The Criminal Law and the Incest Offender: A Case for Decriminalization? *

RONALD B. SKLAR**

The criminal law's attitude toward incest has been documented in two very recent papers.[1] The purpose of the present paper is not to go over this old ground. It is rather to inquire into society's rationale for criminalizing incest and then to examine the growing movement for decriminalization.

For present purposes, therefore, it is sufficient to summarize briefly the existing attitude of the criminal law:

1. Incest has been called "the universal crime."[2] But as a "crime" rather than a "taboo" or ecclesiastical offence, it is of relatively recent origin. It was not punishable in England until 1908[3] and hence was not an offence under the common law.[4] At present, however, jurisdictions which do not include it in their list of crimes represent the exception. Some do not punish incest at all (Luxembourg, Portugal and Turkey) and some punish it only in the context of broader provisions concerning sexual intercourse with children.[5] Canada[6] and the American states[7] stand with the majority in punishing incest separately. Some countries may introduce limiting factors, such as, for example, Italy, where the incest, to be criminal, must result in "public scandal,"[8] "what the offended modesty of the majority of average citizens cannot tolerate."[9]

2. For the crime of incest ("legal" incest) to occur, heterosexual sexual intercourse must take place between the parties.[10] Other forms of sexual behavior – which the clinician would consider "incestuous" – may be criminal, as well, but would have to be reached under "indecent assault," "gross indecency" or related offences. Consent of the "assaulted" party will usually be a defence in these cases, unless the party is deemed too young – in Canada, below the age of 14[11] – to give his or her consent. Such behavior may also be reached under "neglect," "corrupting children," "contributing to delinquency," "child abuse" or similar provisions (which, for that matter, can encompass "legal" incest as well). If the delinquency or child abuse route is chosen, prosecution may be diverted to other courts – in Canada, the Social Welfare or Juvenile Court, with less formal procedures and atmosphere and lower sanctions. As is evident, police and prosecutorial discretion abounds under this scheme.

3. There is redundancy between the incest provision and the general

*Delivered at the annual meeting of the AAPL, in Montreal, October, 1978.

**Mr. Sklar is on the Faculty of Law, McGill University, Montreal, Canada, H2W 1S4.

provisions prohibiting sexual intercourse with females under prescribed ages – in Canada, under 16 and, the more seriously punished situation (maximum of imprisonment for life), under 14 years of age.[12] Though one would expect the incest provision to be invoked in the blood-relationship situation (where the maximum penalty is 14 years of imprisonment),[13] the prosecutor, until some high court says otherwise, seems to have discretion to invoke the more general provisions.

4. Incest generally requires a blood relationship between the parties,[14] which is known at the time the act takes place. The range of blood relationships, as might be expected, varies from jurisdiction to jurisdiction. The ban generally extends as far as uncles-nieces and aunts-nephews, with penalties sometimes, though not generally, made dependent on the degree of the relationship.[15] In Canada, the relationships prohibited are parent-child, siblings full and half, and grandparent-grandchild.[16] There is no age limitation, *i.e.*, the code covers adult relationships. However, and this is not surprising, studies have indicated that prosecutions for incest between adult relatives very seldom occur.[17] Furthermore, and perhaps no more surprising, recidivism among incest offenders, both as to other sexual offences and repetitions of incest, reportedly is highest for the incest offender vs. children, less so for the incest offender vs. minors, and lowest – in fact, the lowest recidivism rate for any sexual offender – for the incest offender vs. adults.[18] In general, however, recidivism of incest after initial discovery is rare.[19]

5. Except where the younger person is below the age criminal liability can attach (in Canada, that age is still set at seven),[20] both parties to the act of incest may be criminally liable. Such is the case in Canada. The duress implicit in the situation involving a young daughter is recognized in the Canadian provision (Section 150), but only to the extent of stating that the court who is "satisfied" such duress existed "is not required to impose any punishment upon her." Even then, delinquency proceedings will remain a possibility. The trial testimony of the other party to the act, whether adult or child, may have to be "corroborated" either because of general statutory provisions requiring corroborative evidence in sexual offences (as is the case in Canada[21]) or because the other party to the act may be deemed an "accomplice" of the offender.[22]

