10. Have you experienced any problems peculiar to in forma pauperis proceedings?

No — 65% of the judges
Yes — 35%

11. In what way, if any, are such proceedings burdensome for the court? (Note in question 7 applies)

Court reporters and clerks do not like them — 65% of the judges
Financially burdensome — 14%
Not burdensome — 35%

12. What suggestions would you offer toward developing a criteria for deciding in forma pauperis motions? (Note in question 7 applies)

None — 60% of the judges
Anyone on bail bond should not be allowed in forma pauperis — 30%
Standardized affidavit — 35%

13. Do you have suggestions for an alternative procedure for meeting this aspect of the court's responsibility? (Note in question 7 applies)

None — 70% of the judges
Small claims court — 20%
Develop a uniform plan for paying clerks and reporters — 10%

THE CRIME OF INCEST

David Royce*
Anthony A. Waits**

I. INTRODUCTION

While no satisfactory classification of sexual deviations has been devised,[1] it is generally accepted that incest veers far from the norm of conventional sexual behavior.[2] Broadly defined, "incest" refers to sexual activity between members of a family whose kinship would ordinarily preclude marriage.[3] There does not appear to be a universally accepted definition of incest, although intra-family incest taboos are universal with few exceptions.[4] The incest taboo prohibiting sexual relationships between father and daughter, mother and son, and brother and sister, is a constancy in virtually all civilized cultures.[5] Societies have defined incest differently, however, and even in the United States, definitions of and penalties for incest vary widely among the states.[6]

While brother-sister incest is said to occur frequently,[7] and

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1. J. COLEMAN & W. BROEN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 452 (4th ed. 1972).

2. *See* A. FREEDMAN, H. KAPLAN & B. SADOCK, MODERN SYNOPSIS OF COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 423 (1972); Bagley, *Incest Behavior and Incest Taboo*, 16 SOC. PROB. 505-19 (1909); Lindzey, *Some Remarks Concerning Incest, the Incest Taboo, and Psychoanalytic Theory*, 22 AM. PSYCH. 1051-59 (1967).

3. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1141 (1964).

4. Hughes, *The Crime of Incest*, 55 J. CRIM. L. C. & P.S. 322, 326 (1964). *See also* Tormes, *Child Victims of Incest*, AM. HUMANE A., CHILDREN'S DIV. 5 (1977):

> The incest taboo is an almost universal social tenet and although among human societies there is known to be infinite variation of taboo practice within the extended family, application to members of the nuclear family is the most universal of the various incest taboo manifestations.
>
> Certain sub-populations of a very special religious or state-religious nature have been exceptions to the general taboo. These include the royal-religious families among some African societies and the ancient priestly ruling class of Peru. The only known society which provides a more general exception to the universal rule of nuclear family incest taboo is ancient Egypt where property inheritance considerations apparently were of importance sufficient to sanction marriage within the nuclear family.

Id. (footnotes omitted).

5. Hughes, *supra* note 4, at 326.

6. Frances & Frances, *The Incest Taboo and Family Structure*, 15 FAM. PROCESS 235-44 (1976); Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in CHILD AND NEGLECT: THE FAMILY AND THE COMMUNITY 143-58 (R. Helfer & H. Kempe eds. 1976).

7. Berry, *Incest: Some Clinical Violations on a Classical Theme*, 3 J. AM. ACAD. PSYCHOANALYSIS 151-61 (1975).

mother-son incest has occasionally been reported,[8] father-daughter (or stepfather/stepdaughter) incest is most commonly reported in literature.[9] Furthermore, it is the incestous relationship between father and daughter which produces the most dramatic consequences.[10] In this study of the legal and social ramifications of the crime of incest, the terms "incest" and "incestuous intercourse" should be broadly construed as referring to any of the aforementioned intra-family relationships; however, emphasis should be placed on the father-daughter (or step-father/step-daughter) relationship since it is the most common and produces the greatest harm to the familial structure.

The crime of incest has never existed at common law in the United States and was created by statute at varying times in the different states.[11] Statutory prohibition of incest evolved from religious or moral principles that societies throughout the ages determined to be of such vital importance to their preservation as to justify legal sanction. Devlin, in his treatise on law and morals,[12] gave great thought to the justification of legal sanctions for violations of moral principles. Devlin believed that a public morality was the essential element to the existence of a society. He rationalized that, just as society has the right to use the law to prevent treason, so also has it the right to use the law to prevent immorality.[13] Thus, it is the right of society to preserve itself and its morality which gives it the power to use the law to enforce its moral principles.

Incest is universally regarded as a crime against the morality of society, and morality has long been the single most inhibiting factor serving to reduce the incidence of incestuous activity. Nevertheless, moral principles alone are not sufficient to alleviate the incidence of incest, and the necessity of statutory and judical prohibitions against incestuous relationships is thus apparent.

