by persons known to be suffering from hereditary defects or to be carrying dangerous recessive genes. As far as the latter category are concerned, the problem only arises where both parties carry the same dangerous recessive genes, and this condition could not be ascertained without a prior medical examination of both parties. Such an examination was considered in relation to marriage by the Kilbrandon Committee but rejected on the supposed basis that it would be impracticable, since 80,000 marry in Scotland each year.[3] The Committee also noted that the public might reasonably object "on the ground that compulsory medical examinations would be an unwarrantable infringement of the freedom of the individual".[4] Where marriage was not being considered, or

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[1] E.M. Clive, Reform of the Scottish Marriage Law (Thesis) at pp. 151-2. Clive explains that "if men could marry their adopted daughters, wives might be hesitant about introducing a potential fresh young competitor into the household; men might be reluctant to have their motives questioned, and might conceivably feel inhibited about showing too much affection to their adopted daughters".

[2] See paras. 2.12-2.15; cf. paras. 6.8-6.11.

[3] The Marriage Law of Scotland (1969) Cmnd. 4011 paras. 42-44.

[4] ibid. para. 44.

was prohibited, such an examination would not be conducted and therefore the condition would not be predicted.[1]

Relationships by affinity[2]

6.14. The existing prohibitions of Scots law based on relationship by affinity were the product of the concept, inherited from the Medieval Church, that when a man and a woman have intercourse they become one flesh and hence the relatives of each become the relatives of the other.[3] Consequently, sexual intercourse between relations by affinity was incestuous. In our view this justification can no longer be accepted today.[4] The genetic arguments for the retention of incest as a separate crime do not apply to relationships by affinity. Nor does the argument that such relationships should be prohibited in the interests of family harmony apply with the same force because, in the typical family structure in contemporary Britain, in-laws rarely form part of the family household.[5] It is true that there is a danger of sexual abuse by relations by affinity having regard to the confidence which a child may place in such relatives but the problem, in our view, is not significantly greater than that presented by close friends of the family. We believe, therefore, that there is a strong case for the removal of prohibitions based on affinity.

6.15. We are reinforced in this conclusion both by the fact that judicial disquiet has been expressed about incest prosecutions based on affinity and by the trend in our own law and in other systems to eliminate relationships based on affinity from the scope of those who are protected by the crime of incest.[6] Lord Salvesen has remarked:

> "There are only one or two reported cases of a prosecution such as we are now dealing with ... But for the rarity

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[1] A counselling scheme has been set up by the Lothian Health Board to advise on the risks of having genetically defective children.

[2] See paras. 2.7, 2.8. The relationships of step-parent (grandparent) and step-child (grandchild) are discussed separately at para. 6.24.

[3] See paras. 1.5, 1.6.

[4] Cf. para. 6.6.

[5] E.M. Clive, Reform of the Scottish Marriage Law (Thesis) at p.153.

[6] See para. 2.7 and Part V, passim.

> of the prosecutions in the past, in cases of this description, I think public opinion would long ago have revolted against a statute ... which includes relationships which are not merely not criminal, but entirely void of offence."[1]

Lord Salvesen's views were shared by Lord Ormidale who, in a case which involved incest between an uncle and niece by affinity, remarked:

> "In the case of parties convicted of incest, I have always a feeling that there is less, or may be less, real criminality on the part of the accused than in the case of persons found guilty of other crimes, especially where the relationship in which they stand is a relationship by affinity, for their conduct may be based on an excusably innocent misapprehension of the law of the matter. It is clear that for a long time now there has been a very general feeling to the effect that a prosecution for incest should only proceed against parties who are related by blood ..."[2]

6.16. In their Memorandum on the Marriage (Scotland) Bill, the Law Society of Scotland endorsed his views considering that the criminal law should not be invoked against such relationships on the grounds (1) that such unions no longer appeared to be socially reprehensible; (2) that, in any event, juries have in recent years been reluctant to convict in such cases[3] and (3) that, there being no blood relationship between the parties, there can be no genetic argument against this proposal.

