

# *Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society*

Constance B. BACKHOUSE

*The History of nineteenth-century Canadian Law reveals that legislators and social reformers took three distinct approaches to the problem of prostitution. They attempted to regulate the trade in sexuality through a Canadian Contagious Diseases Act which sought to control venereal disease in prostitutes. They attempted to prohibit the commercial sale of sex through systematic criminal enactments meant to abolish all features of prostitution, from the selling and buying of sexual services to the procuring, pimping and profiteering from the business. They attempted to rehabilitate prostitutes and would-be prostitutes by establishing asylums, women's prisons and juvenile detention institutions. None of these approaches was ultimately successful and each worked substantial injustice upon individual prostitutes. Discrimination on the basis of class, race, ethnic origin and sex featured predominantly in the formulation and application of each approach, and served as a hallmark of the Canadian legal response to prostitution.*

*L'histoire de la législation canadienne au XIX<sup>e</sup> siècle révèle que les législateurs et les réformateurs sociaux adoptèrent trois approches distinctes face au problème de la prostitution. Ils s'efforcèrent de réglementer le commerce de la sexualité au moyen de l'Acte canadien des maladies contagieuses, afin de contrôler les maladies vénériennes des prostituées. Ils tentèrent aussi d'interdire la commercialisation du sexe par des mesures systématiques concernant le crime, en vue d'abolir toutes les manifestations de la prostitution, de la vente et achat de services sexuels, ou proxénétisme et aux profits tirés de ce travail. Et ils tentèrent également de réhabiliter les prostituées et celles qui voulaient se prostituer en créant des asiles, des prisons pour femmes et des institutions de détention juvénile. Aucune de ces approches n'eut, en fin de compte, de succès. Chacune d'elles engendra par contre de réelles injustices envers les prostituées. Les discriminations de classe, de race, d'origine ethnique et de sexe furent évidentes dans la formulation et l'application de chacune des approches, et servirent pour ainsi dire de « marque de fabrique » de la réponse juridique du Canada en matière de prostitution.*

Prostitution is an issue which has always stirred controversy. As Canadian policy analysts and legislators agonize today over the proper legal approach to implement in the latest series of amendments to the Criminal Code, it is important to reflect upon how law-makers treated prostitution in the past. Nineteenth-century Canadians seemed divided over whether to treat prostitution as a "necessary evil" or as the leading example of male sexual coercion. Those who believed prostitution to be necessary were content to live with a double standard of sexuality, which forced "virtuous" middle- and upper class women into a straitjacket of chastity while men were encouraged to expend excess sexual energy upon a class of "fallen" women. Those who focused on the coerciveness of prostitution believed that prostitutes were the most victimized women in a patriarchal society, women who were

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Constance B. Backhouse, B.A., LL.B., LL.M., is an Associate Professor of Law, University of Western Ontario.

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forced to service lustful men in an oppressive form of sexual slavery. They wished to eradicate prostitution entirely.

These divergent views were responsible for the formulation of three distinctive legal approaches to prostitution: regulation, prohibition and rehabilitation.<sup>1</sup> Ironically, despite the differences, all three policies were riddled with discriminatory intent and impact. Discrimination on the basis of class, race and ethnic origin figured prominently in each, as immigrant and minority groups such as the Irish, black and native Indian communities suffered disproportionately. Sex discrimination underscored virtually every aspect of these varied measures. The attempt at regulation under the Contagious Diseases Act was single-mindedly aimed at the compulsory hospitalization of diseased prostitutes; their male customers were notoriously exempt from the legislation. The attempt at prohibition, on its face at least, seemed less discriminatory. Not only the prostitutes, but the procurers who set them up in a life of prostitution, the pimps who lived off their earnings, the owners and keepers of bawdy houses, and the men who frequented their establishments were all theoretically subject to criminal punishment. When it came time for enforcement, however, a completely male police force and judiciary applied the statutes almost exclusively against women. Even the third approach of rehabilitation operated to the detriment of women prisoners, who were given significantly longer gaol terms specifically because of their gender.

It was the discriminatory nature of society, of course, which created the conditions that permitted prostitution to flourish in the first place. It seems unlikely to me that individuals would feel forced to sell sexual services indiscriminately in a society in which all men and women enjoyed equal rights and status, where there was no great disparity in economic wealth between individuals. A society in which sexuality was seen as a means of shared communication and mutual bonding would rarely witness the barter and sale of women's bodies. Discriminatory laws, then, were used to attack a social problem that was itself a reflection of a discriminatory society.

### I. — *Early Legislation*

The keeping of a common bawdy house had always constituted a nuisance under English common law, and this position was transplanted to Canada by criminal law reception statutes.<sup>2</sup> Several provinces actually passed statutes to criminalize the keeping of

1. It would be misleading to suggest that these approaches were clearly defined and entirely distinguishable from each other. There was much overlap both in time and substance, but they did represent separate and functionally distinctive ways of attempting to deal with prostitution.

2. See, for example, *An Act for the further introduction of the criminal law of England into this province*, 40 Geo. III (1800), c. 1 (Upper Canada). The phrase "common bawdy house" was used as the technical legal term for a brothel. The basis for the common law nuisance position was that bawdy houses tended to corrupt public morals and endanger public peace by encouraging dissolute persons to gather there. [See 1 *Russell on Crimes*, 5th ed., 427; *Hawkins Pleas of the Crown*, b. 1, c. 74.] In order to encourage prosecutions against keepers of bawdy houses, the English Parliament had enacted a statute in 1752 to authorize payment to private individuals who would institute proceedings. [*An act for better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses*, 25 Geo. II (1752), c. 36 (England).] The act also stated that "by reason of the many subtle and crafty contrivances of persons keeping bawdy houses ... it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment". It thus provided that any person who should at any time appear, act, or behave as master or mistress of the house, or as the person having the care, government or management of the bawdy house, should be deemed to be the keeper. (s. 8).

brothels, and these were supplemented by legislation ostensibly directed against street-walkers. An outgrowth of general vagrancy statutes, the latter acts were designed to remove indigents, persons of lewd behaviour, and other undesirables from the streets.<sup>3</sup>

The first Canadian statute to mention prostitutes specifically was passed in Lower Canada in 1839.<sup>4</sup> The police were authorized to apprehend "all common prostitutes or night walkers wandering in the fields, public streets or highways, not giving a satisfactory account of themselves". Persons "in the habit of frequenting houses of ill-fame" could also be arrested if they failed to give a "satisfactory account" of themselves. In 1858 much of this legislation was extended to the united Province of Canada. The only change was that the police were also authorized to arrest inmates of bawdy houses.<sup>5</sup>

Although the criminal law in Canada was usually modelled upon English precedents, there were some differences between the two countries at this stage.<sup>6</sup> Canadian law was significantly harsher in its treatment of prostitutes and their customers. In Canada, if a prostitute was found in a public area, she could be punished merely for *being* a prostitute. In large measure, it was the "status" of being a prostitute that was unlawful. In contrast, in England specific and offensive behaviour was a prerequisite for detention.<sup>7</sup> In addition,

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3. New Brunswick and Nova Scotia enacted statutes against the keeping of bawdy houses. The New Brunswick statute was titled *An Act for the more speedy and effectual Punishment of Persons keeping Disorderly Houses*, 9 & 10 Geo. IV (1829), c. 8, as amended by *An Act in addition to the Acts for the amendment of the Criminal Law*, 3 Vict. (1840), c. 44, and *An Act to consolidate and amend the several Acts of Assembly relating to the Criminal Law*, 12 Vict. (1849), c. 29. The Nova Scotia statute was titled *Of Offences against Public Morals*, R.S.N.S. 1851, c. 158. These statutes, although less complex, were similar to the English statute of 1752. The first recorded vagrancy statute in Canada, passed in Nova Scotia in 1759, authorized justices of the peace to commit disorderly persons, vagabonds, and persons of lewd behaviour to a house of correction. [*An Act for regulating and maintaining a House of Correction or Work-House within the Town of Halifax*, 33 Geo. II (1759), c. 1, s. 2 (Nova Scotia).] This statute was likely modelled upon the English statute, *An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction*, 17 Geo. II (1744), c. 5 (England). The English legislation defined rogues and vagabonds as "all persons wandering abroad, and lodging in alehouses, barns, outhouses, or in the open air, not giving a good account of themselves". (s. 2). See also *An Act for punishing Rogues, Vagabonds, and other Idle and Disorderly Persons*, 14 Geo. III (1774), c. 4 (Nova Scotia); and *An Act to authorize the Erection and provide for the Maintenance of Houses of Industry*, 7 Wm. IV (1837), c. 24 (upper Canada).

4. *An Ordinance for establishing a system of Police for the Cities of Quebec and Montreal*, 2 Vict. (1) (1839), c. 2 (lower Canada), reprinted in *Revised Acts and Ordinances of Lower Canada 1845*, class B, p. 163. The maximum penalty was two months at hard labour. (s. 8).

5. *An Act to amend and extend the Act of 1857, for diminishing the expense and delay in the Administration of Criminal Justice*, 22 Vict. (1858), c. 27 (Province of Canada). See also *Consol. Statutes of Canada 1859*, c. 105, s. 1(7). The act provided for the summary trial and conviction of persons found "keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy house". (s. 1(4)). Apart from the provisions concerning inmates of bawdy houses, the specific sections concerning common prostitutes were not included.

6. This study was focused on English parliamentary laws. When one compares Canadian legislation from three levels of government — federal, provincial and municipal — a number of distinctions are obvious, as will be outlined. However, there may have been numerous other sources of English law, such as local government ordinances, which provided additional provisions concerning prostitution. Further research on these levels of the English legal system would be necessary before one could draw any firm comparative conclusions.

7. A statute passed in 1824, entitled *An Act for the Punishment of idle and disorderly Persons and Rogues and Vagabonds*, 5 Geo IV, c. 83 (England), provided that "every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner ... shall be deemed an idle and disorderly persons ... ." (s. 3). This was a modification of an earlier statute passed in 1822, *An Act for consolidating into One Act and amending the Laws relating to idle and disorderly Persons*, 3 Geo. IV, c. 40 (England). The 1822 statute stated: "all common prostitutes or night walkers wandering in the public streets or public highways, not giving a satisfactory account of themselves, shall be deemed idle and di-

although English statutes punished prostitutes and keepers of bawdy houses, in Canada habitual frequenters and inmates of bawdy houses were also subject to penalty. While potentially more even-handed in attacking both the buyer and seller of the service, there is little evidence that the Canadian statutes were utilized to any great extent against the men involved in prostitution. (See below, Section IV.) The absence of any reported decisions on these early statutes makes it difficult to conclude much apart from the basic point that these enactments constituted a preliminary attempt to prohibit some of the features of prostitution.