II. INCIDENCE

An early estimate placed the incidence of incest at 1.9 cases per

8. Wahl, *The Psychodynamics of Consummated Maternal Incest*, 3 ARCHIVES GENERAL PSYCH. 188-93 (1960).

9. Awad, *Father-Son Incest: A Case Report*, 162 J. NERVOUS MENTAL DISEASE 135-39 (1976); *see* H. MAISCH, INCEST 92 (1972); L. SANTIAGO, THE CHILDREN OF OEDIPUS: BROTHER-SISTER INCEST IN PSYCHIATRY, LITERATURE, HISTORY AND MYTHOLOGY 155 (1973).

10. Hughes, *supra* note 4, at 328-29.

11. *Id.* at 326.

12. L.P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

13. *Id.* at 117; *see also* M. GOLDING, PHILOSOPHY OF LAW 64-65 (1975).

million population.[14] More recent research suggests that incestuous behavior occurs with much more frequency. One such study found that incest occurred in nine percent of a sample of child abuse cases from the New York boroughs of Brooklyn and the Bronx.[15] Another study found the incidence of incest in Santa Clara County, California to be 200 cases per million.[16] It is felt that even this estimate did not reflect the true incidence of incestuous activity.[17] The Children's Division of the American Humane Society has reported that 5,000 cases of incest may occur annually in the United States.[18] Other estimates of potential incest range from the results of one study which suggest that 500,000 children may be sexually victimized every year,[19] to those of another which calculated that in 1965 two million families concealed the fact that one of their daughters was a victim of incest.[20] Many authorities seem to agree that the reported cases of incest represent the tip of the iceberg.

The implication of incest as a dynamic in other social problems is also striking. One study indicated that forty-four percent of the female drug abusers sampled had been involved in an incestuous experience, and almost half of these women had run away from home by age sixteen.[21] Another study found that five percent of all female admissions to inpatient psychiatric services had been involved in incestuous relationships.[22] In a sampling of 700 psychiatric patients, four percent were found to have been involved in incestuous relationships.[23] And another researcher found that over one-fifth of a sample of prostitutes had been incestuously assaulted as children.[24]

14. Cavallin, *Incestuous Fathers: A Clinical Report*, 122 AM. J. PSYCH. 1132-38 (1966) (citing S.K. WEINBERG, INCEST BEHAVIOR (1955)).

15. V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 27 (1969).

16. Giarretto, *The Treatment of Father-Daughter Incest: A Psycho-Social Approach*, CHILDREN TODAY 2-5 (July-Aug. 1976).

17. *Id.*

18. Schechter & Roberge, *Sexual Exploitation*, CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 127-42 (1976).

19. Chaneles, *Child Victims of Sexual Offenses*, 31 FED. PROBATION 52 (1967).

20. Amir, *The Role of the Victim in Sex Offenses*, in SEXUAL BEHAVIORS: SOCIAL, CLINICAL AND LEGAL ASPECTS 135 (H. Resnik & M. Wolfgang eds. 1972).

21. Benward & Gerber, *Incest as a Causative Factor in Antisocial Behavior: An Exploratory Study*, 4 CONTEMP. DRUG PROB. 323-40 (1975).

22. Molner & Cameron, *Incest Syndromes: Observations in a General Hospital Psychiatric Unit*, 20 CAN. PSYCH. A.J. 373-77 (1975).

23. Sarles, *Incest*, 22 PEDIATRIC CLINICS N. AM. 633-42 (1975).

24. Giarretto, *supra* note 6, at 145.

It is certain that incest has inherently harmful consequences and, therefore, it is not difficult for a society to justify the enactment of laws prohibiting such activity. Potential victims and society in general are entitled to be protected from potential incest offenders by the additional prohibitive force of judicial and legislative enactments since moral principles alone have not been able to sufficiently reduce the incidence of incestuous activity.

III. Statutory Analysis

The crime of incest is generally more encompassing in United States' jurisdictions than in other civilized countries around the world.[25] A comparative study of several state statutes will provide a better understanding of the crime of incest as it exists in the United States today and give some insight as to why incest has been regarded by some as a crime which, by its very nature, is "repulsive and shocking to every sense of decency."[26]

In Kentucky the statute prohibiting incestuous intercourse[27] provides that

> [a] person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to . . . include blood relationships of either the whole blood or half blood without regard to legitmacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

As in other states, the crime of incestuous marriage is a separate offense in Kentucky.[28]

Ohio has recently amended its statute prohibiting incestuous intercourse, and the revision should prove to be an innovative step toward better protection for those susceptible to sexual abuse.[29] In order to fully understand the revision which took place in Ohio, a look at the former statute prohibiting incestuous intercourse will lend assistance. It read in part:

> Persons, nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery or fornication together, shall be imprisoned . . . .[30]

25. Hughes, *supra* note 4, at 323.
26. State v. Brown, 47 Ohio St. 102, 23 N.E. 747 (1890).
27. Ky. Rev. Stat. § 530.020(1) (1975).
28. *Id.* § 402.010 (1970); N.Y. Dom. Rel. Law § 5 (McKinney 1977); Ohio Rev. Code Ann. § 3101.01 (Page 1972).
29. Ohio Rev. Code Ann. § 2907.03 (Page 1975).
30. Act of May 5, 1877, 74 Ohio Laws 240,279, pt. 4, tit. I, ch. 9, § 2.