6.17. Our preliminary conclusion, therefore, on which we seek comment, is that the crime of incest should not be constituted by intercourse between a person and the relatives of his spouse. This is not to say that the remaining prohibitions of the criminal law relating to sexual practices should not apply as between such persons;[4] merely that the specific sanctions of the law of incest are inappropriately

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[1] H.M. Advocate v. Ryan 1914 S.C.(J.) 108 at p.112.

[2] C. & W. v. H.M. Advocate 1929 J.C. 1 at p.2.

[3] In a recent case (unreported) involving father-in-law and daughter-in-law, H.M. Advocate v. McKee (1976) a verdict of not proven was returned in face of an admission and the birth of two children.

[4] See paras. 2.12-2.15; cf. paras. 6.8-6.11.

applied where the element of genetic harm is absent and that the remaining objections to a sexual relationship between the parties are attenuated.

Relationships based on consanguinity[1]

6.18 The arguments for the retention of incest as a specific crime are strongest in the case of relationships by consanguinity. Where intercourse takes place between close relatives by consanguinity, all the arguments referred to in paragraph 6.7 above apply with force and, in our view, the question is predominantly one of specifying the degree of relationship within which intercourse should be visited with the specific sanctions of the crime of incest. It is clear that the genetic risks increase substantially where the proportion of genes in common is greater than one in eight.[2] For this reason, we consider that the prohibition on incest should extend to those relationships where the proportion of genes in common is of the order of one-quarter or more.[3] This would have the effect of including the following relationships:

Parents and children;
Brothers and sisters;
Grandparents and grandchildren;
Uncles and nieces, aunts and nephews; and
Half-brothers and half-sisters.

The prohibitions as between parents and children, brothers and sisters, either of the full or of the half-blood, and perhaps grandparents and grandchildren can be justified on the additional grounds -

(a) that they protect the younger members of the family from sexual exploitation and corruption; and

(b) that they promote family solidarity.

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[1] See paras. 2.5, 2.6.

[2] See paras. 3.2-3.4.

[3] See para. 3.4.

Great grandparents and great grandchildren

6.19. We doubt whether the prohibitions should extend beyond grandparents and grandchildren. Although the Marriage (Scotland) Act 1977[1] includes among those forbidden to marry great grandparents and great grandchildren, the links that are likely to exist between such persons are not in our opinion sufficiently close to warrant the special protection which the crime of incest affords. Such an extension of the prohibition certainly cannot be justified on genetic grounds alone in that, on average, they have only one eighth of their genes in common. It is difficult also to justify on the ground of promoting family solidarity. The typical family unit in the United Kingdom is the conjugal or nuclear family of husband and wife, with or without their children.[2] We consider that the general law prohibiting unlawful sexual intercourse with a girl under the age of 16 provides adequate protection and we do not recommend any extension of the prohibition beyond that of grandparents and grandchildren.[3]

Uncle-niece, aunt-nephew

6.20. These relationships are not prohibited in England, and this fact prompted Lord Salvesen to urge their exclusion in Scotland on the ground that "there can be no reason why they should be crimes if committed by Scotsmen and severely punishable while the law of England declines to regard them as such."[4] Exclusion of this relationship has also been suggested on the grounds that the uncle is not a member of the typical family unit;[5] that is, there is no question of promoting family solidarity. On the other hand, uncles and aunts have been included among the persons from whom

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[1] c.15.

[2] That is, the normal residential unit which shares its resources, food, work, play and affection. See E.M. Clive, Reform of the Scottish Marriage Law (Thesis) at p.153.

[3] See paras. 2.12-2.15, especially para. 2.15; cf. paras. 6.8-6.11.

[4] "The Law of Incest", Juridical Review (1941), 53, 262-266 at p.266.

[5] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.330.

the child "should rightfully expect warmth, protection and sexual distance."[1] In our view this principle forms, particularly with genetic arguments, a satisfactory ground for retaining the present law. We invite views, therefore, on our proposal to make no change in the present rule characterising sexual relationships between uncle and niece and aunt and nephew as incestuous.