6. In its 1978 Working Paper on Sexual Offences, the Law Reform Commission of Canada has recommended the repeal of Section 150 of the Criminal Code, the incest provision. It would be replaced by one that would retain the prohibition of sexual relations between parents and children under the age of 18 within the context of a general provision relating to sexual relations with "a young person within [the offender's] authority."[23] This, in effect, would decriminalize incest between siblings and between adults, the approach that has been proposed in Sweden.[24] Due to what it calls "the strong social and religious views held by many about incest even between adults," the Commission has solicited opinions on the wisdom of its proposal.[25]

II

It is becoming generally accepted, albeit begrudgingly, that conduct

should be labeled "criminal," and the actor thus subjected to the rigors of the criminal process and to criminal sanctions, *only* where such conduct meets two criteria:

1. That it be widely viewed by society as morally blameworthy; and
2. That it be harmful (there be a "victim").

This reality, it must be admitted, has not yet totally permeated our criminal codes, but conduct that lacks one or the other prerequisite has been or is presently on the carpet before most law reform commissions and, to a lesser extent (because they react more slowly), before legislative bodies. Abortion, euthanasia and the possession and/or sale of marijuana are forms of conduct which, one would have to say, now lack the first prerequisite in the eyes of a great many people, while homosexuality between consenting adults and prostitution lack the second. For this reason, they pose serious problems, even crises, for law enforcement officials, juries and sentencing judges and, when prosecuted, probably diminish the public's already fragile respect for the criminal law.

The "moral blameworthiness" requirement stems from the essential nature of the criminal law – what distinguishes it, say, from civil wrongs or "tort" law – namely, that it calls forth a "judgment of community condemnation."[26] Its "central distinguishing aspect," as one writer has put it, is its "stigmatization of the morally culpable."[27]

This notion of the offender's moral blame or "responsibility" for his conduct has, of course, been eroded by other disciplines, most notably psychology, psychiatry and philosophy. It is hard nowadays to maintain one's faith in the notion of human autonomy, the freedom to choose to do right or wrong – the essence of moral responsibility for one's actions. But the criminal law hangs tough. Except for a strictly construed defence of insanity and, in some jurisdictions (not yet Canada), a partial defence of "diminished responsibility," the criminal law persists in imputing responsibility, blame, to the offender, relegating the offender's claim of "no real choice" to the time of sentencing and, *sub rosa,* to the stage of police and prosecutorial discretion. It has to, to survive in its present form.

The second requirement, "harm," does not stem from any essential nature of the criminal law. One can, quite consistently with criminal law theory and policy, argue for the punishment of the morally wicked without regard to whether the offender has harmed anyone, including himself. The Devlin-Hart debate[28] over the criminal punishment of prostitution and homosexuality between consenting adults has confirmed this. Though he undoubtedly is fighting a losing battle, Lord Devlin's argument that society may quite properly utilize the criminal law to coerce adherence to its moral principles is hardly unrespectable.

"Harm" is an essential ingredient of criminal conduct for other reasons: expediency (not used pejoratively) and fairness. The criminal law is too expensive and cumbersome a process, its police resources and court time are in too high demand and too short supply, its effect on people's lives (not only the offender's) is too drastic, the methods its enforcement officers must use to uncover the so-called "victimless crime"[29] (entrapment, informers) are too degrading to allow its use against conduct that produces no provable harm, creates no "victim." The criminal law has justifiably been termed "a

last-resort process."[30]

Does incest meet these two criteria? If "yes," then, presumptively, it is a worthy subject for the criminal sanction. It meets the first; for incest, it seems safe to say, is an abhorred crime, and the offender stands morally condemned in the eyes of the general public. The general public's view, of course, may be based on mis- or non-information about the reality and dynamics of the incest situation, and it is possible to re-educate them on the subject. Decriminalizing incest would certainly be a step, probably a substantial one, in that direction. But the question must be asked whether it should be the first.

Is incest "harmful"? Where incest between adults or between siblings is concerned, the response to this question must be "unproved." Medical evidence on alleged genetic risks for the child of an incestuous union is scanty and inconclusive.[31] Other claimed harms boil down to religious or moral arguments.[32] These, as maintained above, do not by themselves justify imposition of the criminal law, a conclusion also reached by the Law Reform Commission of Canada.