In contrast, the new statute makes the crime of incest part of a very broad prohibition that encompasses sexual conduct with a person other than one's spouse in a variety of situations where the offender is considered to be taking "unconscionable advantage" of the victim.[31] The statute, entitled "Sexual Battery," was enacted to broaden the coverage of what was formerly known as incestuous conduct so as to include not only sexual conduct by a parent with child, but also sexual conduct by a stepparent with stepchild, a guardian with his ward, or a custodian or person in loco parentis with his charge.[32]

Ohio's sexual battery statute[33] is an attempt to enlarge the area of protection for potential sex offense victims. It includes sexual conduct by coercion, which is somewhat less restrictive than sexual conduct by force or threat of force, a necessary element in prosecuting for rape. The distinguishing characteristic of this statute as it pertains to incestuous conduct is that it extends the proscribed degree of relationship to that of a guardian with ward and that of a person in loco parentis with his charge.

New York's statute prohibiting incestuous intercourse[34] is similar to that of Kentucky,[35] except its coverage does not extend to relationships between stepparent and stepchild. It proscribes sexual relations between blood relatives:

> A person is guilty of incest when he marries or engages in sexual intercourse with a person he knows to be related to him, either legitimately or illegimately, as an ancestor, descendent, brother or sister of either the whole blood or halfblood, uncle or aunt, nephew or neice.[36]

In comparison with Ohio's new sexual battery statute, the New York statute is greatly limited in its scope of proscription. The gravamen of the offense under the new Ohio statute is that the offender takes unconscionable advantage of his or her relationship to the victim, arising out of kinship or duty of protection or supervision.[37] In this respect the Ohio statute is specifically broader than its predecessor and the Kentucky and New York statutes prohibiting only certain intra-familial intercourse.

31. Ohio Rev. Code Ann. § 2907.03 (Page 1975).
32. *Id.* Committee Comment.
33. Ohio Rev. Code Ann. § 2907.02 (Page 1975).
34. N.Y. Penal Law § 255.25 (McKinney 1967).
35. Ky. Rev. Stat § 530.020(1) (1975).
36. N.Y. Penal Law § 255.25 (McKinney 1967).
37. Ohio Legis. Serv. Comm., Proposed Ohio Criminal Code (1971).

IV. Prosecution of the Case

Generally, in order to prosecute for the crime of incest, three facts must be established: (i) the relationship of the offender and the victim; (ii) the offender's knowledge of that relationship; and (iii) sexual intercourse with the victim.[38]

The most difficult element of the offense to establish is the act of sexual intercourse. Generally, the prosecution has the right to present proof of the commission of the offense at any time prior to the finding of the indictment charging incestuous intercourse.[39] While each act of sexual intercourse constitutes a separate and distinct offense,[40] charging the commission of incest on a number of occasions within a given period of time has been held to be specific enough to support an indictment for the charge of incest.[41] However, where the crime is so charged, the court will, on a motion for a bill of particulars, require the prosecution to specify, or approximate, a particular date of occurrence.[42]

Where numerous acts of intercourse are alleged, the prosecution, upon proper motion, will be required to elect a specific incident upon which to base its case.[43] Even if no such motion is made by the defense, the court may, sua sponte, instruct the jury to consider evidence of subsequent acts only for the purpose of corroboration of the first.[44] It should be noted, however, that if the defense counsel fails to make timely objection and the court fails to so instruct the jury on its own, this failure is not a basis for appeal.[45]

As a rule, "evidence of the commission of crimes other than the one that is the subject of the charge is not admissible to prove that the accused is a person of criminal disposition . . . ."[46] However, there are important exceptions to this rule. Kentucky has adopted the following position:

38. *E.g.*, Cecil v. Commonwealth, 140 Ky. 717, 131 S.W. 781 (1910).

39. Browning v. Commonwealth, 351 S.W.2d 499 (Ky. 1961).

40. State v. Brown, 47 Ohio St. 318, 81 N.E.2d 546 (1890); Barnhouse v. State, 31 Ohio St. 39 (1876).

41. Keeton v. Commonwealth, 459 S.W.2d 612 (Ky. 1970); Smith v. Commonwealth, 109 Ky. 685, 60 S.W. 531 (1901) (evidence of prior acts held admissible in corroboration of testimony); State v. Jackson, 82 Ohio St. 318, 81 N.E.2d 546 (1948).

42. *E.g.*, Breeding v. Commonwealth, 191 Ky. 128, 229 S.W. 372 (1921); Bardue v. Commonwealth, 144 Ky. 428, 138 S.W. 296 (1911).