## II. — *The Contagious Diseases Acts: An Attempt at Regulation*

This initial approach of prohibition was soon superseded by a scheme of regulation buttressed upon a public health platform.<sup>8</sup> In 1865 the united provinces of Upper and Lower Canada passed the Contagious Diseases Act.<sup>9</sup> Designed to protect military men from venereal disease, the statute authorized the detention of diseased prostitutes for up to three months at certified hospitals. Anyone could set the machinery of the act in motion by swearing before a justice of the peace that a prostitute who was suffering from venereal disease was plying her trade in one of the areas covered by the act. A police constable would locate the woman who could then choose to submit voluntarily for a medical examination or be arrested.<sup>10</sup> The statute was virtually an exact duplicate of an English act by the same name passed in 1864.<sup>11</sup> Canadian officials likely decided to follow the English lead as a result of pressure from officers of the Royal Navy who were worried that sailors would contract venereal diseases after visiting colonial ports.<sup>12</sup> While the English statute covered only garrison and dock towns in the south, the Canadian act included all of the major urban centres in Upper and Lower Canada.

Implicit in the statutory scheme to enforce treatment of medically diseased prostitutes was a recognition, even an acceptance, that prostitution was a necessary social evil which

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sorderly persons". (s. 2). The Canadian legislature adopted the 1822 act, but apparently failed to amend it in accordance with the English example. See also *Metropolitan Police Act, 2 & 3 Vict. (1839), c. 47 (England); and An Act to protect Women from fraudulent Practices for Procuring their Defilement, 12 & 13 Vict. (1849), c. 76 (England)*.

8. Surprisingly, the new regulatory legislation made no mention of the previous prohibitory enactments; they were neither repealed nor rendered inapplicable by implication.

9. 29 Vict (1865), c. 8 (Province of Canada).

10. See the Second Schedule under the Act and s. 11-16. Once at the hospital, the doctors could detain a woman for up to 24 hours for examination. If she was found to be diseased she could be detained for up to three months for "treatment". (s. 16). Any woman refusing to submit to the examination or to the detention could be imprisoned for one month for the first offence and two months for any additional offences. Keepers of bawdy houses who permitted a diseased prostitute to work there, knowing or having reasonable cause to believe she was diseased, were to be imprisoned for up to three months or ordered to pay a fine of ten pounds. Convictions for bawdy house keepers under this act did not exempt them from other penal sanctions for keeping a bawdy house. (s. 18). "Contagious diseases" was defined in the act to mean venereal disease, including gonorrhoea. (s. 2).

11. *An Act for the Prevention of Contagious Diseases at certain Naval and Military Stations, 27 & 28 Vict. (1864), c. 85 (England)*.

12. The Contagious Diseases Acts, passed in many colonial jurisdictions, were primarily imperial legislation, designed to preserve the security of the British Empire. See Mary MURNANE and Kay DANIELS, "Prostitutes as Purveyors of Disease: Venereal Disease Legislation in Tasmania 1868-1945", *Hecate* v. 5, 1979, 5-21 at 6; Elizabeth VAN HEYNINGEN, "The Social Evil in the Cape Colony 1868-1902", *Journal of South African Studies*, 10:2, April 1984, 170-197 at 173.

could never be eliminated and must therefore be controlled. Victorian attitudes which viewed males as having strong sexual desires and females as being essentially passionless created a sexually-divisive culture which required a whole class of morally unconventional women to satisfy male needs. The nineteenth-century journals occasionally noted that prostitution kept unmarried men from the more dangerous vice of masturbation and seduction, and provided husbands with sexual outlets when their wives were unwilling. They were "distracted" from attacking pure women and their wives were protected from repeated pregnancies.<sup>13</sup>

According to Judith Walkowitz, the Contagious Diseases Act represented "the high water mark of an officially sanctioned double standard of sexual morality, one that upheld different standards of chastity for men and women and carefully tried to demarcate pure women from the impure".<sup>14</sup> The legislation itself was a blatant form of sex discrimination. Only women were to be subjected to medical inspection and forced treatment; in contrast, by 1859 most regiments of the army had abandoned compulsory examination of soldiers for venereal disease, because it had been found to be "extremely inefficient" in reducing disease, "unpopular" with the soldiers, and distasteful for the medical officers who had to perform the inspections.<sup>15</sup> Furthermore, medical ability to diagnose and cure venereal disease was woefully inadequate. Until blood tests for syphilis were invented in 1906 and the discovery of Salvarsan brought to light an effective treatment in 1909, all medical remedies were generally ineffective and could lead to effects comparable to the horror of venereal disease itself.<sup>16</sup>

Despite the fact that the Contagious Diseases Act inaugurated a radically new approach to prostitution, there was little controversy over the initial passage of the statute. There was no record of any Canadian legislative debate, and it took only 11 days for the bill to pass through first reading to third reading.<sup>17</sup> There was no discussion in the newspapers; without comment the *Toronto Globe* routinely listed the act along with all the statutes that had received royal assent that session.<sup>18</sup> Furthermore, knowledge of the act was not widespread. An Ontario Grand Jury seemed unaware of its existence when it recommended

13. E.M. PALMEGIANO, *Women and British Periodicals 1832-1867: A Bibliography* (New York: Garland, 1976) at xxxviii-xxxix. Marion Goldman has pointed out another very important *raison d'être* for prostitution: "The physical hazards and psychic consequences of sexual commerce were so great that the possibility of becoming a prostitute probably served as a powerful deterrent to wives' sexual or social nonconformity". Thus prostitution functioned as a means of social control to keep women married. [Marion GOLDMAN, *Gold Diggers and Silver Miners: Prostitution and Social Life on the Comstock Lode* (Ann Arbor: Univ. of Michigan Press, 1981), at 56.]

14. Judith WALKOWITZ, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge Univ. Press, 1980) at 70.

15. Myna TRUSTRAM, "Distasteful and derogatory? Examining Victorian soldiers for venereal disease", in London Feminist History Group, *The Sexual Dynamics of History* (London: Pluto Press, 1983), 154 at 158.

16. WALKOWITZ, *Prostitution* at 48-54; E.M. SIGSWORTH and T.J. WYKE, "A Study of Victorian Prostitution and Venereal Disease", in Martha VINCUS, ed., *Suffer and Be Still: Women in the Victorian Age* (Bloomington: Indiana Univ. Press, 1972) at 98-9.

17. In the *Journals of the Legislative Assembly* (1865, vol. 25), the timetable was set out: first reading, 4 Sept. 1865; second reading and committed to a Committee of the Whole House, 13 Sept. 1865; third reading, 15 Sept. 1865; royally assented, 18 Sept. 1865. No debates or other evidence are found in the *Journals* because the bill was referred to a Committee of the Whole House where debates were not recorded. The speed of passage may relate to the fact that 18 Sept. was the last day before the autumn prorogue of the Legislature.

18. *Toronto Globe*, 19 Sept. 1865. The lack of public attention may have been related to the fact that the expenses incurred under the act were to be paid by the British government, under the direction of the Lord High Admiral. (s. 4).

in 1866 that brothels be placed under police regulation and medical inspection, and that a special tax be levied upon them to pay for this.<sup>19</sup> It was the Grand Jury recommendation that generated the first philosophical debate over the new scheme of regulation.

The Toronto *Daily Telegraph* was moved to examine the situation and soon discovered the existence of the Contagious Diseases Act. The editor noted that the statute was not being enforced, and blamed this on the fact that "the existence of this Act [was] not well known". Taking a strong stand in favour of the regulatory approach, the *Daily Telegraph* advocated the enforcement of the new law, arguing that prostitution could never be totally repressed and that the best situation was to control its ill-effects.<sup>20</sup> This touched off a heated dispute between the *Daily Telegraph* and the *Globe*. Appalled by the *Telegraph's* endorsement of regulation, the *Globe* editor, George Brown, equated the scheme with the regulation of burglary because it could not be prevented. The government should not "nurture" prostitution, claimed the *Globe*, concluding: "Take away the fear that now deters from such vile dens, remove the disgust and shame that now repel the unhardened offender, make sin outwardly decent — will not the consequence surely be the extension of the sin and all its attendant evils a thousand fold?"<sup>21</sup>

It was the *Globe* whose views took precedence, and the legislation remained virtually a dead letter. Governmental authorities failed to certify any hospitals as lock-up and treatment facilities, and without certified hospitals, the act was unenforceable.<sup>22</sup> When first enacted, the statute provided that it would only continue in effect for five years. Without much discussion or debate, the statute expired in September 1870 and was never reenacted. That Canadian legislators chose not to reenact the law or enforce it probably reflected their ambivalence over its efficacy. They may also have been affected by the bitter controversy that raged in England over the parent country's counterpart legislation, in which middle- and upper-class women attacked the acts as state recognition of vice and profoundly discriminatory against women and the lower classes.<sup>23</sup> Despite the victory of the campaign against the Contagious Diseases Acts in England in 1886, some individuals in Canada still professed to support the regulatory approach to prostitution. Individuals as diverse as a medical doctor writing in the *Canada Lancet*, the eccentric author C.S. Clark, religious figures such as Archbishop Bruchesi and Bishop Bond of Montreal, legal authorities such as Judge Desnoyers and Recorder De Montigny from the province of Quebec, E.L. Bond, President of the Citizens' League, and the Ontario Provincial Board of Health all called for some form of regulation.<sup>24</sup> Canadian politicians, however, refused to be swayed by

19. Toronto *Globe*, 29 Dec. 1866, p. 2.

20. Toronto *Daily Telegraph*, 28 Dec. 1866, p. 3. Despite receiving a number of letters critical of this stance from Toronto citizens, the *Telegraph* remained undeterred and reiterated its views in an article on 9 Jan. 1867, p. 4.

21. Toronto *Globe*, 29 Dec. 1866, p. 2. See also 9 May 1867.

22. The *Canadian Gazette* contained no reports of any hospitals certified under the Act. [*Canada Gazette*, 1865-1871.]

23. For accounts of the English situation, see SIGSWORTH and WYKE, "A Study"; WALKOWITZ, *Prostitution*; W.R. GREG "Prostitution", *Westminster Review* 53 (1850), at 481; William ACTON, *Prostitution* (N.Y.: Frederick A. Praeger, 1968, orig. pub. 1857); Martha VINCUS, "Sexuality and Power: A Review of Current Work in the History of Sexuality", *Feminist Studies* 8:1, Spring 1982, 133 at 142.