However, where the incest involves an adult, especially a parent, and a child or minor, the evidence is otherwise. Studies, mostly of father-daughter incest, have revealed, in the words of one, "depression, symptom formation, or acting-out behavior" in the children and minors seen. "[A]ll were judged to be experiencing some degree of distress, . . ."[33] The few follow-up studies that have been made generally agree that the incest "has a negative effect on the girl's development, [although] the degree and nature of the after-effects of the trauma have yet to be confirmed."[34] There is some evidence that daughters sexually abused by their fathers tend to marry physically and sexually abusive men, perhaps even repeating the incest syndrome.[35] It must be noted at this point that the criminal law's actual or threatened intervention plays no small part in the child's distress: "[M]others who were pressured by their families not to file charges experienced loss of family support and often had to sever important family ties and move in order to protect their children. For the child the series of events were bewildering, and the mother's anxiety rendered her less available to the child."[36] The daughter will suffer a more direct anxiety and guilt over her own role in initiating the criminal process, especially if she feels partly responsible for the onset of the incestuous behavior. She has "gained her liberation" through her disclosure, but it is not achieved "without emotional storm."[37] Finally, the child's "later pathology [may be] due more to the family's disorganization [an undoubted effect of the institution of criminal charges] than to the incest itself."[38] We will return to this point very shortly.

III

We have arrived at the concluding section of the paper. As noted above, incest with children or minors presumptively merits the attention of the criminal law. Are there, however, countervailing factors, forces that nonetheless militate against criminalizing this form of incest? Quite a few exist.

1. The possibility that criminal charges will be initiated will discourage (not always; for some, it might encourage) family members from seeking

help from one or more of the social agencies equipped to offer help. Likewise, a social worker made aware of the situation may, for the same reason, be reluctant to seek therapeutic help for the family – especially as the social worker knows that he or she may have to testify in court and that, as the Quebec Court of Appeal reiterated recently in a case involving incest,[39] the law still does not recognize any privilege against disclosure of communications made to the social worker by members of the family.[40] The threat of the criminal sanction thus hangs heavily over the family. A family already in crisis has to cope additionally with the decision of "what to do about it" and with the knowledge that, if outside help is sought, "daddy" or husband may have to go to jail. Whether or not the family decides to reveal the problem to outsiders, the ordeal of making that decision can only further tear the family apart.

2. If the manner has been reported out of the family and criminal proceedings have been in fact instituted, further family trauma will occur. Some of the effects of incarceration, should that be ordered, no doubt are no different for the family of the incest offender than for the family of the bank robber: separation of family members, economic hardship during and after incarceration, emotional hardship, and the like. However, the anxiety and guilt the child feels over the consequences of her accusation, greatly exacerbated by the ordeal of appearing in court against her father should the matter go to trial and, in any event, by her contact with the law enforcement machinery,[41] seems unique to the incest case. The child is victimized by the law both through its individual impact upon her and, as noted above, through its impact on her mother and on the family as a whole. The degree of trauma for the victim and the family caused by incestuous conduct which is not made public is not known.[42]

3. In most incest situations, the criminal law is anti-therapeutic, for the offender and for the family; it is not a treatment or supportive process. It "aggravates rather than aids,"[43] and may well be, for that reason, the least appropriate of societal responses.

4. The legal provisions dealing with incest are a mess. The incest crime itself pertains to a relatively small aspect of incestuous sexual behavior. There are at least a dozen provisions of most criminal codes and youth protection acts that can apply to incestuous conduct and several to "legal" incest as well. This ambiguity allows for enormous police and prosecutorial discretion both as to whether or not to prosecute criminally and as to what provisions to prosecute under (all with widely varying penalties), with inevitable disparities in treatment of like cases. This situation certainly is not unique to the incest offence or to incestuous conduct, but seems particularly acute in these areas. The answer, however, where this countervailing factor is concerned, may lie not in decriminalizing incest, but rather in clarifying the provisions dealing with incest and incestuous behavior and placing controls on the scope of police and prosecutorial discretion in the area.[44]