43. Commonwealth v. Stites, 190 Ky. 402, 227 S.W. 574 (1921).

44. *Id.*

45. Browning v. Commonwealth, 351 S.W.2d 499 (Ky. 1961).

46. R. Lawson, Kentucky Evidence Law Handbook § 2.20 (1976).

> (1) Evidence of independent sexual acts between an accused and the victim of an alleged sex crime is admissible to prove a disposition and inclination in the accused to engage in sexual acts with the victim. Upon admission of such evidence, the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.
>
> (2) Evidence of independent sexual acts between an accused and persons other than the victim of an alleged sex crime, if such acts are similar to that involved in the charge and not too remote in time, is admissible to prove disposition and lustful inclination in the accused, intent as to the act charged, motive, or a common plan, scheme, or pattern. Upon admission of such evidence the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.[47]

A general qualification to the above rules is that even though such evidence might be admissible thereunder, the court has the power to exclude it upon a determination that its probative value is outweighed by its possible prejudicial effect.[48] Nevertheless, it has been stated,

> In prosecutions for sex crimes the law has come closer than in any other area to allowing proof of a defendant's general predisposition to engage in criminal activity. Prior acts of sexual misconduct by the accused with his alleged victim, as well as prior acts with other person, have ruled admissible . . . .[49]

A further limitation to admissibility is that "evidence 'of other crimes' may not be admitted when the other crimes have no relevancy to the case other than to show a disposition in the defendant toward criminal activity."[50] It is not prejudical, however, to allow the victim to testify that sexual intercourse with the accused occurred on "numerous occasions." Such evidence is admissible to show a course of conduct.[51]

47. *Id. Cf.* Ohio Rev. Code Ann. § 2945.59 (Page 1975) (evidence of prior acts is admissible in any criminal case where motive or intent, the absence of mistake or accident on the defendant's part, or the defendant's scheme, plan, or system in doing an act is material); *see also* Fed. R. Evid. 404.

48. *See* Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970); State v. Chapman, 111 Ohio App. 441, 168 N.E.2d 14 (1959) (evidence of defendant's alleged sexual relations with one of his daughters eight years before incest prosecution held inadmissible as being too remote and, therefore, insufficient to show a course of conduct); Fed. R. Evid. 403.

49. R. Lawson, *supra* note 46, § 2.20, at 22.

50. *Id.* at 21.

51. Keeton v. Commonwealth, 459 S.W.2d 612 (Ky. 1970); Brister v. Commonwealth, 439 S.W.2d 940 (Ky. 1969); Williams v. Commonwealth, 277 Ky. 227, 126 S.W.2d 131 (1939); Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922)(evidence of other acts limited to

Another question which is frequently raised in sexual offense cases, and especially in rape and incest cases, is whether the accused can be convicted upon the uncorroborated testimony of the prosecutrix. Generally there are two situations in which corroboration of testimony is required: (i) where there are statutes requiring corroboration of accomplices, and (ii) where there are statutes requiring corroboration in the prosecution of sex offenses.[52] Kentucky falls within the first category. It has a statute requiring the corroboration of an accomplice's testimony.[53] New York, on the other hand, falls within the second category; it has a statute which provides that a person cannot be convicted of incest or an attempt to commit incest upon the uncorroborated testimony of the victim.[54] Ohio, however, has no requirement, statutory or otherwise, that a victim's testimony be corroborated.[55]

It has been said that the rationale for requiring corroboration in prosecutions for sex offenses lies "in the fact that crimes of this nature are easily charged and very difficult to disprove; in view of the instinctive horror with which mankind regards them."[56] Nevertheless, the statute, standing alone, can be somewhat misleading because even with this statute, corroboration of the testimony of a prosecutrix who is a child under the age of consent is not required.[57] This is in accord with the Ohio[58] and Kentucky[59] positions. As stated in *Bailey v. Commonwealth:*

> We have held consistently in this character of case . . . that the verdict based upon the uncorroborated testimony of the prosecutrix will be sustained unless her testimony is so highly improbable as to show it to be false.[60]

Where there is a statute requiring corroboration of an accomplice's testimony, as in Kentucky, and there is reason to believe that

identifying the accused); State v. Jackson, 82 Ohio App. 318, 81 N.E.2d 546 (1948). *But see* Keith v. Commonwealth, 251 S.W.2d 850 (Ky. 1952); State v. Ross, 92 Ohio App. 29, 108 N.E.2d 77 (1952).

52. *See generally* 41 AM. JUR. 2d *Incest* § 24 (1968).

53. KY. R. CRIM. P. 9.62.

54. N.Y. PENAL LAW § 255.30 (McKinney Supp. 1977).

55. *See* State v. Robinson, 83 Ohio St. 136, 93 N.E. 623 (1910); Straub v. State, 5 Ohio C.C. (n.s.) 529, 17 Ohio Cir. Dec. 50 (1904).

56. People v. Friedman, 139 App. Div. 794, 795, 124 N.Y.S. 521, 522 (1918).

57. People v. Vernum, 28 App. Div. 2d 946, 281 N.Y.S.2d 672 (1967); *cf.* People v. Gibson, 301 N.Y. 244, 93 N.E.2d 827 (1950).