24. In 1883 the *Canada Lancet* described syphilis as "one of the most, if not verily the most destructive maladies that has ever fallen on the human race". The author called upon doctors to "exhibit the courage of their opinions" and demand compulsory medical inspection of prostitutes. [J. SORMANI, Professor of Hygiene in the University of Pavia, translated by J. WORKMAN, M.D., Toronto, "Prophylaxis of Venereal Diseases and Especially Syphilis", *The Canada Lancet* (December 1883), vol. XVI, No. 4, at 96-98.] C.S. Clark made regulation one of his primary themes. Stating that houses of prostitution were "absolutely necessary", he continued:

their arguments. The regulatory approach thus had a brief and rather unsatisfactory history in Canada.

### III. — *The "Social Purity" Campaign: An Attempt at Prohibition*

With the demise of the regulatory approach, reformers who wished to eradicate prostitution captured the attention of Canadian law-makers. From the outrage expressed in the *Globe* in the 1860s through to the end of the century, there was a growing outcry against the sexual exploitation of women. Demanding a pledge of "social purity", the reformers advocated a single standard of sexual morality, and urged "the maintenance of the law of purity as equally binding on men and women".<sup>25</sup> Prostitution, a glaring illustration of promiscuity and the commercialization of sexuality, was challenged as antithetical to the goal of harmony between the sexes. Attention was focused upon the exploitation of innocent young women who were widely believed to have been manipulated or forced into a life of prostitution.<sup>26</sup>

Coining the term "white slavery", reformers on both sides of the Atlantic began to document an international conspiracy to trap women into serving in brothels in North America, England and Europe.<sup>27</sup> There has been much debate over the actual extent of white slavery, but a number of contemporary scholars have concluded that it accounted for a significant proportion of the women engaged in prostitution.<sup>28</sup> The actual methods by which some of these women were initiated into prostitution varied; according to Ruth

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"I contend that some system of licensing or inspecting should prevail in every city in America". [C.- S. CLARK, *Of Toronto the Good* (Montreal: The Toronto Publishing Co., 1898) at 86-7.] Clark recounted that in February 1898, at a conference in Montreal between Archbishop Bruchesi, Bishop Bond, Judge Desnoyers, Recorder De Montigny and E.L. Bond, President of the Citizens' League, it was decided to go before the City Council and ask that houses of ill-fame and inmates be examined every week; any found not following certain regulations [should] be promptly suppressed. [CLARK, *Of Toronto* at 88.] In 1882, Ontario's Provincial Board of Health recommended that female lock-hospitals (prisons with hospital facilities) be established to check prostitution, a suggestion which was never implemented. [Jo OPPENHEIMER, "Childbirth in Ontario", *Ontario History* LXXV, no. 1 (March 1983) 36 at 42.]

25. Jessie C. SMITH, "Social Purity", Women's Christian Temperance Union (Nova Scotia, 1898) in Ramsey COOK and Wendy MITCHINSON, *The Proper Sphere: Woman's Place in Canadian Society* (Toronto: Oxford University Press, 1976) at 234.

26. See, for example, Lucy W. BROOKING, "Conditions in Toronto", in *Canada's War on the White Slave Trade* (London 1911), in COOK and MITCHINSON, *The Proper Sphere* at 241. Brooking, the Superintendent of the Toronto Haven, argued that it was often the unsuspecting, impoverished and slow-witted women who were debauched and led into a life of prostitution.

27. According to Florence Rush, the term "white slavery", unrelated to skin colour, merely distinguished the traffic in women and children from the black slave trade. [Florence RUSH, *The Best Kept Secret: Sexual Abuse of Children* (Englewood Cliffs, N.J.: Prentice-Hall, 1980) at 62-64.] For accounts of the English and American "social purity" campaigns, see W.T. STEAD, "The Maiden Tribute to Modern Babylon", *Pall Mall Gazette*, Summer 1885; WALKOWITZ, *Prostitution*; David Jay PVAR, *Purity Crusade: Sexual Morality and Social Control 1868-1900* (Westport, Conn.: Greenwood, 1973).

28. See, for example, Roy Lubove, who has concluded that "even a superficial sampling of contemporary evidence leaves no doubt that a white-slave traffic existed in the United States". [Roy LUBOVE, "The Progressives and the Prostitute", *The Historian*, 24:3 (1962), 308 at 314.] Ruth Rosen has stated that between June 1910 and January 1915, 1057 persons were convicted under the *White-slave Traffic (Mann) Act*, ch. 395, 36 Stat. 825 (1910), and estimated that white slavery accounted for approximately ten percent of the population of American prostitutes. [Ruth ROSEN, *The Lost Sisterhood: Prostitution in America 1900-1918* (Baltimore: Johns Hopkins Univ. Press, 1982) at 116-33.] See also WALKOWITZ, *Prostitution*, at 247, where she argues that the white slave scandals arose out of cultural paranoia.

Rosen, "false promises of marriage, mock marriages that had no legal status, and deliberate attempts to entangle a woman in foreign debt or emotional dependency were some of the most commonly known methods of procurement".<sup>29</sup> Responding to the revelation that Canadian women were being coerced into prostitution, demand for reform reached a peak in the 1880s. Sources as varied as an Ontario Grand Jury, the *Legal News* (a Canadian legal periodical), D.A. Watt (a Montrealer who headed the Society for the Protection of Women and Children), and the Presbyterian Church of Canada began to express their concern about the need for more legislation to attack the problem.<sup>30</sup>

The legislators were surprisingly sensitive to this situation. Beginning in 1869 and culminating in the enactment of the Criminal Code in 1892, they passed a great deal of relevant legislation. The profession that required women to sell access to their bodies was to be attacked by law as repugnant to society. Many municipalities began to pass by-laws suppressing houses of prostitution and invoking criminal sanctions against prostitutes, inmates and frequenters of bawdy houses.<sup>31</sup> However, it was the federal government, newly created in 1867, which played the dominant role. Drawing upon the earliest legislation enacted in Canada, it passed "An Act respecting Vagrants" in 1869, which condemned the following categories to imprisonment or a fine:

- 1) all common prostitutes, or night walkers wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves;
- 2) all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves; and

29. ROSEN, *Lost Sisterhood* at 125. Rosen has also concluded that Montreal was one of the ports of entry for the white-slave traffic and cites at least one Canadian case study of a woman forcibly detained in a brothel. [Id. at 119-21.]

30. In 1882 an Ontario Grand Jury recommended that imprisonment as well as a fine should be inflicted upon keepers of bawdy houses, that the present laws should be enforced strictly, and that every publicity should be given to the names of those who frequented brothels. Urging the government and the judiciary to take more action, the grand jurors decried the growing immorality: "From the vast increase of the social evil the foundation of the social system is being threatened and a lasting blot left upon the fair name of Canada. Let our Judges and Legislators use every means to have it removed". [Presentment of the Grand Jury to the Judge of the Court of Oyer and Terminer at the end of the Winter Assize, 1882, *York Criminal Assize Book 1878-87*, at 269.] The *Legal News* contained a column urging the government to enact legislation with regard to inveigling young women into houses of ill-fame: "This is an offence of a serious character", it stated, and legislation prohibiting it "would not [meet] with any opposition". [Vol. VII, No. 14, 5 April 1884 at 108.] D.A. Watt led the Parliamentary lobby for more laws to protect women and young girls from loss of virtue through defilement and abduction. [D.A. WATT, *Moral Legislation: A Statement Prepared for the Information of the Senate* (Montreal: Gazette Printing Co., 1980).] After hearing Watt speak at their general assembly in 1885, the Presbyterian Church of Canada petitioned Parliament to improve its legislation: There is ... good reason to believe that many wicked men and women make a trade and business of procuring young women for immoral purposes, and who use threats and intimidation and every species of fraud and artifice to accomplish their ends. Your petitioners believe that a large number of women are annually ruined and go down to premature graves for want of legal protection. [T]he existing law is inadequate ... and the protection now given to women and girls should be enlarged and extended ... (Id. at 38).

31. The constitutionality of this legislation was, of course, open to question, although there were no legal challenges to municipal by-laws on prostitution during the nineteenth century. See, for example, *Charter and By-Laws of the City of London* (London, Ontario: The Free Press Printing Office, 1880) at 22, 83, 87-88, 251 and 274; *Toronto City Council By-Law No. 468*, "A By-Law to Restrain and Punish Vagrants and other Disorderly Persons", October 1868; *Lethbridge Town Council By-Law 94*, 1898; *Halifax City Charter*, Acts of 1864, c. 81, s. 228.

- 3) all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by the avails of prostitution.<sup>32</sup>

That same year, “An Act respecting offenses against the Person” made it criminal to procure the defilement of women under the age of 21 by false pretenses, representations, or other fraudulent means.<sup>33</sup> While there was no statutory definition of the term “defilement”, this provision must have been intended to deal with persons who were using manipulative methods to trick women into becoming prostitutes. In the latter two decades of the nineteenth century, there was a veritable explosion of additional criminal sanctions against behaviour that was believed to contribute to the debauchery of innocent women. Householders were prohibited from allowing women under the age of 16 to resort there for the purpose of “unlawful carnal knowledge”. It was also made an offense to entice a woman to a brothel for the purpose of prostitution, or to knowingly conceal her in such a house. Men were forbidden to seduce and have illicit connection with any woman of previously chaste character who was above the age of 12 and under the age of 16. The provisions concerning bawdy houses were reenacted, with additional prohibitions against being an inmate of such a house. It was also made unlawful to procure women for unlawful carnal connection, or for parents or guardians to encourage the defilement of their daughters. In addition, a new offense was created: conspiracy to defile by “conspiracy with any other fraudulent means, to induce any woman to commit adultery or fornication”.<sup>34</sup>

This explosion of legislation constituted a remarkable indication of how seriously the public and its legislative representatives viewed the evils of prostitution. Laws from several overlapping jurisdictions combined a myriad of approaches in setting out to prohibit prostitution. The last decades of the nineteenth century witnessed a strikingly interventionist approach to the problem. Virtually no stone was left unturned. The legislators prohibited every aspect of prostitution except the actual and specific act of commercial exchange for sexual services. Prostitution remained a “status” offense, which did not require overt activity or behaviour before conviction. If prostitutes were caught in the streets or in a public place or meeting, they could be arrested just for being unable to give “a satisfactory account of themselves”. Keepers, inmates and the habitual frequenters of bawdy houses were similarly subject to imprisonment, and for the first time persons living off the avails of prostitution were subject to penalty. A multitude of supplementary provisions were set in place to prevent men from debauching innocent young women who might then be forced to join the ranks of prostitution.