5. The "responsibility" argument which, as noted above, is a cornerstone for imposition of the criminal process, takes little account of the dynamics of the incest situation. Incest "definitely [is] a familial problem, . . . Legal removal of the father only causes additional stresses without ameliorating the basic family problems."[45] Incest is a symptom of "family

disorganization" as well as individual pathology.[46] It "does not take place in isolation but is carried out within the family dynamics."[47] It seems to occur most frequently in the so-called "mid-life crisis" period of the husband/father, during his late thirties and forties.[48] Overcrowding in the home has been called "a crucial factor."[49] The "mother's passivity" plays a role in contributing to the incest, and "it is generally accepted that mothers are in some degree of collusion with the incest."[50] It has even been suggested that the father's incestuous relationship with the daughter acts as a pressure valve within the marriage and that it may, in a dysfunctional family, serve to preserve the marriage.[51] The girls, according to an earlier study, may be "reacting to their mothers' unconscious desire to put them in the maternal role."[52] It is further said to be natural for the daughter to practice her flirting technique on the father, and the flirtation becomes a problem when both she and her father fail to perceive the limits of this "harmless" activity.[53] Whether it is the daughter's "promiscuity and submissiveness" or the father's "parental possessiveness" and coercion that typify the relationship depends upon which study you read.[54] Probably it is a little of both.[55] Whether or not one accepts all of the preceding, it seems clear that while only the father is declared "guilty," "all members of the family play a role in the incest drama."[56]

I am willing, for the most part, to accept these clinical assessments of the incest situation, but, as a criminal law professor, I am troubled by them – greatly. Assuming we all accept that the prevention of incest is a desired goal, what is the consequence of such assessments? The criminal law, as earlier noted, is posited on the notion of responsibility – that man is responsible, and hence accountable, for his actions. This is the principal *message* the criminal law sends out to society, to the potential offender. To the extent the decriminalization of incest with children or minors would be premised upon the view that incest is a "family problem," a "symptom of family disorganization" in which every member "plays a role," what message would *thereby* be sent out?

My concern is not for the erosion of a theory. My concern is much more pragmatic: by decriminalizing incest, we allow the incest offender to lighten the onus of his actions.[57] We tell him that his thoughts and the early stages of his conduct are symptoms of family breakdown or the result of youthful seduction and the like, and are not necessarily "guilty." We label him, too, as a "victim" and enable him, at least in his own mind, to escape society's moral disapproval.[58] The question must be asked whether this transformation of the problem will undermine the person's already weakening internal controls against such conduct. The labels we give to things count.

I do admit that we are justifiably skeptical of the criminal law's preventive powers, especially with respect to sexual offences,[59] but in making such judgments we tend to think only of prevention through conscious fear of punishment. As the Norwegian criminal law theorist, Johannes Andenaes, has written, the threat of criminal punishment may have "general-preventive effects" through "strengthen[ing] moral inhibitions," both at the conscious and unconscious levels, and through "stimulat[ing] habitual law-abiding conduct." And "even if it can be shown that conscious fear of punishment is

not present in certain cases [and incest probably is such a case], this is by no means the same as showing that the secondary effects of punishment are without importance. To the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence.'[60] Anything that might impair our internal controls against undesirable conduct must be viewed with great caution.

As I see it, it is no answer to these concerns that most decriminalization proposals allow for penal-type sanctions (removal of the father or, as a "last resort,"[61] a sentence of imprisonment) through the Family Court in cases where measures more stringent than therapeutic intervention appear needed.[62] First, the great difficulty of prescribing criteria for such Family Court intervention (one study uses terms like "an extremely rigid father" or one who exhibits "poor impulse control" or is "psychotic"[63]) still further loads the system with discretion and disparities of disposition. However, the more basic objection is that Family Court, to the general public, deals with "family problems," not blameworthy acts. Social disapproval is still absent.

And so, if the arguments and points of this paper be accepted, we are left in a dilemma. The decriminalization of incest committed with children or minors would, I maintain, have a deleterious effect on the prevention of this form of incest, while the actual invocation of the criminal process does more harm than good to the offender, the young victim, and the family. Incest may not be alone in presenting this dilemma. It may be that most criminal offences could be analyzed this way.