Illegitimate relationships

6.21. It is not entirely clear whether intercourse between a parent and his or her illegitimate child or between such a child and the blood relations of his natural parents constitutes a crime under the law of Scotland.[2] However we consider that the illegitimate child should be placed in exactly the same position as a legitimate child. There are no genetic reasons for excluding the illegitimate child and the present law can only be described as anomalous. Illegitimate children are often brought up in the family with the legitimate children of the parent and yet, while the legitimate children are given the special protection of the law, the illegitimate child may "be seduced by the author of its being whose duty it is to preserve its chastity" with only that protection which the law affords a child against a stranger.[3] Illegitimate children are commonly featured in the studies of incest victims and in many respects they are even more vulnerable than their legitimate counterparts.

Prohibitions based on adoption

6.22. Sexual intercourse between an adoptive parent and his or her adopted child or between more distant relatives by adoption is not characterised as incest under the present law of Scotland[4]. The main distinction between adoptive

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[1] J. Benward and J Densen-Gerber, "Incest as A Causative Factor in Antisocial Behaviour: an Exploratory Study"; Contemporary Drug Problems (1975), 4, 323-340 at p.326.

[2] Cf. para. 2.11.

[3] per Lord Salvesen, "The Law of Incest", Juridical Review (1941), 262-266 at p.266.

[4] H.M. Advocate v. Mackenzie 1970 S.L.T. 81; see paras. 2.9-2.10.

relationships and natural relationships in this context is that the genetic arguments are inapplicable. Arguments, however, based on the abuse of a position of confidence and the need to promote family solidarity do apply and, possibly, with special force. The emotional and social damage which a girl suffers from being manoeuvred into a sexual relationship by her adoptive father may be as great as that suffered by a natural daughter, sister or grand-daughter. We do not consider, however, that sexual relations between an adopted child and his adoptive family should be declared incestuous. The Houghton Committee discovered that, even among adoptive parents, there was little support for a complete ban on marriage between siblings by adoption,[1] and if marriage is to be permitted between them, it would be absurd to make their connections incestuous. Again, what has been said about the need to protect the adopted child applies equally to other children, such as step-children, foster-children and even any child who is, at the time when the sexual relations take place, in the "custody, charge or care" of that adult.[2] The clear need is to protect the child until she has attained that degree of maturity where she can make up her own mind without the constraints of family ties. In our view, this can be achieved separately from the law of incest.[3]

6.23. We tentatively recommend, therefore, that sexual intercourse between relations by adoption only should not be characterised as incest and that such conduct should contine to be dealt with by the present law dealing with sexual relations between unrelated adults and children.

Step-parents and step-children etc.

6.24. Under the present law intercourse between step-parents and step-children (and step-grandparents and step-grand-children) is proscribed as incestuous.[4] To remove the stigma

[1] Report of the Departmental Committee on the Adoption of Children (1972), Cmnd. 5107, para. 332.

[2] The words used in section 12(1) (Cruelty to persons under sixteen) of the Children and Young Persons (Scotland) Act 1937 1 Edw. 8 & 1 Geo. 6 c.37.

[3] See paras. 2.12-2.15; cf. paras. 6.8-6.11.

[4] See paras. 2.7, 2.8; cf. paras. 6.14-6.17.

of incest from sexual relations between step-parents and step-children possibly goes further than society would wish especially at a time when divorce and remarriage are increasing the number of homes where such relationships exist.[1] However, as with adoption, the primary purpose of the law is to protect the child because of his or her state of physical and economic dependence on an adult and we consider that this can be effected, as in adoption, by the present non-incest provisions of the law.[2] We would propose therefore that the crime of incest should not be constituted by intercourse between a step-parent and step-child or step-grandparent and step-grandchild.

Penalties in the case of adopted and step-children

6.25. It may be that special provisions are necessary in the case of adopted or step-children[3] to afford special protection to such children against abuse by those in a parental relationship[4] by increasing the penalty for sexual intercourse to a level comparable with the penalty for incest. It may also be desirable to extend that protection beyond the age of 16. This additional protection may appear to be justified by the evidence that, at least in respect of daughters, the psychological harm may be greater when the sexual relations occur after puberty. It is not clear, however, whether the child requires protection after 16, the age at which a person can marry in Scotland, and we would welcome comment on this point.

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[1] See A F Messer, "The Phaedra Complex", Archives of General Psychiatry (1969), 21, 213-218.

[2] See paras. 2.12-2.15; cf. paras. 6.8-6.11.