The expansive enactments covered prostitutes inside and outside brothels, their customers, their landlords, the madams of their brothels, and all of those who contributed

32. 32 & 33 Vict. (1869), c. 28, s. 1 (Canada). The penalty was a maximum of two months imprisonment, \$50.00 or both. *An Act to amend “An Act respecting Vagrants”*, 37 Vict. (1874), c. 43 (Canada) increased the penalty to six months imprisonment, s. 1. *An Act to remove doubts as to the power to imprison with hard labour under the Act respecting Vagrants*, 44 Vict. (1881), c. 31, s. 1 (Canada) clarified that prisoners could be sentenced to six months with or without hard labour.

33. 32 & 33 Vict. (1869), c. 20, s. 50 (Canada). This was an exact duplicate of the English statute of 1849, (see *supra* note 7).

34. *An Act respecting Offences against Public Morals and Public Convenience*, 49 Vict. (1886), c. 157 (Canada); R.S.C. 1886, c. 157, s. 3, 5, 6, 7 and 8; 49 Vict. (1886), c. 52 (Canada); 50 & 51 Vict. (1887), c. 48 (Canada); R.S.C. 1887, vol. 2, c. 157; *The Criminal code*, 55 & 56 Vict. (1892), c. 29, s. 185, 186, 188 (Canada). Much of this legislation was inspired by an English statute, *An Act to make further provision for the protection of Women and Girls, the suppression of brothels and other purposes*, 48 & 49 Vict. (1885), c. 69 (England), also cited as the *Criminal Law Amendment Act, 1885*.

to the trade in female sexuality or lived off the avails of its financial reward. Special care had been taken to ensure that at least some provisions covered men as well as women involved in prostitution; the habitual frequenters of bawdy houses (the purchasers of sexual services) were equally as liable to the reach of the criminal law as were their quarry. The reformers and government officials who were responsible for the legislation showed strong optimism in the efficacy of public criminal legislation to stem the tide of what was seen as an intolerable traffic in women and children. The legislative picture was set to respond to what the Canadian public clearly perceived as a manifest social need.

#### IV. — *The Response of the Courts to Prohibition*

##### A. *The Trial Level*

Criminal enforcement of these laws took place on two totally different levels. Cases heard at the level of the appellate courts will be discussed in more detail in a later section. At the level of the magistrates' courts, however, hundreds of women were tried, convicted and gaoled without much regard to the finer points of legal interpretation. Gene Howard Homel has described the typical court room procedure of one Toronto magistrate as follows: "His goal was to render justice — and quickly. Usually a moment or two sufficed. It was not uncommon to deal with 250 cases in 180 minutes".<sup>35</sup> Few records are available to document the experience of those who were tried at this lower court level and could not afford to seek review from a higher court. Perhaps the best source of information is the Toronto Gaol Register, which provides information about the individuals who were actually arrested and convicted. In an effort to understand the impact that the criminal law had upon these individuals' lives, one sample year was reviewed for each decade between 1840 and 1900.<sup>36</sup> Prostitution-related charges were determined to include the following: "keeping a bawdy house", "vagrancy", "drunk and disorderly", and "frequenting a bawdy house". It is impossible to be certain that all of the women charged as "vagrants" and "drunk and disorderly" were in fact involved with prostitution. The inclusion of prostitution offenses inside the more general vagrancy statute, as well as the Register's use of broad and overlapping categories, has unfortunately complicated the goal of accurate analysis of the records.<sup>37</sup>

35. Gene Howard HOMEL, "Denison's Law: Criminal Justice and the Police Court in Toronto, 1877-1921" (1981), *73 Ontario History* 171-185 at 173. See also Paul CRAVEN, "Law and Ideology: The Toronto Police Court 1850-80", in David H. FLAHERTY, *Essays in the History of Canadian Law*, vol. 2 (Toronto: U. of T. Press, 1983) 248 at 269, regarding the speed of police court trials.

36. The middle years, 1845 through 1895, were selected arbitrarily although no records were available for 1875 or 1874, and the year 1873 was taken instead. After this research was completed, Carolyn Strange, who was kind enough to read a draft of this paper, reminded me that 1873, 1884 and 1893-4 were years of economic depression in Ontario. Presumably this would have affected the number of arrests for prostitution-related offences; on the other hand, data from these years also present a fruitful source of analysis as an illustration of the sorts of women who were driven to prostitution in hard times. Future empirical research would be useful in filling in a more complete picture. It will be recalled that the time period selected also overlaps with the years of the regulatory approach, prior to a switch to complete prohibition. Since the earlier laws against prostitution continued through these years, it was felt to be important to determine how they were enforced.

37. The decision to use over-inclusive categories was taken for many reasons. The "drunk and disorderly" category, for example, included charges of "disorderly", "drunk and disorderly", "drunk", "disorderly vagrant", "disorderly conduct", "disorderly character" and "inmates of a disorderly house". To omit this group of charges from the analysis would be to omit a significant proportion of prostitutes classified under

Possible prostitution offenses constituted an overwhelming proportion of women's crimes, ranging from a high of 87.7 percent in 1865 to a low of 63.0 percent in 1895. (See Table 1.) There was no evident trend indicating either a steady increase or decrease in the actual number of these charges.<sup>38</sup> The Toronto Gaol Register also indicated that there was a wide range in age among women convicted of possible prostitution offenses. The age breakdown showed women from their early teenage years to their eighties, although both extremes were rare. (The inclusion of the category "drunk and disorderly" in this analysis may be partly responsible for this wide age range.) The majority of the women prostitutes (those charged with offenses other than "keeping a bawdy house") ranged in age from 20 to 40 years, but a significant number were both much younger and much older. (See Table 2.) The strikingly high proportion of very young women convicted in 1845 is interesting, as is the slight tendency toward an increase in prostitutes' ages over the 50-year period surveyed. The age range was similar for women convicted of keeping a bawdy house, although there was more variation in these data. (See Table 3.) In 1873, for example, women keepers of bawdy houses were classified as follows: 25 percent under 20 years old; 25 percent from 20 to 29 years, 37.5 percent from 30 to 39 years and 12.5 percent aged 50 and over.<sup>39</sup> This certainly belied the common conception that *all* keepers were elderly madams. In one surprising instance, Lucinda Carmen, aged ten, was gaoled from May 10 to June 8, 1845, for keeping a bawdy house; this seemed to be a somewhat loose interpretation of the term "keeping".

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the legal term "vagrants", as well as numerous inmates of common bawdy houses. There was also a great deal of overlap in the records, since it was common for a woman to be charged with vagrancy one month, and "drunk and disorderly" the next. Nevertheless, some of the charges must have involved alcoholic women, or women who behaved as disorderly deviants in public but who were not prostitutes by occupation. However, there were factors which indicated that it was prostitutes who were charged with these offences in the majority of cases. In many cases a woman charged with being disorderly was recorded as a prostitute by occupation, leading to the conclusion that the status of being a prostitute was probably linked with the behavior cited in the charge. In fact prostitution may have been viewed as less tolerable when combined with other forms of unruly behavior in public. In other cases women charged as disorderly or vagrants were arrested in large groups, often as many as six or more at a time. On the same date another woman would also be charged with keeping a bawdy house. Presumably the entire group was being charged for prostitution, although the more general categorizations were used in the Register. The charges also varied from year to year, and from clerk to clerk. One clerk might favour the charge of "drunk", while the next clerk might favour the charge of "disorderly". Recognizing the limits the nineteenth century classifications have placed upon contemporary analysis, one can still attempt to draw some useful conclusions from the data.

38. This can be compared with the findings of Thomas Thorne, who discovered a dramatic increase in the crime rates for vagrancy and prostitution between 1878 and 1915 in southern Alberta. [Thomas THORNER, "The Incidence of Crime in Southern Alberta, 1878-1915" in BERCUSON and KNALFA, eds., *Law and Society in Canada in Historical Perspective*, c. 4 at 72.] Deborah Nilson has also done an excellent study of prostitution in Vancouver, and has concluded that arrests peaked and declined between 1900 and 1920 largely in response to public pressure to eradicate prostitution [Deborah NILSON, "The Social Evil: Prostitution in Vancouver 1900-1920", in LATHAM and KESS, *In Her Own Right* (Victoria B.C.: Camosun College, 1980) 205-228].

39. The wide age range found contrasts with a number of previous studies. Joel Best found that the "madams" of St. Paul, Minnesota were usually in their twenties, while the brothel inmates, although tending to be slightly younger than the madams, ranged in age from 16 to 30 years. [Joel BEST, "Careers in Brothel Prostitution: St. Paul 1865-1883", *Journal of Interdisciplinary History*, xii: 4 (Spring 1982) 597 at 603-6.] Marion Goldman found prostitutes on the Comstock Lode to be generally young, most less than 30 years old. [GOLDMAN, *Gold Diggers* at 64.] William Sanger estimated 75 percent of New York City prostitutes were between 16 and 24 years old. [William SANGER, M.D., *The History of Prostitution: Its Extent, Causes & Effects Throughout the World* (N.Y.: Eugenics Publishing Co. 1937, orig. pub. 1897) at 452.] C.S. Clark estimated that the majority of prostitutes in Toronto at the turn of the century were between 15 and 20 years old. [CLARK, *Of Toronto* at 134-5.] See also Carolyn, STRANGE, "A Profile of Prostitutes, their Clients and Brothel Keepers in Middlesex County, Ontario 1875-1885", unpublished manuscript, May 1981.

**Table 1** Women Charged with Prostitution Offences Toronto Gaol Register, 1840-1900

	All Females Charged	Drunk & Disorderly	Vagrancy	Keeping a Bawdy House	Possible Prostitution Charges**
1845	217	148 68.2%	0	16 7.4%	164 75.6%
1855	450	173 38.4%	190 42.2%	10 2.2%	373 82.9%
1865	734	589 80.2%	37 5.0%	18 2.5%	644 87.7%
1873*	633	447 70.6%	76 12.0%	8 1.3%	531 83.9%
1885	698	442 63.3%	96 13.8%	33 4.7%	571 81.8%
1895	552	294 53.3%	54 9.8%	0	348 63.0%
Total	3,284	2,093	453	85	2,631

\* Due to a gap in the records, information was not available for 1875. The year 1873 was chosen instead as the sample year for the 1870s.

\*\* The number of women charged should not be equated with the number of women involved in prostitution, since many women were charged more than once.