References

1. Manchester AH: Incest and the law, in Eekelaar JM & Katz SN, (eds.): Family Violence: An International and Interdisciplinary Study. Toronto, Butterworths, 1978, p. 487; Cooper IK: Decriminalization of incest – New legal-clinical responses, in Family Violence, *op. cit.*, p. 518
2. Weinberg SK: Incest Behavior. New York, Citadel Press, 1955, p. 3
3. Punishment of Incest Act, 1908, 8 Edw. 7, ch. 45
4. Stephen L: A History of the Criminal Law of England (1883), pp. 429-430
5. For example, Belgium, France and the Netherlands. Maisch H: Incest. London, André Deutsch Ltd., 1973, pp. 66-67
6. Criminal Code, R.S.C. 1970, ch. C-34, s.150. This provision appeared in 1892 in Canada's first criminal code.
7. American Jursiprudence 2d, 41:512-513 (1968)
8. Italian Penal Code of 1930, s.564, in The American Series of Foreign Penal Codes, South Hackensack, N.J., Fred B. Rothman, 1978
9. Galeotti EM: Incest under Italian Law (unpublished). Proceedings of the Second International Conference on Family Law – Violence in the Family, 1977, p. 2
10. "Legal" incest does not, therefore, include father-son incest, *i.e.*, "homosexual incest," a form that a very recent study has suggested may be "higher [in the population] than has been assumed." Dixon KN, Arnold LE, Calestro MA: Father-Son Incest: Underreported Psychiatric Problem? Amer J Psychiat 135:835, 838 (1978)
11. Criminal Code, R.S.C. 1970, ch. C-34, s.140
12. *Id.*, s.145
13. *Id.*, s.150(2)
14. Manchester, *op. cit.*, n.1, pp. 495-497
15. Maisch, *op. cit.*, n.5, pp. 68-69
16. Criminal Code, R.S.C. 1970, ch. C-34, s.150(1), (4). As to parent-child, however, see n.10 *supra*, and accompanying text
17. Manchester, *op. cit.*, n.1, pp. 505-506
18. Gebhard PH, Gagnon JH, Pomeroy WB, Christenson CV: Sex Offenders. New York, Harper & Row, 1965, pp. 221-222, 241-242, 264-265
19. Cormier BM, Kennedy M, Sangowicz J: Psychodynamics of father-daughter incest. Can Psychiat Assn J 7:203, 204 (1962)

20. Criminal Code, R.S.C. 1970, ch. C-34, s.12. For the child between seven and fourteen, criminal liability depends on whether "he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong." *Id.*, s.13
21. *Id.*, s.139
22. "In sexual crimes [including incest], the other person – usually the woman – may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it." 7 Wigmore, Evidence s.2060, p. 443 (Chadbourn rev. 1978). A child below the age of consent in the particular jurisdiction generally cannot be an accomplice. *Ibid.* (cases cited at n.7)
23. Law Reform Commission of Canada: Criminal Law Working Paper no. 22 – Sexual Offences, 1978, p. 32
24. Engström LG: New Penal Provisions on Sexual Offences Proposed in Sweden. Current Sweden 118:1, 7 (1976). This recommendation reportedly has not been adopted. Manchester, *op. cit.*, n.1, p. 510, n.101
25. Law Reform Commission of Canada, *op. cit.*, n.23, p. 32. The writer has been advised that to date (October, 1978) the opinions received have been strongly opposed, with favorable responses mainly from psychiatrists and gay groups.
26. Hart HM Jr: The aims of the criminal law. Law & Contemp Probs 23:401, 404 (1958)
27. Kadish SH: Some observations on the use of criminal sanctions in enforcing economic regulations. U Chicago L Rev 30:423, 437 (1963)
28. Devlin P: The Enforcement of Morals. London, Oxford University Press, 1965 (first read in 1959 as the Maccabaean Lecture in Jurisprudence at the British Academy); Hart HLA: Law, Liberty and Morality. New York, Vintage Books, 1963
29. A term if not coined then popularized in Packer HL: The Limits of the Criminal Sanction. Stanford, Stanford University Press, 1968
30. Goldstein AS, Goldstein J: Crime, Law and Society. New York, The Free Press, 1971, p. 1
31. Engström, *op. cit.*, n.24, pp. 5-6; Manchester, *op. cit.*, n.1, pp. 500-501
32. *Id.*, p. 500
33. Browning DH, Boatman B: Incest: Children at risk. Amer J Psychiat 134:69, 72 (1977)
34. Cooper, *op. cit.*, n.1, p. 520
35. Summit R, Kryso J: Sexual abuse of children, a clinical spectrum. Amer J Orthopsychiat 48:237, 248 (1978)
36. Browning and Boatman, *op. cit.*, n.33, p. 72
37. Cormier, *et al.*, *op cit.*, n. 19, p. 214
38. Cooper, *op. cit.*, n.1, p. 520; Maisch, *op. cit.*, n.5, pp. 208-209
39. *R. v. St-Jean*, 34 C.R.N.S. 378, 387 (Que. C.A. 1976)
40. Privileges against disclosing information in court, since they do not advance the search for truth, but rather "shut out the light," are not favored by the common law of evidence. McCormick: Evidence (2nd ed., Cleary ed.), St. Paul, West Publishing Co., 1972, p. 152. In Canada, section 41 of the draft code on Evidence prepared by the Law Reform Commission (see Report, Evidence, 1975) would extend a qualified privileged communication status to the social worker – client relationship:

    A person who has consulted a person exercising a profession for the purpose of obtaining professional services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice.

41. Most reform proposals stress the importance of avoiding the psychological trauma of a courtroom appearance while still protecting the accused's rights (see Law Reform Commission of Canada, *op. cit.*, n.23, p. 33), but fail to observe that the interview with the police and the prosecutor, even if sympathetically and adroitly handled, can be almost as traumatizing for the child.
42. Manchester, *op. cit.*, n.1, p. 500
43. Gigeroff AK, *et al.*: Research Report Incest, Sexual Offences Under the Criminal Code of Canada Research Project. Law Reform Commission of Canada and Clarke Institute of Psychiatry, 1975, p. 13
44. The law in general exercises very little control over police and prosecutorial discretion. See Goldstein J: Police discretion not to invoke the criminal process: Low visibility decisions in the administration of justice. Yale Law J 69:543-594 (1960); Grosman BA: The Prosecutor: An Inquiry into the Exercise of Discretion. Toronto, University of Toronto Press, 1969
45. Gigeroff, *op. cit.*, n.43, p. 13
46. Cooper, *op. cit.*, n.1, pp. 519-520
47. *Id.*, p. 519
48. Cormier, *et al.*, *op. cit.*, n.19, p. 204
49. Weinberg,*op. cit.*, n.2, p. 55; but see Cooper, *op. cit.*, n.1, p. 519 (according to recent studies, the claim that most cases "come from rural areas, are the result of poverty, alcoholism and over-crowding" is a "myth.") As to the role of alcoholism, however, see the recent study by

Browning and Boatman, *op. cit.*, n.33
50. Browning and Boatman, *op. cit.*, n.33, p. 69
51. Lustig N, Dresser JV, Spellman SW, Murray TB: Incest: A family group survival pattern. Arch Gen Psychiat 14:31, 39 (1966)
52. Kaufman I, Peck AL, Taguiri CK: The family constellation and overt incestuous relations between father and daughter. Amer J Orthopsychiat 24:266, 277 (1954)
53. Summit and Kryso, *op. cit.*, n.35, p. 243
54. Compare Weinberg, *op. cit.*, n.2, p. 115, with Summit and Kryso, *op. cit.*, n. 35, pp. 243-244
55. Cormier, *et al.*, *op. cit.*, n.19, p. 206
56. Cooper, *op. cit.*, n.1, p. 519
57. Gusfield JR: Moral passage: The symbolic process in public designations of deviance. Social Probs 15:175-188 (1968), writing about the effect of the movement to redefine the alcoholic as sick.
58. On the criminal law's perhaps key function of expressing the community's disapproval for the actor's conduct, see Hart, *op. cit.*, n.26; Cohen MR: Moral aspects of the criminal law. Yale Law J 49:987, 1017 (1940)
59. Andenaes J: The general preventive effects of punishments. U Pennsylvania Law Rev 114:949, 957-958 (1966)
60. Andenaes J: General prevention – illusion or reality. J Crim Law, Criminol & Pol Sci 43:176, 179-180 (1952)
61. Cooper, *op. cit.*, n.1, p. 525
62. *Id.*, pp. 524-525; Gigeroff, *op. cit.*, n.43, pp. 14-15; *cf.* Law Reform Commission of Canada, *op. cit.*, n.23, pp. 31-32
63. Cooper, *op. cit.*, n.1, pp. 524-525