58. State v. Straub, 5 Ohio C.C. (n.s.) 529, 17 Ohio Cir. Dec. 50 (1904).

59. Bailey v. Commonwealth, 312 Ky. 764, 229 S.W.2d 767 (1950).

60. *Id.* at 764, 229 S.W.2d at 769; *see* Straub v. State, 5 Ohio C.C. (n.s.) 529, 17 Ohio Cir. Dec. 50 (1904).

the victim of the incestuous act was, in fact, a consenting party and thus an accomplice, a conviction cannot be sustained upon the victim's testimony alone.[61] In the absence of other testimony or evidence tending to implicate the defendant in the commission of the offense, the court will instruct the jury to render a verdict of acquittal.[62] Where corroborative evidence is required, it may be direct or circumstantial.[63] Evidence of prior and subsequent acts of intercourse between the defendant and the victim or a third party is generally admissible for the purpose of corroboration as pointed out earlier in the article.[64]

Generally, corroboration is not required in a charge of incestuous intercourse. If the defendant accomplished his criminal act through the exercise of force, fraud, or undue influence, or if for any reason the consent of the victim was wanting, then the victim should not be viewed as an accomplice.[65] This is frequently the case. Kentucky cases have consistently held in a long line of decisions that, under an indictment for incestuous intercourse committed by a father on his daughter, a conviction is authorized upon the testimony of the daughter alone, and in such case, the daughter is not considered an accomplice in any sense, but rather a victim.[66] The majority of incest offenses are committed by fathers against their daughters within the privacy of the family home.[67] This could be one of the major reasons that the corroboration requirement is dropped in such situations.

V. PUNISHMENT

Statutory punishment for the crime of incestuous intercourse varies greatly across the United States. Incestuous rape is frequently punishable with life imprisonment.[68] In Kentucky, incest minus the rape element carries a sentence of at least five years but not more

61. R. LAWSON, *supra* note 46, § 2.20, at 21.

62. *Id.*

63. *See* Sarver v. Commonwealth, 425 S.W.2d 565 (Ky. 1968); Hooper v. Commonwealth, 419 S.W.2d 756 (Ky. 1967); Anderson v. Commonwealth, 312 Ky. 768, 229 S.W.2d 756 (1950).

64. Keith v. Commonwealth, 251 S.W.2d 850 (Ky. 1952); State v. Reinke, 89 Ohio St. 390, 106 N.E. 52 (1914).

65. *See generally* 42 C.J.S. *Incest* § 17 (1944).

66. Browning v. Commonwealth, 351 S.W.2d 499 (Ky. 1961); Salyers v. Commonwealth, 255 S.W.2d 605 (Ky. 1953); Whitaker v. Commonwealth, 95 Ky. 632, 27 S.W. 83 (1894).

67. *See* text accompanying note 9, *supra.*

68. KY. REV. STAT. § 532.060 (1975); OHIO REV. CODE ANN. § 2907.02(3)(b) (Page 1975); N.Y. PENAL LAWS § 70.00(2)(b) (McKinney 1975) (sentence for first rape not to exceed 25 years).

than ten years,[69] and in New York incestuous intercourse is punishable by a term to be fixed by the court, not to exceed four years.[70] However, where the court, having regard to the nature and circumstances of the crime and the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix the term of one year or less.[71] In Ohio, sexual battery, *i.e.*, incestuous intercourse, is punishable by an indefinite term of imprisonment to be not less than one year and not more than ten years, plus a possible fine not to exceed $5,000.[72]

Ohio courts are required to have the convicted offender examined by the department of mental health and retardation or a state facility designated by the department, or a psychiatric clinic approved by the department, or by three psychiatrists.[73] And upon consideration of the examination report, the court will then enter a finding and prescribe the appropriate punishment or treatment.[74] Because of the nature of the crime of incest and the parties involved, treatment and punishment vary according to the severity of the offense and the mental state of the offender. Where mental illness is the prevailing factor involved and psychiatric care is recommended, the offender will normally be referred to the health board for treatment before a sentence will be carried out.[75]

VI. Nonreporting and the Duty to Disclose

The most alarming aspect of the crime of incest is that it frequently goes undetected and unprosecuted. "To such a remarkable extent is the incest family able, at will, to isolate itself from all public censure, that the control of incest behavior must rely on an agent within the family."[76] In a recent article, Sergeant Wesly Mysonheimer of the Cincinnati Police Juvenile Division said that "the

69. Ky. Rev. Stat § 530.020 (1975).

70. N.Y. Penal Law § 255.30 (McKinney Supp. 1977).

71. N.Y. Penal Law § 70.00 (McKinney 1975 & Supp. 1977). This section refers to a conviction for a violation of N.Y. Penal Law § 255.25 (McKinney 1967). A conviction for a violation of N.Y. Dom. Rel. Law § 5 (McKinney 1977) results in the imposition of a fine, and the court, in its discretion, may also sentence the violator to prison.