**Table 2** Age of Prostitutes\* Toronto Gaol Register, 1840-1900

	10-19 Yrs.	20-29 Yrs.	30-39 Yrs.	40-49 Yrs.	50+ Yrs.
1845	65 43.9%	52 35.1%	16 10.8%	10 6.6%	5 3.4%
1855	51 14.1%	154 42.5%	83 22.9%	49 13.5%	25 6.9%
1865	63 10.0%	246 39.2%	191 30.5%	91 14.5%	36 5.7%
1873	32 16.2%	160 30.9%	164 31.7%	87 16.8%	75 14.5%
1885	42 7.8%	210 39.0%	103 19.1%	104 19.3%	79 14.7%
1895	42 12.1%	106 30.5%	94 27.0%	52 14.9%	54 15.5%
Total	295	928	651	393	274

\* This table includes all women charged with prostitution-related offences *except* keeping a bawdy house.

There has been some disagreement over the usual length of a prostitute's career and her fate once it was over. Some have argued that most maintained a brutally short career of striking downward mobility often terminating in death; others have claimed that pros-

**Table 3** Age of Keepers of Bawdy Houses\* Toronto Gaol Register, 1860-1900\*\*

	10-19 Yrs.	20-29 Yrs.	30-39 Yrs.	40-49 Yrs.	50+ Yrs.
1865	1 5.6%	13 72.2%	3 16.7%	1 5.6%	0
1873	2 25.0%	2 25.0%	3 37.5%	0	1 12.5%
1885	1 3.0%	16 48.5%	10 30.3%	2 6.1%	4 12.1%
1895	0	0	0	0	0
Total	4	31	16	3	5

\* This table includes all women charged with keeping a bawdy house, but not other prostitution-related offences.

\*\* Data were not available before the 1860s.

stitution was only a temporary stage in most women's lives.<sup>40</sup> The Toronto Gaol Register data tend to provide evidence of a number of disparate patterns. Some women clearly maintained a lengthy career in prostitution, while others served time in gaol over the course of several years and then dropped out of sight. Some may have married, or taken up other careers, although the stigma that attached to prostitution certainly would have made their attempts at reform difficult. Some may have moved away from the area, since geographic mobility was a prominent feature of the lives of many prostitutes of the time; many may also have died.<sup>41</sup>

The Toronto Gaol Register also revealed a great deal about the prostitutes' place of birth. (See Table 4.) The majority of the women were born in Ireland.<sup>42</sup> In the later years, this proportion had begun to decrease, although it remained high: 38.1 percent in 1885 and 29.3 percent in 1895. Correspondingly, as the Irish-born ratio decreased, the Canadian-born prostitutes increased in number: from 5.5 percent in 1855 to 37.1 percent in 1895. The number of prostitutes born in England showed a slight increase over time, whereas those from Scotland and the United States remained constant and at a low proportion. Many of the American-born prostitutes were black women, although some of the latter were Canadian-born. Their numbers, however, remained low, approximately one or two black women a year. In 1885, one prostitute was also listed as having an East Indian background.

40. See CLARK, SANGER and Reverend J.G. SHEARER, Secretary of the Moral and Social Reform Council of Canada, for the former opinion, and GOLDMAN, ACTON AND WALKOWITZ for the latter. [See BEST, "Careers", for Sanger and Acton's comments at 597-8; CLARK, *Of Toronto* at 89; SHEARER "The Canadian Crusade", *Fighting the Traffic in Young Girls* at 335; GOLDMAN, *Gold Diggers* at 64-6; WALKOWITZ, *Prostitution* at 31.]

41. Best has noted that in St. Paul, suicide attempts were common among prostitutes. Some also died of complications from abortions, and since prostitutes accounted for many of the narcotics users of the time, this may have contributed to an early death. [BEST, "Careers" at 615-7.] Some prostitutes were even murdered by their clients. See one notorious instance in Robert RIEGEL, "Changing American Attitudes Toward Prostitution 1800-1920", (1968), *Journal of the History of Ideas*, 29:3, 437 at 439.

42. Interestingly, Frances Finnegan, in a study of prostitution in the city of York in England between 1837 and 1887, found precisely the opposite. Although the Irish immigrants in York were among the most destitute in the area, they "contributed few women to an activity which actually declined or even virtually disappeared in the area colonized by the immigrants". [Frances FINNEGAN, *Poverty and Prostitution: A Study of Victorian Prostitutes in York* (Cambridge Univ. Press, Cambridge, 1979), 53.]

The madams charged with keeping bawdy houses showed a very similar background to that of the prostitutes: they came primarily from Ireland in the early years and were increasingly native-born Canadians in the later years. (See Table 5.)<sup>43</sup>

**Table 4** Place of Birth and Religion of Prostitutes\* Toronto Gaol Register 1850-1900\*\*

	Place of Birth					Religion	
	Ireland	England	Scotland	Canada	U.S.A.	Roman Cath.	Protestant
1855	285 78.5%	26 7.2%	21 5.8%	20 5.5%	11 3.0%		
1865	405 64.7%	61 9.7%	42 6.7%	98 15.7%	20 3.2%	349 55.8%	277 44.2%
1873	307 57.8%	74 13.9%	17 3.2%	123 23.2%	10 1.9%	247 47.7%	271 52.3%
1885	205 38.1%	98 18.2%	29 5.4%	176 32.7%	30 5.6%	259 48.3%	277 51.7%
1895	102 29.3%	76 21.8%	15 4.3%	129 37.1%	26 7.5%	172 49.4%	176 50.6%
Total	1,304	335	124	546	97	1,027	1,001

\* This table includes all women charged with prostitution related offences *except* keeping a bawdy house.

\*\* Data were not available before the 1850s.

**Table 5** Place of Birth and Religion of Keepers of Bawdy Houses\* Toronto Gaol Register, 1860-1900\*\*

	Place of Birth					Religion	
	Ireland	England	Scotland	Canada	U.S.A.	Roman Cath.	Protestant
1865	11 61.1%	0	0	4 22.2%	3 16.7%	6 33.3%	12 66.6%
1873	5 62.5%	0	1 12.5%	2 25.0%	0	3 37.5%	5 62.5%
1885	11 33.3%	6 18.2%	1 3.2%	14 42.4%	1 3.0%	9 27.3%	24 72.7%
1895	0	0	0	0	0	0	0
Total	27	6	2	20	4	18	41

\* This table includes all women charged with keeping a bawdy house, but not other prostitution-related offences.

\*\* Data were not available before the 1860s.

43. There was a fairly even balance between prostitutes who were Roman Catholic and those who were Protestant; the madams were more likely to be Protestant, although many also listed themselves as Roman Catholic. No Jewish women were cited. (See Tables 4 and 5). Strange found that the majority of women charged with prostitution-related offences in London, Ontario between 1875 and 1885 were native-born Canadians. [STRANGE, "A Profile".] Judy Bedford concluded that the majority of prostitutes convicted in Calgary between 1905 and 1914 were American immigrants, closely followed by women from central Canada and a few from Britain. A

Speculating on the high number of foreign-born women prostitutes in Toronto, Lori Rotenberg has noted that immigrant women may have been ill-equipped to support themselves financially. "Their material and psychological vulnerability, in combination with their unfamiliarity with the city of Toronto, made these young women particularly susceptible to overtures from madams and pimps".<sup>44</sup> Michael Cross has explained the situation by direct reference to discrimination. Throughout British North America, he noted, the Irish were usually involved in outbreaks of large-scale violence, and formed the bulk of the prison population. Reports from the Upper Canadian provincial penitentiary in the 1850s recorded persons of Irish origin to be the majority of the inmates generally; as many as 90 percent of the women prisoners were Irish. The Irish faced discrimination in employment as well as in social relations, and were probably more likely to be arrested, and when arrested, convicted, claimed Cross.<sup>45</sup> Judith Fingard's research on prostitution between 1864 and 1873 in Halifax reveals that black women were vastly over-represented among the population of convicted prostitutes there. While blacks constituted 3 percent of the recorded civilian population in the 1860s and 1870s, 40 percent of the prostitutes incarcerated in Halifax were black.<sup>46</sup> Judy Bedford's study of prostitution in Calgary between 1905 and 1914 has also indicated that black prostitutes faced more terms of imprisonment than their white counterparts. Poverty and social isolation may explain why groups such as the immigrant Irish and blacks were found in such large numbers among the ranks of prostitutes. However, as Cross argues, legal discrimination may also have operated to subject their activities more frequently to criminal sanctions. Discrimination on the basis of race and ethnic origin was obviously an important factor in the enforcement of Canadian prostitution laws.<sup>47</sup>

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significant proportion of these American immigrants were black women. [Judy BEDFORD, "Prostitution in Calgary 1905-1914" (Spring, 1981), 29 *Alberta History* 1 at 8.] James Gray has noted that prostitutes on the Canadian prairies were white, black, Chinese and Japanese. [James GRAY, *Red Lights on the Prairies* (Scarborough, Ont.: New American Library of Canada, 1971).] See Lori ROTENBERG, "The Wayward Worker: Toronto's Prostitutes at the Turn of the Century", in Janice ACTON et al., eds., *Women at Work 1850-1930* (Toronto: Canadian Women's Educational Press, 1974), at 139-40 for material about the first two decades of the twentieth century in Canada. This information can be compared with the background of prostitutes in the United States. Best found that over three quarters of the prostitutes were native-born, and most of the madams were as well. In contrast, Best noted that when examining *all* crime records, Irish and Scandinavian immigrants and native-born blacks were over-represented. Best's study, done for St. Paul from 1865 to 1883, contrasted with Sanger's study done for 1858, which showed that five-eighths of the prostitutes in New York City were born abroad, mostly coming from the "dominions of Great Britain". [BEST, "Careers" at 603-6; Joel BEST, "Keeping the Peace in St. Paul: Crime, Vice and Police Work 1869-74", *Minnesota History* (1981), 47:6 at 244-5; SANGER, *History of Prostitution* at 460-1 and 488-91.] George Kneeland's 1912 investigation showed 68 percent of New York City prostitutes to be native-born. [George KNEELAND, *Commercialized Prostitution* (Reprint, Montclair N.J.: Patterson-Smith, 1969) at 101.]

44. ROTENBERG, "The Wayward Worker" at 38.

45. Michael S. CROSS, "Violence and Authority: The Case of Bytown", in BERCUSON and KNALFA, eds., *Law and Society*, c. 1 at 6. For attitudes toward the Irish, see also Jean R. BURNETT, *Ethnic Groups in Upper Canada* (Toronto: 1972), and M.S. CROSS, "The Shiner's War: Social Violence in the Ottawa Valley in the 1830's", *Canadian Historical Review* LIV (March 1973) at 23-6.

46. Fingard does not attribute these statistics to overt discrimination within the criminal justice system, but concludes that racially-conscious Halifax offered few employment opportunities for black women, thus forcing a disproportionate number toward careers in street prostitution. [Judith FINGARD, "Jailbirds in Mid-Victorian Halifax", in Peter WAITE, Sandra OXNER and Thomas BARNES, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 81 at 90.]