[3] It may also be that such special provisions should be extended beyond adopted and step-children to include foster children and any child in "custody, charge or care" of an adult. See G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.330; para. 5.8.

[4] cf. paras. 6.3-6.5.

6.26. So far as penalty is concerned, the same penalty as for incest, that is life imprisonment, can be imposed in two situations where non-related persons are involved:-

(i) sexual intercourse or attempted sexual intercourse with a girl under 12 since this would be a case of rape or attempted rape;[1] and

(ii) where a man has sexual intercourse with a girl under 13 - a strict liability offence under section 3 of the Sexual Offences (Scotland) Act 1976.[2]

The maximum penalty under section 3 of that Act for an attempt is two years, and the offence may even be dealt with summarily.[3] On the face of it, this penalty may be considered inadequate in the case of special relationships. The potential psychological harm to the child is as likely to occur whether the act is completed or not. Physically, the child is only likely to become pregnant if she has attained puberty, and thus there would appear to be little reason for the great divergence in the penalties available.

6.27. If the position of the step-child or adopted child is to be equated with that of the natural child then the maximum penalty is, by comparison, grossly inadequate. Compared with the actual penalties imposed, the difference is less significant.[4] There is, however, no evidence to show whether the present penalties act as a general deterrent. We would, therefore, invite views as to whether increased penalties should be available in the case of adopted children and step-children, and if so, whether statutory maxima should be imposed or a greater discretion conferred on the courts.

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[1] Gordon, para. 33-14 at p.889.

[2] c.67. See para. 2.15.

[3] The same penalty is provided for unlawful sexual intercourse (or attempt) with a girl over the age of 13 but under 16, an offence which can also be tried summarily - s.4, Sexual Offences (Scotland) Act 1976 (c.67); see para. 2.15; cf. paras. 6.8-6.11.

[4] See paras. 6.29, 6.30 and Appendix II, section 3.

Restricting the penalty for incest

6.28. On the more general question of what might be the appropriate penalty for incest offences, we would propose to retain the present unlimited penalty.[1] The quality of the offence is often indistinguishable from that of rape. While consent may not be completely absent, it is difficult to differentiate between threats, duress, acquiescence and willingness in a situation where the man is in authority over the child.[2] The effects on the incest victim may be even more serious than in cases of rape. These are, in our view, good grounds for retaining a comparable penalty in cases of incest and we, therefore, so propose.

6.29. On the other hand, we recognise that, because of the disparate nature of incest offences, there may be cases where the more extreme penalties are considered inappropriate. Indeed, to some extent, current sentencing policies already reflect this diversity. In England, the comment has been made that "... the process of selection of cases for prosecution and for non-custodial sentences is operating to produce a fairly narrow range of offences of moderate severity where sentences of two-four years are considered appropriate", though "sentences of five years would be upheld in cases where a father deliberately exploited his position in the family by systematically seducing his daughter over a period of time".[3] From our study of cases reported to the Crown Office between 1971 and 1976[4], it would appear that a rather similar pattern has become established in Scotland. In only one case was the penalty in excess of 5 years and the circumstances of that case were rather exceptional in that the accused had a previous conviction for lewd, indecent and libidinous practices towards

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[1] To reduce this would be anomalous while the penalty under s.3 of the Sexual Offences (Scotland) Act 1976 (c.67) remained unchanged. See paras. 2.15, 6.26.

[2] See para. 4.5.

[3] V. Bailey and S. McCabe, Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at p.752.

[4] See para. 1.11 and Appendix II, section 3.

his two daughters when one was under 10 and the other 11 years of age and the incest, two years later, was accompanied by violence towards one of the children.[1]

6.30. There are two factors which might be expected to influence the sentence in cases of father-daughter incest; the relative youth of the girl involved and the fact that more than one daughter was involved.[2] The sentences imposed in the latter category were generally higher but no clear pattern emerged when a comparison was made between the ages of the daughters and the length of the sentences imposed. In fact, the percentage of fathers sentenced to 4 or 5 years' imprisonment was greater when the daughter was over 13 at the start of the sentence, and, significantly, a sentence of 5 years' imprisonment was imposed in one case where a daughter was already 16 at the start of the incest. The sentences in non-paternal incest cases are generally at the bottom end of the scale,[3] but imprisonment seems to be imposed in cases where it could be said that there has been some abuse of authority. If one accepts the age of 16 as the age at which consenting adult sex can occur without fear of penalty, then 7 of the cases examined come within this category. Except in the case of father-daughter incest, the courts would appear to take a more lenient view in sentencing.[4]