72. Ohio Rev. Code Ann. § 2929.11 (Page 1975).

73. *Id.* § 2947.25(A) (Page Supp. 1977).

74. Interview with John Fergeson, Case Worker Supervisor for the Child Protective Service in Cincinnati, Ohio (Jan. 22, 1978).

75. *Id.*

76. Tormes, *supra* note 4, at 32.

majority of sexual abuse cases against children are done right within the household by some relative. . . . Father-daughter [situations] are most common."[77] As to the difficulty of prosecuting the incest offender, the sergeant said that the mothers of children who have been sexually abused by incestuous intercourse often refuse to bring the action to the attention of the police for fear of getting beaten up by the spouse and losing their "meal ticket." In many cases, the fathers are able to persuade the mother and daughter not to testify. In such a case, where the mother refuses to report the crime, police and social workers may be left with nothing but suspicions.[78] Reasons for not reporting the offense include fear of disgrace, lack of courage, and the fact that the sexual relationship between the father and daughter might serve the wife's ends, by taking the pressure of sexual advances by the husband off the spouse, although she may not be conscious of this.[79]

It is not surprising that the incidence of incestuous intercourse is much greater than the number of prosecutions indicate. It should be noted, however, that the law is not the only remedy that the victimized family has available to it. Some families inflicted with the incestuous problem seek help from their clergymen; others consult their doctors or other professionals whom they ultimately feel to be better suited to deal with their problem and protect their privacy and reputation.[80]

However, incest or sexual abuse is a type of child abuse in most cases and, in the majority of jurisdictions, physicians and others are under a legal obligation to report "any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child . . . to a municipal or county peace officer [or to the proper child protective agency]."[81] There should be no other option.

77. Lang, *Incest is Unmentionable—and Common*, Cincinnati Enquirer, Jan. 15, 1978, at H-1, col. 1.

78. *Id.*

79. Virkkunen, *Incest Offenses and Alcoholism*, 14 Med. Sci. & L. 124, 127 (1974).

80. Interview with John Fergeson, *supra* note 74.

81. Ohio Rev. Code Ann. § 2151.421 (Page 1976). See also Ky. Rev. Stat. § 199.335(2) (1976). This statute provides in part as follows:

> Any physician, osteopathic physician, . . . social worker, coroner, medical examiner, child caring personnel, resident, intern, chiropractor, dentist, optometrist, health professional, peace officer, mental health professional or other person who knows or has reasonable cause to believe that a child is an abused or neglected child, shall report or cause a report to be made in accordance with the provisions of this section.

See also N.Y. Soc. Serv. Law § 413 (McKinney 1976). These sections and others like them are designed to assure that protective services of the state are made available to abused and neglected children and to preserve and strengthen family life, where possible.

Physicians and others entrusted with such confidential matters are often guilty of trying to handle these matters on their own when the child's best interest may be served by the reporting of acts of incestuous intercourse. The purpose of statutory requirements making it mandatory for physicians, nurses, school personnel, etc. to report believed or known incidents of child abuse is to assure that the protective services of the state will be made available to an abused or neglected child in order to protect such a child and to preserve and strengthen family life, where possible.[82]

In Cincinnati, the Child Protective Service (CPS) provides services for families where child abuse has become a problem. The CPS is a program that has been established throughout the United States and provides services in most major metropolitan areas. The CPS receives reports of child abuse and incest by way of various channels of information, most commonly the mother, the teacher, the family physician or clergyman, the friends and neighbors of the family. The CPS attempts to alleviate the problem by providing the victimized family and abusive parent with on-going treatment and therapy programs.[83] By agency policy, CPS is required to:

1. Respond promptly to reports of alleged neglect, abuse or exploitation of children to determine the validity of the report;
2. Assess the damage to children resulting from neglect or abuse;
3. Evaluate the risk of further injury to the children in the home and determine whether the children should remain in the home or whether emergency action is required;
4. Determine and identify the family problem or problems which contributed to or resulted in neglect or abuse;
5. Evaluate the potential for treatment of the underlying factors to correct conditions and rehabilitate the family;
6. Plan a course of treatment calculated to stabilize and rehabilitate the family through services of the protective agency and the use of other appropriate community resources to meet special needs of the children and parents;
7. Initiate the treatment plan and stimulate involvement of services from community resources to meet identified special needs;
8. Invoke the authority of the juvenile or family court in situations where there is risk to the children should they remain at home, or where there is active resistance to child protective intervention.[84]

82. KY. REV. STAT. § 199.335(1) (1976).
83. Interview with John Fergeson, *supra* note 74.
84. American Humane A., *Child Protective Services, Standards* (1977).