47. BEDFORD, "Prostitution in Calgary" at 8. See also N.E.H. HULL, "The Certain Wages of Sin: Sentence and Punishment of Female Felons in Colonial Massachusetts 1673-1774", in D. Kelly WEISBERG, *Women and the Law*, vol. 1 at 7-25 for a discussion of racial discrimination in the criminal justice process.

Despite the existence of a major campaign throughout mid-nineteenth-century North America to promote universal education, the records show that a large proportion of these prostitutes were unable to read and write.<sup>48</sup> (See Tables 6 and 7.) Some women could read poorly but could not write; they were included in the illiterate category. With the exception of one woman listed as having obtained higher education in 1885, none of the women listed as literate had obtained more than elementary education. The literacy rate of the madams was not significantly higher than that of the prostitutes.<sup>49</sup> The same Tables also give data on the marital status of prostitutes. These statistics show that a substantial proportion of women prostitutes were married. One wonders if the married women had been deserted by their husbands, or whether their husbands were still with them, and perhaps knowledgeable and even actively involved in furthering their wives' careers as prostitutes. The marital status of madams was similar, although there were more single women in that group.<sup>50</sup>

**Table 6** Literacy and Marital Status of Prostitutes\* Toronto Gaol Register, 1860-1900\*\*

	Literacy			Marital Status		
	Could not Read & Write	Elementary Education	Higher Education	Single	Married	Widowed
1865	272 43.7%	350 56.3%	0	312 49.8%	86 13.7%	228 36.4%
1873	316 61.1%	201 38.9%	0	453 86.6%	70 13.4%	not given
1885	223 41.6%	313 58.4%	1 0.2%	229 42.6%	208 38.7%	101 18.8%
1895	117 36.6%	231 66.4%	0	127 37.2%	151 44.3%	63 18.5%
Total	928	1,095	1	1,121	515	392

\* This table includes all women charged with prostitution-related offences *except* keeping a bawdy house.

\*\* Data were not available before the 1860s.

48. On some level, one wonders why gaol authorities took the trouble of recording data on literacy, religion, ethnic origin, age etc. This was apparently part of a much larger bureaucratic preoccupation with keeping statistics, motivated by public health concerns, a new appreciation of scientific method, and nativistic fears. [See, for example, George EMERY, "Ontario's Civil Registration of Vital Statistics, 1869-1926: The Evolution of an Administrative System", *Canadian Historical Review*, LXIV:4, 468-493, December 1983.]

49. Rosen has reported the American situation was similar. [ROSEN, *Lost Sisterhood* at 143.]

50. The findings of this study contrast with those of Strange, who found most London, Ontario, prostitutes to be unmarried, and Best, who found that the prostitutes and madams of St. Paul tended to be overwhelmingly single women. [STRANGE "A Profile"; BEST, "Careers" at 603-6.] But see Bedford, who found that 52 of the 91 women convicted for prostitution in Calgary were married, and Rosen, who stated that many American prostitutes were married and many had children. [BEDFORD, "Prostitution in Calgary" at 8; ROSEN, *Lost Sisterhood* at 143.]

**Table 7** Literacy and Marital Status of Keepers of Bawdy Houses\* Toronto Gaol Register, 1860-1900\*\*

	Literacy			Marital Status		
	Could not Read & Write	Elementary Education	Higher Education	Single	Married	Widowed
1865	8 44.4%	9 50.0%	1 5.6%			
1873	5 62.5%	3 37.5%	0	8 100.0%	0	0
1885	11 33.3%	22 66.6%	0	9 28.1%	9 28.1%	14 43.8%
1895	0	0	0	0	0	0
Total	24	34	1	17	9	14

\* This table includes all women charged with keeping a bawdy house, but not other prostitution-related offences.

\*\* Data were not available before the 1860s.

Most Toronto prostitutes actually served their sentence in gaol, and fines accounted for a low proportion of their penalties. (See Table 8.) In the early years, the option of paying a fine was rarely given; in later years, it was given but usually not taken. In the early years a sentence of 30 days at hard labour was the standard; in later years the sentence had become more arbitrary, ranging from seven days at hard labour to six months, and from \$2.00 to \$53.50 in fines. It is difficult to rationalize this wide spread in punishment. Sometimes it appeared to be related to the number of times a woman had been previously charged, with those frequently before the courts receiving the stiffer sentences; however, this was not true in all, or even in a majority, of cases. In the last quarter of the century, some women were sentenced to six months in the Andrew Mercer Reformatory for Women, rather than in the common gaol. Those sentenced to the reformatory were generally the youngest and oldest women.

Although fewer women were convicted of keeping a bawdy house, (see Table 9), one can compare these data with the sentences for prostitutes in 1865, 1873 and 1885. In 1865, although the figures were similar regarding the number of women who received one-month sentences, some of the keepers received a much heavier sentence. Forty-four percent received a penalty of three or more months, while only 2.9 percent of the prostitutes had to serve this length of time in gaol. Although one might have expected the keepers to have more wherewithal to pay fines, none of the keepers in this year did so, while .6 percent of the prostitutes did. These keepers were probably women who were accommodating several prostitutes in common quarters, rather than madams who actually employed such women and controlled the financial end of the business. In 1873 the heavier sentences still seemed to be handed out to keepers. Only 12.4 percent of the prostitutes served three or more months, while 62.5 percent of the keepers did. In 1885 while the actual proportion was decreasing, 6.1 percent of the keepers still served three or more months, while only 3.0 percent of the prostitutes did. By 1885, however, 39.4 percent of the keepers were paying fines, compared with 12.8 percent of the prostitutes. More keepers were also sent to the reformatory: 12.1 percent of the keepers in 1885, compared with 6.3 percent of the prostitutes.

**Table 8 Sentences for Prostitutes\* Toronto Gaol Register, 1840-1900**

	Less than One Month	One Month	One-Two Months	Two-Three Months	Over Three Months	Reform- atory	Paid Fine	On Further Examination	Excused	Total
1845	36 24.3%	100 67.6%	7 4.7%	0	0	0	0	0	5 3.4%	148
1855	4 1.1%	315 86.8%	0	0	0	0	2 0.6%	42 11.6%	0	363
1865	4 0.6%	256 40.6%	172 27.3%	105 16.6%	18 2.9%	0	9 1.4%	67 10.6%	0	631
1873	19 3.6%	169 32.3%	53 10.1%	9 1.7%	65 12.4%	3 0.6%	92 17.6%	114 21.8%	0	524
1885	68 12.6%	236 43.7%	11 2.0%	12 2.0%	16 3.0%	34 6.3%	69 12.8%	94 17.4%	0	540
1895	40 11.6%	170 49.3%	21 6.1%	16 4.6%	12 3.5%	18 5.2%	15 4.3%	53 15.4%	0	345
Total	171	1,246	264	142	111	55	187	370	5	2,551

\* This table includes all women charged with prostitution-related offences *except* keeping a bawdy house.

**Table 9 Sentences for Keepers of Bawdy Houses\* Toronto Gaol Register, 1860-1900\*\***

	Less than One Month	One Month	One-Two Months	Two-Three Months	Over Three Months	Reform- atory	Paid Fine	On Further Examination	Excused	Total
1865	0	7 38.9%	0	3 16.7%	8 44.4%	0	0	0	0	18
1873	0	1 12.5%	0	1 12.5%	5 62.5%	0	0	1 12.5%	0	8
1885	4 12.1%	0	0	6 18.2%	2 6.1%	13 39.4%	4 12.1%	4 12.1%	0	33
1895	0	0	0	0	0	0	0			0
Total	4	8	0	10	15	13	4	5	0	59

\* This table includes all women charged with keeping a bawdy house, but not other prostitution related charges.

\*\* Data were not available before the 1860s.

Many women arrested as prostitutes also served time in gaol on repeated occasions. Although not all of the women had a systematic history of arrest, a great many of them did. To illustrate what their lives were like, a few women whose names cropped up regularly in the records were chosen from the 1885 Register and traced for the full details of their prison history. Mary A. Gorman was born in 1858 in Ontario, to Mary Gorman, who was herself a prostitute of Irish descent. Indeed it would seem that the occupation of prostitution may to some extent have been an inherited one, since mother and daughter combinations not infrequently showed up in the gaol records. Both mother and daughter in this case were

illiterate and Roman Catholic. The mother had repeatedly served time as a prostitute, and in 1844 had been charged as the keeper of a disorderly house. Mary A. Gorman was first convicted on October 20, 1867, at age nine, on the charge of being drunk and disorderly, and sentenced to \$3.00 or 30 days. She chose to serve 30 days at hard labour in the gaol. At age ten, she was convicted three different times — May 10, October 31, and December 30 — of larceny, and although she was released “on further examination” for the first charge, she served 30 days at hard labour and four months at hard labour for the other charges respectively. (“On further examination” meant that the individual was not given a sentence at the time, but was usually released on bail.)<sup>51</sup> At this point, the Gaol Register listed her occupation as “none”. She was listed as a “servant” from age ten to 14. During this time she was convicted four more times — twice for being “drunk”, once for larceny and once for vagrancy. For these crimes she paid a \$3.00 fine and served a total of six months at hard labour.

From age 15 on, Mary A. Gorman’s occupation was listed as “prostitute” until she dropped out of sight at age 20. Her arrest record read as follows:

Drunk, served January 2 to January 31, 1873 in gaol;

Drunk, served February 5 to February 11, 1873 in gaol and paid fine of \$4.00;

Drunk, served February 15 to February 17, 1873 in gaol and paid fine of \$5.00;

Inmate of disorderly house, served March 23 to May 2, 1873 (40 days);

Drunk and disorderly, served May 24 to June 30, 1873;

Disorderly, served July 5 to August 3, 1873;

Vagrancy, served August 4 to 6, 1873, and released on further examination;

Vagrancy, served October 7 to November 1, 1873 in gaol and paid \$4.25 fine rather than spend two months at hard labour;

Drunk, November 5 to May 4, 1874, served six months at hard labour since unable to pay fine of \$6.25;

[There was a gap in the records from 1874 until October 1876, although Mary A. Gorman was released from gaol on 8 October 1876. The charge or length of stay is unknown because of the missing records.]

Vagrancy, served April 11 to July 10, 1877 (three months);

Assault, served September 20 to 21, 1877;

Larceny, served October 8, 1877 to February 28, 1878;

Inmate of a house of ill-fame, March 2 to 4, 1878 when released on further examination;

Drunk, served March 31 to May 1, 1878.