6.31. In light of these considerations, we would propose that incest, which at present is only triable in the High Court,[5] should also be triable on indictment in the sheriff court, to obviate the necessity of bringing before the High Court those cases for which that forum may be thought

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[1] In line with the other studies referred to, it was discovered that the majority of cases (40 out of 52) involved incestuous relationships between a father and one or more of his daughters.

[2] Cf. V. Bailey and S. McCabe, "Reforming the Law of Incest" [1979] Criminal Law Review 749-764 at pp. 752-753. These authors identify the age of the victim and absence of consent, where the victim is over the age of consent, as factors influencing the Court of Appeal in England.

[3] Of the 33 sentences of imprisonment referred to in Appendix II, section 3, 11 (including 7 cases of paternal incest) were of 2 years or less.

[4] See Appendix II, section 3.

[5] See para. 2.1.

inappropriate. It would, of course, always be competent for the sheriff, on conviction, to remit for sentence to the High Court, if he considered that a sentence of imprisonment in excess of two years was warranted.

Redefining the offence

6.32. The present law of incest has been criticised because of its focus on sexual intercourse with the effect that there is no special offence or additional penalty when a girl is exposed to other forms of sexual familiarities within her family where she might expect to be most protected. For this reason, Hughes would broaden the offence to include more than the act of intercourse itself and would extend it to cover indecent assault.[1] There is little doubt that the harm which results from this form of sexual activity can be as great as that which results from sexual intercourse.[2] However such activity is at present an offence under the law of Scotland[3] and the fact that a parent or relative was the person charged would no doubt aggravate the offence. Accordingly, and since the genetic arguments do not apply in this context, we think it inappropriate to extend the concept of incest to such activity. We provisionally recommend, therefore, that the present definition of incest requiring penetration should be retained.

Prosecution and sentencing policy in incest cases

6.33. If one of the values which the law of incest seeks to maintain is the integrity of the family, then it must be recognised that a prosecution may be counter-productive and may, in fact, contribute to the complete dissolution of the family.

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[1] G. Hughes, "The Crime of Incest", Journal of Criminal Law, Criminology and Police Science (1964), 55, 322-331 at p.330.

[2] In the study by Benward and Densen-Gerber 37% of the relationships involved intercourse. The other forms of sexual activity included fondling of breasts and genitals, exposure and attempted seduction. J. Benward and J. Densen-Gerber, "Incest as a Causative Factor in Anti-social Behaviour: An Exploratory Study", Contemporary Drug Problems (1975), 4, 323-340 at p.328.

[3] See paras. 2.12-2.15, especially paras. 2.12-2.14; cf. paras. 6.8-6.11.

This is likely to arise if the father is subsequently sentenced to a long term of imprisonment so that the family loses his physical and economic support. The dislocation of the family may in turn produce great anxiety in a daughter who may hold herself responsible for what is taking place. It is therefore important to consider if anything can be done to help both the family and the children so that the harm done by the incest is not aggravated by the legal process.[1]

6.34. What might be regarded as a useful scheme, operated within the normal criminal process, has been reported by the Canadian psychiatrists, Kennedy and Cormier.[2] They report a study of 30 cases in most of which action was taken by the Social Welfare Court but in which, as a result of pre-sentence investigation and evaluation, a treatment plan was formulated and the fathers were not imprisoned. Once the incest becomes known to an outside agency, immediate action is taken and an assessment of the family situation carried out by interviewing father, mother and daughter as well as, at times, other family members both individually and collectively. As a result of this assessment, "a plan is suggested at once to the family and to the court to tide over the immediate situation though this emergency plan is subject to much revision in the course of time".[3] Plans are formulated after taking into account such factors as the presence of other daughters in the household, the attitude of the wife and mother and the relationship between mother and daughter and are revised in the light of changing attitudes within the families. Kennedy and Cormier write:-

> "There is a great deal of movement backwards and forwards in the treatment of these families, as the

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[1] H. Maisch, Incest at p.82 states that in the ratio legis to the French Penal Code, the possibility of harm as a result of the legal process is given as a ground for the non-punishment of incest.