The CPS does not prosecute reported incidents of incest. In those cases in which an appropriate offer of service is refused and the CPS determines that the best interests of the child require family court or criminal court action, the agency will initiate the appropriate court proceeding or make a referral to the appropriate district attorney, or both.[85]

VII. CAUSATION FACTORS

Psychoanalysts have been unable to reach total agreement as to what the general characteristics of the incest barrier entail and, similarly, they have been unable to pinpoint the factors which ultimately lead to the destruction of the barrier. However, many factors contributing to the incidence of incestuous activity can be cited: (i) dysfunctional marriage, deceased or absent wife;[86] (ii) overcrowding — studies indicate that incestuous families were more overcrowded than those of non-incestuous families;[87] (iii) joblessness — creating a greater likelihood that the father will be alone in the home with the child and also potentially greater marital and personal stress which may reduce the father's perception of his ability to perform his appropriate role as father;[88] (iv) social isolation;[89] (v) onset of puberty — where the daughter's more womanly appearance may precipitate the father's viewing her as a new sexual object;[90] (vi) deviant socialization — a potent disinhibiting factor which may operate to minimize or prevent the internalization of the incest taboo;[91] (vii) alcohol — acts as a disinhibiting factor and also has a tendency to produce marital stress;[92] (ix) mental illness and retardation — serve as powerful disinhibitors which do not need to interact with other predisposing factors.[93]

85. Interview with John Fergeson, *supra* note 74.
86. With marital discord often comes reduced or interrupted marital sex relations. Studies have indicated that this factor sometimes causes incestuous desires.
87. Henderson, *Incest, A Synthesis of Data*, 17 CAN. PSYCH. A.J. 299, 300 (1972); *see* Berry, *supra* note 7.
88. *See* Bagley, *supra* note 2; Daveron, *The Role of the Social Worker*, in THE BATTERED CHILD 140 (2d ed. R. Helfer & C. Kempe 1974); Molner & Cameron, *supra* note 22; Virkkunen, *supra* note 79.
89. H. MAISCH, *supra* note 9, at 106; Sarles, *Incest*, 22 PEDIATRIC CLINICS N. AM. 633, 637 (1975).
90. Raphling, Carpenter & Davis, *Incest: A Genealogical Study*, 16 ARCHIVES GEN. PSYCH. 505-11 (1967).
91. H. MAISCH, *supra* note 9, at 130; S. K. WEINBERG, *supra* note 14, at 111-14; Cavallin, *supra* note 14, at 1135; Virkkunen, *supra* note 73.
92. H. MAISCH, *supra* note 9, at 132; Williams, *The Neglect of Incest: A Criminologist's View*, 14 MED. SCI. & L. 64, 65 (1974).
93. Hughes, *supra* note 4, at 327.

Regardless of what factors are ultimately the cause of the incestuous act, one thing is certain and all seem to agree that incestuous relationships have a very disruptive effect upon the familial structure and its members. Incest produces a confusion of roles within the family: the father becomes the lover as well as the father; the daughter becomes the wife or mistress as well as the daughter.[94] Confusion and tension are produced which lead to the destruction of the familial structure. The actual incidence of incest is generally described as evidencing profound disorganization of the intra-family relationship, coupled with a psycho-pathological condition in the incest initiator.[95]

The Cincinnati Enquirer quoted the director of the Cincinnati Mental Health Services, Pat Hewitt, as stating that the daughter is the most abused child in families where the father has abusive tendencies, and the daughter most abused as a child was often the one with which the father later had incestuous intercourse.[96] Hewitt described the classic example of incestuous activity as a situation where:

> [S]exual activity began when the daughters were 10 or 11. The girls would attempt to tell their mothers, who would then deny it happened and say, 'you had a bad dream.' When the girls were about 14, actual intercourse first took place. Four or five years later, they started taking overdoses or cutting their wrists. Without fail, they were admitted to mental hospitals with suicidal tendencies. When the incest broke out in the open, the marriages ended in divorce. At 20-21, the daughters couldn't have meaningful relationships with either sex. Even at 26 or 27, they have no major goal in life. Usually, they're very active sexually, say they feel sorry for men and feel men want them only for sex. All these girls are messed up and have to be on medication.[97]

Hewitt pointed out that the Mental Health Services hears most of the desperate cases where, as she puts it, "the mothers are usually the only ones who could stop the incestuous activity, but they tend to be women of 'weak egos,' fearful of being left alone with large families to support. . . . The mothers don't want anyone to know. And they don't know where to get help before it gets to the point of no return."[98] The victimized child ultimately bears the brunt of the

94. *Id.*
95. *Id.*
96. Lang, *supra* note 77.
97. *Id.*
98. *Id.*

crime by being unable to establish a healthy and purposeful life. The problem is more acute than that, however, as "[t]he problem of incest, specifically of father-daughter incest has one other intrinsic importance. It is the central relationship of a syndrome developed within the family which profoundly affects the relatedness of each family member and the family as a unit to society in general."[99]

VIII. Conclusion

Incest represents a great threat to the familial structure and inevitably to society itself, and this alone sufficiently accounts for the constancy of the incest taboo throughout the world without posing built-in biological explanations. Nevertheless, it should be noted that the most recognized consequence of incestuous intercourse is the dysgenic effect on the offspring.[100] This factor has had some effect upon the promulgation of statutory laws in the United States. In fact, it explains the peculiarity of the New York statute which does not recognize the stepfather/stepdaughter relationship as being within the proscribed degree of kinship. Most modern statutes, however, are directed toward protecting the victim of incest and the family from the harmful psychological and sociological effects of the crime.