During this time Mary Gorman, the mother, who was now over 50 years of age, also continued to be arrested as frequently as her daughter. Often they were arrested at the same

51. Some of those listed as “on further examination” were sentenced at a later time, but in most cases they would be arrested on another charge before they could be sentenced for the initial offence. The category labelled “excused” in Tables 8 and 9 included a few women who were apparently excused by the mayor or aldermen. Paul Craven has noted that until 1851, the functions of police magistrates were carried out by the mayor and aldermen sitting in their capacity as city justices of the peace. Even after the creation of the position of stipendiary police magistrates, “aldermanic interference on behalf of constituents was ... a serious and frequent matter, and one that persisted as an intrinsic part of the Police Court system until at least the late 1870s ...” [Paul CRAVEN, “Law and Ideology”, 248 at 276-7.]

time, and although Mary A. Gorman was sometimes able to pay her fine, her mother mostly remained behind to do the full 30-days' sentence.

Mary Daley, whose career began at a somewhat late stage, was first convicted of being an inmate of a disorderly house at age 30, in July 1861. She had been born in 1831, in Ireland, and her gaolers registered her as Roman Catholic, married and illiterate. She served 30 days in gaol in 1861 and then managed to elude the police until she was sentenced to a four-month term for assault in 1867. After this, her arrest record was almost continuous. She served two 30-day sentences for being drunk and disorderly in 1868, and was again arrested on an assault charge in August 1869. After serving two days, she was released on bail. She was gaoled again on August 22, for vagrancy, and served 30 days. The whole Daley family appeared to have been arrested on this last charge, including a male aged 45 (presumably her husband) and three children, aged three, four and 12. Between 1870 and 1873, Daley served 17 separate sentences for the following offenses: assault, drunk and disorderly, drunk in the streets, and drunk. The sentences ranged from several days to four months. In fact, Daley was rarely out of gaol. It is difficult to imagine how she continued to be listed as a prostitute by occupation, since she had virtually no time to practice her trade. Her daughter, Mary A. Daley, began the same familiar arrest pattern at age 17, when she was arrested for larceny.

Sarah Norton, born in Ireland in 1819, was another Toronto prostitute with a lengthy prison record. Her pattern was somewhat different from Gorman's or Daley's, since her arrests began at the relatively late age of 42. Although her occupation was registered as 'prostitute', the majority of her convictions were for being drunk and disorderly. Between 1861 and 1873, she was convicted 81 times, and served as many separate sentences in goal, ranging from several days to six months. In some cases, she was released from gaol and re-arrested the very same day. In fact she spent very few days out of gaol during this period. Her life could not have been a happy one, as one conviction was for attempting to commit suicide in September 1864. Norton's record appeared to be one of an alcoholic, often a common end to a career of prostitution.

These women were not extremely unusual in the number of convictions they sustained. Catherine O'Hern, born in Ireland in 1823, was first arrested at age 19 and between 1843 and 1868 served 77 separate sentences in the Toronto gaol. From 1865, her daughter Catherine O'Hern (born 1851) began to repeat this cycle of convictions. Rosanna McDonald, born in England in 1819, was first arrested at age 25 and served at least 33 terms before dropping out of sight in 1854.

The statistics indicate that many women involved in prostitution were treated harshly by the criminal law.<sup>52</sup> Serving out a prison sentence at hard labour was far from a token

52. Frances Finnegan has found similar data from a study of prostitution in York, England, between 1837 and 1887 [FINNEGAN, *Poverty and Prostitution* at 136-42.] Judith Fingard recounts the extensive criminal justice involvement of three women prostitutes in mid-Victorian Halifax [FINGARD, "Jailbirds" 89-99]. The systematic and harsh penalties handed down to the women in Toronto, however, appear to contrast with data from earlier periods, later periods and from western North American regions. Raymond Mohl has reported that although 60-day terms were handed out to prostitutes in New York in the first quarter of the nineteenth century, a more common penalty for those lacking legal residence was transportation from New York, [RAYMOND A. MOHL, *Poverty in New York 1783-1825* (New York: Oxford University Press, 1971) at 32]. In the early twentieth century, Toronto prostitutes seem to have been treated more leniently. The Social Survey Commission, established in 1913, found that the majority of those convicted of prostitution offences were let off with a fine. However, 43 percent of the convicted keepers and 33 percent of the convicted inmates still served their sentences in gaol.

penalty. The notoriety that would also have attended their term in gaol would have marked them as “fallen women” in an era when a woman’s reputation for chastity was immensely valuable. The women who were actually subjected to criminal sanction, however, seem not to have been the ones who were really reaping financial gains from prostitution. That so many of the prostitutes and madams were forced to serve substantial prison sentences for want of a few dollars with which to pay a fine indicates how weak a link they were in the chain of individuals who were involved in the business of prostitution. It would be invaluable to have future historical researchers uncover details about the ownership of the land and buildings used as brothels, and the rate of return these individuals exacted from prostitutes. Similarly, one would like to know how lucrative the occupations of procurer and pimp were in the nineteenth century. Preliminary research by Marion Goldman, based on Nevada records, indicates that the real profiteers from prostitution were the property owners. Demanding a high rate of return on their property, they used their capital investment to share in the profits of prostitution, while they avoided the risks inherent in the profession.<sup>53</sup>

Compared with the number of women, the men convicted on prostitution-related charges were a paltry lot. In the six sample years studied, only 26 were arrested as keepers of bawdy houses. (See Table 10.) These men were often jointly charged with their wives, although this was not always the case. Twenty-one men were arrested as ‘inmates’ of bawdy houses; some of these may have been employees of the owner of the house (such as teamsters, etc.), while others may possibly have been customers. The largest number of men were arrested as customers, charged with being “habitual frequenters”, “frequenters”, or “found ins”.<sup>54</sup> A total of 65 male customers were subjected to criminal prosecution, six of whom were eventually discharged.<sup>55</sup> Compared with the 2546 women charged with prostitution-related offenses apart from keeping, this number seems relatively small, especially since one would expect that on any particular day there would be more customers than prostitutes potentially available for arrest. Ruth Rosen has estimated, based on her study of American prostitution between 1900 and 1918, that higher-class prostitutes were required to have sexual relations with four or five men a night, while lower-class prostitutes were forced to service 13 to 30 men a day.<sup>56</sup>

The most interesting feature of these gaol register statistics is the disproportionate number of men charged with prostitution-related offenses in 1885. Further research would be necessary to determine whether this was an isolated and unusual occurrence, or whether

[ROTENBERG, “The Wayward Worker” at 34 & 56.] James Gray reported that transportation out of the area and fines were the most common remedies in prairie cities and towns. [GRAY, *Red Lights*; Jan GOULD, *Women of British Columbia*, Saanichton, B.C.: Hancock House Pub., 1975) at 130 and 133.] Best noted that prison sentences were almost never served in St. Paul. [BEST, “Keeping the Peace” at 246.] Lighter penalties in western regions may have reflected a paucity of women’s prisons in which to detain prostitutes.

53. GOLDMAN, *Gold Diggers* at 122-4.

54. Although the legislation referred to persons “in the habit of frequenting” bawdy houses, the gaol records indicate three different ways of naming the offence; presumably all were legally interchangeable.

55. This figure was taken from sentence records in the Toronto Gaol Register 1840-1900. It compares with three male keepers who were also discharged. These data can be compared with those of Strange, who discovered 116 women and 87 men arrested between 1875 and 1885. Her statistics may result from her decision to exclude the charges of “vagrancy” and “drunk and disorderly”, which constitute a significant proportion of females charged for prostitution. Strange’s study is under-inclusive, compared with my own, which is over-inclusive. [STRANGE, “A Profile”.] Bedford has also located data about the number of men charged in Calgary between 1905 and 1914. She states that from 1905 to 1909, the Royal West Mounted Police arrested on average three keepers, 20 inmates, and ten frequenters each year. In 1913, 99 males and 245 females were convicted. [BEDFORD, “Prostitution in Calgary” at 2 and 5.]

56. ROSEN, *Lost Sisterhood* at 98, 165-6.

it represented a peak of prosecution activity more generally evident during the decade of the 1880s. It is not entirely clear why the focus on male clientele was so pronounced in 1885. Demand for prosecution of prostitutes' clients was not restricted to the 1880s. Many individuals had called for criminal prosecution of the customers of prostitutes, from John Stuart Mill who had insisted in the 1870s that male clients "should be the subject of deterrence if anyone was to be",<sup>57</sup> to Jessie C. Smith, who spoke for the Women's Christian Temperance Union in Nova Scotia in 1898. Smith insisted that both prostitute and customer were equally involved in the selling of sexual service, and urged her listeners to "get the names of the frequenters and their inmates, and let us, as Christians, do personal work with both classes."<sup>58</sup> Indeed, in 1908, a reporter for *Maclean's Magazine* asserted in an evocative and apparently semi-fictionalized account of a prostitution trial, that the judge had discharged two women prostitutes because their male customers had not been charged. Questioning the police officer involved, the judge was alleged to have asked, "Did the men resist them?" When the officer replied in the negative, the judge queried, "So that the girls were doing no more than the men?" When the officer agreed, the judge demanded to know why he had not arrested the men as well. The magazine article continued:

The officer did not hesitate long; he was frank enough and honest enough, and he was doing his duty well, doing, indeed, just what society wished him to do and was paying him for doing. And he said: "It is not customary to bring the men in".<sup>59</sup>

There seems to be no substantive evidence that the large number of males charged in 1885 reflected any greater acceptance of an egalitarian approach to the prosecution of prostitution. Indeed it was probably an outgrowth of the heightened public demand for the prohibition of prostitution generally, which as noted earlier, reached a peak in Canada in the 1880s.

The predominant pattern throughout the 60 years studied was to ignore the male customers and at the level of criminal enforcement, the law was primarily directed at women. Harvey J. Graff has concluded that the judicial focus on women criminals was fundamentally attributable to sex discrimination. "[T]hey no doubt were seen as failing in the society's expected standards of feminine behaviour", he noted. "[T]hey were not at home, nurturing a family or properly domesticated; their perceived deviance endangered the maintenance and propagation of the moral order, the family, and the training of children".<sup>60</sup> Sex discrimination lay at the heart of the criminal justice system's purported efforts to put the laws against prostitution into practice.

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57. See account of J.S. Mill's comments in Pat McHUGH, *Prostitution and Victorian Social Reform* (New York: St. Martin's Press, 1980) at 63-4.

58. Jessie C. SMITH, "Social Purity", Women's Christian Temperance Union (Nova Scotia, 1898) in COOK and MITCHINSON, *Proper Sphere* at 234.