[2] M. Kennedy and B.M. Cormier, "Father-Daughter Incest - Treatment of the Family", Laval Medical (1969), 40, 946-950. Bailey and McCabe also report a treatment programme in Santa Clara County, California - see V. Bailey and S. McCabe, "Reforming the Law of Incest", [1979] Criminal Law Review 749-764 at pp. 763-764.

[3] M Kennedy and B.M. Cormier, "Father-Daughter Incest - Treatment of the Family", Laval Medical (1969), 40, 946-950 at p.948.

> individuals adjust themselves to what has happened, as well as try out new ways."[1]

6.35. They report that fathers most frequently leave the house when the situation becomes known although many of them return. In no case was there a complete break between husband and wife following separation and even when a separation finally took place, the father continued, except in two cases, to take financial responsibility for, and to show an interest in, the family. Their treatment embraced all the members of the family and they conclude that "where a treatment plan has been carried out, families have functioned at a better level, and where separation occurred, it was generally planned." They add:-[2]

> "With proper management, the outcome of incest may not always be as traumatic as was previously believed inevitable. In considering incest as basically a family pathology, and treating it as such, there is evidence that there may be gain for all concerned when the family co-operates in treatment, and where this is not possible less damage for those members who have involved themselves."

6.36. In an earlier paper, they identified the essential preconditions if there was to be any prospect of building a sound marriage as, firstly, the need for the husband and wife to accept without too much recrimination their share of responsibility in the situation (though only one was legally guilty); and, secondly, the possibility of a genuine change in the marital relationship permitting husband and wife to assume normal roles and fulfil their proper function.[3] If they did this, they can "then be of mutual help to one another in trying to establish a marriage on a healthier basis and in looking to the protection and eventual independence of their children".[4]

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[1] M. Kennedy and B.M. Cormier, "Father-Daughter Incest - Treatment of the Family", Laval Medical (1969), 40, 946-950 at p.948.

[2] ibid. at pp. 949-950.

[3] B.M. Cormier, M. Kennedy and J. Sangowicz, "Psychodynamics of Father-Daughter Incest", Canadian Psychiatric Association Journal (1963), 7, 203-217 at p.216.

[4] They do point out however, that treatment can be complicated by legal procedures and open court proceedings may be a great impediment to rehabilitation (ibid. at p.215).

6.37. The principal potential benefit which we see in the treatment plan set out above is that it might help to alleviate the harmful effects which the incest may have had on the victim. The value of a proper response to the child's situation has already been stressed and we are strongly of the view that "therapeutic intervention" should be considered in every case where a child has been involved in incest.

6.38. It would therefore be necessary for an outside agency to become involved and we do not accept the view that help and treatment for the victim and other members of the family cannot be secured within the criminal process.[1] Many child victims of incest would hardly know what to tell and would be unaware of the processes of law or that a serious offence had been committed. In most cases, the mother is the only person who is likely to know what is going on and there is little doubt that, in a good number of these cases, the mother will be reluctant to report the father, not through fear of losing him but because she is afraid of him. Lukianowicz discovered that the common and basic characteristic of the fathers in her study was aggressive behaviour and, she argued, the incest may have been only one of its expressions.[2] In such circumstances, it is conceivable that a mother would not wish to inform an agency which could not offer her some protection against her husband's violence, and this is a possible advantage of reporting the matter to the police.

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[1] See National Council for Civil Liberties, Report No. 13 at p.15.

[2] N. Lukianowicz, "Incest", British Journal of Psychiatry (1972), 120, 301-313 at p.307.

6.39. While, therefore, we accept that incest as a separate offence should be retained, we believe that the decision to prosecute and to punish in incest cases should take account of the potential effects that such prosecution and punishment may have on the victim and on the family. In our view, there is a need in the criminal process for a treatment plan, embracing the whole of the family, such as that formulated by Kennedy and Cormier.[1] To elicit comment, we make the tentative proposal that there should be made available in Scotland such a treatment plan.