> Laws dealing with the violation of the incest taboo reflect a prevailing confusion regarding the exact source of the pernicious effects of incest. Some, like those of New York State, which recognize only sexual intercourse among consanguineal relations, are based unequivocally on the hypothesis of harmful biological effects and a consequent concern for the production of defective progeny. Other states, however, recognize as incestuous behavior sexual relations between various "legal" in addition to blood relatives. The most commonly forbidden non-consanguineous sexual relationships are between adoptive or stepparents and their children. These latter laws recognize current sociological and psychological thinking that sexual relations between parents and children (whether by blood or by law) interfere with family functioning by promoting sex rivalries and jealousies within it, and produce an atmosphere which is deleterious to the healthy personality development of the child.[101]

The Kentucky and Ohio laws prohibiting incestuous relationships reflect their legislatures' general recognition of the current sociological and psychological thinking. By extending the prohibited degree

99. Tormes, *supra* note 4, at 6.
100. Hughes, *supra* note 4, at 328.
101. Tormes, *supra* note 4, at 5.

of relationship to stepparents and adopted children, and even further to that of legal guardian and ward, the Kentucky and Ohio statutes provide maximum protection against the crime of incest.[102]

In light of the alarming estimates as to the incidence of incestuous activity and the insidious miseries produced as a result, "the law must add what weight it can to the general social condemnation."[103] Aside from the legislative and judicial prohibitions, other governmental agencies have taken on part of the responsibility of dealing with incest offenders and victims. Human resources, child protective services, and mental health clinics are a few of the agencies now available to families who are victimized by the crime of incest.

The real problem involved with helping the victims of the crime of incest is getting someone to bring the offense to the attention of those who can provide help and guidance. "[T]he act of incest, unlike other serious sex crimes, takes place within the privacy of the home. . . . The sanctity of the home and the right to family privacy are cornerstones of American social and political thought. In the absence of overt symptoms family problems remain secret."[104]

102. KY. REV. STAT. § 530.020 (1975); OHIO REV. CODE ANN. § 2907.03 (Page 1975). Note that a legal guardian, who has sexual relations with his ward, can be convicted of incest in Kentucky, even though the statute does not specifically proscribe sexual relations between guardians and wards. *See* McCreary v. Commonwealth, 163 Ky. 206, 173 S.W. 351 (1915) (defendant, in loco parentis, convicted of incest).

103. Hughes, *supra* note 4, at 330.

104. Tormes, *supra* note 4, at 32.

COMMENTS

BREATH ALCOHOL ANALYSIS: CAN IT WITHSTAND MODERN SCIENTIFIC SCRUTINY?

I. INTRODUCTION

In response to increasing personal injuries and property damage attributable to drinking drivers, the federal government has prodded the states into unanimously adopting "implied consent" statutes.[1] These statutes provide for the revocation of the driver's license of anyone who refuses the reasonable request of a police officer to submit to a chemical analysis of his blood, urine, saliva, or breath in order to determine whether he (the accused) was driving while intoxicated. These laws have consistently been found to be constitutional in the face of unlawful search and seizure and self-incrimination arguments.[2]

The proposition that a correlation exists between a normal individual's blood alcohol concentration (BAC) and his degree of neurological impairment is generally accepted in both the scientific and legal communities.[3] Most states have adopted the statutory presumptions that a driver with a BAC of less than 0.05% W/V (weight to volume) is not intoxicated, and that a driver with a BAC greater than or equal to 0.10% W/V is intoxicated. The introduction of a BAC of .10% or greater is prima facie evidence of intoxication. BAC's falling into the area between the presumptive thresholds do not create a presumption but may be considered as evidence of intoxication by the trier of fact.[4]

Since the only way to *directly* measure anything is to obtain the actual substance to be measured, the only way to directly determine

1. Section 402(a) of the Highway Safety Act of 1966, 23 U.S.C. § 402(a) (1976), provides that each state shall have a highway safety program. The Secretary of Transportation is empowered to promulgate standards for the programs. *Id.* The standards include requirements for legislative actions, such as implied-consent laws. 38 Fed. Reg. 30459 (1973). Other standards are aimed at controlling the property damage, injuries, and deaths attributable to drunken drivers. Failure of a state to meet the federal standards can result in a cutoff of federal highway funds. 23 U.S.C. § 402(c) (1976).

2. *E.g.*, Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961).

3. A reasonably thorough discussion of the absorption, distribution, excretion, and pharmacology of ethanol in man can be found in W. RODINI, DEFENDING THE DRINKING DRIVER, chs. 1, 2 (1973).

4. *E.g.*, KY. REV. STAT. § 189.520 (1970).