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[1] M. Kennedy and B.M. Cormier, "Father-Daughter Incest - Treatment of the Family", Laval Medical (1969), 40, 946-950.

Appendix I

Incest in a cultural context: the "incest taboo"

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APPENDIX II

1. Number of Cases Made Known to the Police 1951-1978

year	Rape	Assault with Intent	Indecent Assault	Incest
1951	18	18	287	20
1952	22	16	284	35
1953	27	23	259	20
1954	26	22	254	32
1955	21	20	259	42
1956	23	16	229	27
1957	35	32	281	23
1958	27	31	299	23
1959	34	39	405	27
1960	40	33	381	41
1961	40	50	381	39
1962	42	49	452	41
1963	55	43	438	18
1964	39	66	542	47
1965	58	57	527	33
1966	64	48	506	44
1967	101	76	669	33
1968	81	88	708	44
1969	91	100	725	25
1970	77	110	605	33
1971	102	92	674	44
1972	131	91	601	31
1973	101	140	618	36
1974	120	121	701	32
1975	141	146	691	49
1976	184	146	805	33
1977	178	156	807	42
1978	166	164	946	23

2: Number of Persons Proceeded against for Incest and Convicted

YEAR	Persons proceeded against		Persons Convicted	
	M.	F.	M.	F.
1951	6	-	5	-
1952	15	-	8	-
1953	10	-	9	-
1954	18	-	13	-
1955	7	-	5	-
1956	16	1	14	-
1957	9	-	7	-
1958	13	-	9	-
1959	13	-	9	-
1960	14	-	12	-
1961	24	-	21	-
1962	8	-	7	-
1963	13	-	13	-
1964	9	-	8	-
1965	14	2	11	1
1966	15	-	13	-
1967	8	-	7	-
1968	15	-	14	-
1969	8	-	7	-
1970	6	-	6	-
1971	21	2	14	1
1972	11	-	10	-
1973	12	1	10	1
1974	13	-	11	-
1975	15	1	11	-
1976	6	-	3	-
1977	11	-	11	-
1978	17	3	14	3

3. Examination of Incest cases reported to Crown Office April 1971 and December 1976

(a) The relationship involved

	No of Cases
Father-daughter incest	40
Step-Father-step-daughter incest	3
Mother-son incest	1
Brother-sister incest	3
Uncle-niece incest	4
Father-in-law - daughter-in-law incest	1
TOTAL	52

(b) Father-daughter incest

Of the 40 cases, there were only 4 acquittals and in one case a lesser charge was accepted by the Crown. In no case was a daughter prosecuted although 4 could be described as "adult" at the start of the incest.

Ages of daughters

Under 10	10-12	13-15	16-17	18-19
8	14	26	3	1

Ages of fathers

29-35	36-40	41-45	46-49
12	14	9	5

Two-thirds of the fathers were between the ages of 29 and 40; youngest father was 29; the oldest 49.

Sentences Imposed

Imprisonment	Hospital Orders	Probation
33	2	1

Lengths of Sentences

Under 2 years	2 years	2½ years	3 years	4 years
7	4	3	7	6

5 years	Life Imprisonment
5	1

c) Step-father and step-daughter incest

Two convictions resulted from the 3 cases reported. In the first case, where the parties were aged 32 and 13, the sentence imposed was one of 2 years imprisonment. In the other case both parties were adult, the step-daughter being 25 and the step-father 43. He alone was prosecuted and received an admonition.

(d) Mother-son

The one case reported involved a mother and her illegitimate son who was adult but, like his mother, mentally retarded. Both were prosecuted and a guardianship order made under the Mental Health (Scotland) Act 1960 in respect of both.

(e) Brother-sister incest

Three cases were reported with the following results.

Age of Brother	Age of Sister	Sentence
19	14	Hospital Order
32	15	3 Years imprisonment
16	14	Probation

(f) Uncle-niece incest

One of the four cases reported led to a committal; the niece was not prosecuted.

Age of Uncle	Age of Niece	Sentence
31	15	18 months
20	14	18 months
47	17	1 month

(g) Father-in-law and daughter-in-law incest

Both parties in the only case reported were prosecuted and pled guilty. The male was 57 and the female 19. He was fined £50 and she was put on probation for a period of 3 years.