59. Brand WHITLOCK, "The Girl that is Down", *Maclean's Magazine*, July 1908, vol. XVI, No. 3, 106-111, at 110-11. Four years later, the Women's Christian Temperance Union of British Columbia also called for prosecution of "frequenters equally with inmates" in their 1912 Report. [Report, Women's Christian Temperance Union of British Columbia, 1912, in COOK and MITCHINSON, *Proper Sphere* at 79.]

60. Harvey J. GRAFF, "Pauperism, Misery and Vice Illiteracy and Criminality in the Nineteenth-Century", *Journal of Social History* Vol. 11, No. 2 (Winter 1977) 245 at 262. Graff's study was based upon crime records in the Middlesex County of Upper Canada between 1867 and 1868. He found women convicted in 80 percent of the cases compared to 60 percent of the men. "While Irish and illiterate women were convicted most often, women were punished if arrested more often than men within each ethnic group and for virtually all crimes".

### B. The Appellate Courts: A Different Perspective

Few of those convicted of prostitution offenses were able to have their initial convictions reviewed by appellate courts. The costs of hiring a lawyer and making application for a discharge barred all but the most financially secure and determined individuals. However, for the few who could afford to obtain a hearing from the higher court judges received legal treatment remarkably different from the turnstile procedures so evident in the magistrates' courts. Carefully sifting through the factual evidence and the legal principles involved, these judges scrutinized the materials before them and frequently overturned the original convictions.<sup>61</sup> The most interesting feature of their judgments was the expression of a distinctive judicial viewpoint about the limits of the role of the law in the battle to wipe out prostitution. These judges were deeply troubled about the efforts of the legislators, the police and the magistrates to make the criminal law a tool of social reform. In response, they began to devise ways of interpreting the legislation to restrict its impact to a fairly narrow scope. Their decisions played a significant role in the failure of the prohibition policies.

One of the most important prostitution cases of the century was *R. v. Levecque*.<sup>62</sup> Victoria Levecque had been initially convicted upon the sworn evidence of John Jordan. Jordan, whose reason for being involved in the case was not explained, testified that he had been out walking in Ottawa on the evening of February 24, 1870, around 9 p.m., when he had seen the defendant "with a soldier in the barrack-yard". Jordan had just seen the soldier put Levecque "against the wall and [take] up her clothes", when another soldier struck him. He testified that Levecque was drunk and that he had seen her drunk on the street before. As to her reputation, Jordan claimed she was a prostitute, and that she bore "a very bad character". Although he admitted he only spoke of her character by reputation, he stated that he had "no doubt that she was there for an immoral purpose". Levecque was convicted of being a "common prostitute" who was "wandering in the public streets" and unable to give "a satisfactory account of herself". She was sentenced to pay a rather large fine of \$50.00 and to be imprisoned in the common gaol for two months.

When Mr. Justice Adam Wilson of the Court of Queen's Bench of Upper Canada reviewed the case, he concluded that this evidence was completely insufficient for a conviction. The Crown had not proven that the barrack-yard was a public place; in fact, it "may have been, for anything that is shewn, in the most deserted, unfrequented part of the city". Neither had Levecque been proven to be a common prostitute, apart from rather flimsy evidence of a reputation. Furthermore, the prisoner "was under no necessity to give any account of herself unless she was asked to do so". Most importantly, he asserted that prostitutes were entitled to rights as well as other citizens: "[S]he cannot suppose she is [to be apprehended] for wandering in the streets, though she is a common prostitute, so long as she is conducting herself harmlessly and decently, and just as other people are conducting themselves".<sup>63</sup>

61. It was by no means a certainty that they would discharge the prisoner in every case, but the decision to overturn the earlier ruling was a common one. Of 23 reported decisions located from the period between 1800 and 1902, the higher courts discharged the prisoner 12 times and upheld the conviction 11. For good examples of some cases in which the lower-court ruling was upheld, see *R. v. Remon* (1888), 16 O.R. 560; *The Queen v. Roy* (1900), 3 C.C.C. 472; *R. v. Flint* (1883), 4 O.R. 214; *R. v. St. Clair* (1900), 27 O.A.R. 308, 3 C.C.C. 551; *R. v. Warren et ux.* (1888), 16 O.R. 590; *The Queen v. Spoonerr* (1900), 4 C.C.C. 209.

62. (1870), 30 U.C.Q.B.R. 509.

63. *Id.* at 513-16.

In his interpretation of the vagrancy legislation, Wilson J. was shifting the focus of the view from a "status" offense to one requiring publicly obstructive or indecent behaviour. However, when one recalls that Victoria Levecque was caught having sexual relations with a soldier in an outdoor barrack-yard where she had been observed by a passerby, the judge's analysis seems somewhat at odds with the evidence. In his championing of prostitutes' rights to live unimpeded by the intrusion of law, Wilson J. seemed determined to ignore the concerns of the social purity reformers who were demanding a legal attack on public indecency and prostitution. He reiterated these views 16 years later in the case of *Arscott v. Lilly and Hutchison*, where he stressed that prostitutes, whom he referred to as "these unfortunate people", should not be interfered with lightly.<sup>64</sup> Canadian Supreme Court Justice John Wellington Gwynne similarly referred to prostitutes as "these unfortunate creatures" in an 1894 judgment.<sup>65</sup>

These judicial sentiments cannot be explained merely by reference to paternalistic attitudes inspired by the perceived frailty of women. Similar legal attitudes were also exhibited in the isolated cases in which some of the few men convicted of frequenting bawdy houses chose to seek judicial review. John Clark had been convicted by the police magistrate in Hamilton of frequenting a house of ill-fame kept by one Jane Shepherd on New Year's Eve, 1882. He had been ordered to pay a stiff fine of \$60.00, as well as the sum of \$2.00 to Alexander D. Stewart, the complainant, to cover costs. Mr. Justice John Douglas Armour decided to quash the conviction because there had been no evidence that Clark was an "habitual" frequenter and because he had been ordered to pay costs, which the statute did not authorize.<sup>66</sup> There was no further elaboration about what sorts of evidence would be necessary to prove that an individual "habitually" frequented bawdy houses, but one can surmise that this was one prerequisite which the higher court judges were prepared to apply rigorously to minimize the impact of the criminal law upon the customers of prostitutes. In another decision five years later, Mr. Justice Hugh Macmahon made reference to other preconditions for upholding criminal sanctions against frequenters:

[B]efore arresting a person on a charge of frequenting houses of ill-fame, it is necessary in order to [have] a valid conviction that he or she should be asked to give an account of himself or herself; for it may be the person charged as being a "frequenter" is there for a lawful purpose, as collecting an account, a bailiff temporarily in possession under a landlord's warrant, . . . who might readily give a satisfactory account of his or her presence in such a house.<sup>67</sup>

64. (1886), 11 O.R. 153 at 182. Wilson J.'s statement read as follows: . . . these unfortunate people shall not be interfered with unless wandering in these named places; nor even then, unless they fail to give a satisfactory account of themselves; and it is quite manifest they may be able to give a very satisfactory account why they are found at the time in such places . . . . The *Arscott* litigation involved a fascinating series of cases in which Esther Arscott was first convicted by Charles Lilly, police magistrate of London, of keeping a common bawdy house in 1885. Discharged by Rose J., upon what was surely an incorrect interpretation of the statute, she then had her attorneys bring an action against Lilly and the Crown attorney for false imprisonment. She lost this claim, and the Ontario Court of Appeal ultimately resolved the matter in favour of Lilly and Hutchinson, while at the same time expressly disagreeing with Rose J.'s interpretation of the law. By this time, however, Arscott had apparently fled the country before a fresh warrant could be issued. [*R. v. Arscott* (1885), 9 O.R. 541; *Arscott v. Lilly and Hutchinson* (1886), 11 O.R. 153; *Arscott v. Lilly* (1887), 14 O.A.R. 283 and 297.]

65. *Clark v. Hagar* (1894), 22 S.C.R. 510 at 541. The case was not a criminal one, but involved litigation over the conveyance of property. Alleging that part of the purchase price was for the good will of a bawdy house, the purchaser sought to be released from his obligation to pay for the house in question. The Supreme Court dismissed this argument on a procedural point, but noted: "If the contention of [the purchaser] should prevail, I cannot see that it would be possible for any of these unfortunate creatures who lead a life similar to that led by the [purchaser's] grantor to enter into any contract with any person knowing her character for the purchase in fee of a house to shelter her or for the purchase of any of the necessities of life".

66. *R. v. Clark* (1883), 2 O.R. 523 (Queen's Bench) at 524.

67. *R. v. Remon* (1888), 16 O.R. 560 at 561, in *obiter*.

Another mechanism by which the higher court judges whittled down the scope of the laws involved their interpretation of the word "prostitution". In *R. v. Gareau*, Eugenie Gareau had been convicted of keeping a disorderly house on Dominique Street in Montreal in 1891. When Chief Justice Sir A.A. Dorion of the Court of Appeal of Quebec learned that Gareau was paid to be the mistress of one man only, he quashed the conviction. He wanted further evidence of indiscriminate sexual intercourse before upholding a criminal sanction.<sup>68</sup> Similarly, in *The Queen v. Rehe*, Mr. Justice Jonathan S.C. Wurtele of the Court of Queen's Bench of Quebec concluded that in the case of a mistress kept by a married man, "prostitution in the general sense of a woman submitting herself to illicit sexual intercourse with a man may have existed [but] prostitution in a restricted and legal sense did not exist". The purpose of the prostitution laws, he maintained, was "the repression of acts which outrage public decency and are injurious to public morals". While a kept woman might violate moral law, her private behaviour "did not outrage public decency nor violate any provision of the criminal law of the land".<sup>69</sup> Once again the judge appeared to be taking a restrictive view of the role of law. He seemed genuinely unconcerned about the purchase and sale of sexual services involved in this arrangement, preferring to classify the activity as a private matter, unreachable by public law.

The case of *R v. McNamara* in 1890 involved one of the few convictions in the century for procuring a woman for prostitution. This type of case went to the heart of the reformers' concerns about innocent young women tricked into prostitution by nefarious scoundrels who sought to profit financially from their exploitation. The facts of this case, while differing in some respects from the commonly-accepted prototype, do reveal that some of their fears were justified. Ellen McIntosh, the 19-year old woman involved, told the court that she had become pregnant as a young, unmarried woman in Peterborough. The father of the child refused to marry her, but she still hoped to marry someday, and was eventually beguiled into having sexual relations with Frederick McNamara, a dentist from Peterborough who promised to marry her and then failed to honour his commitment. At this time she decided to move to Toronto to go into domestic services, but McNamara followed her to Toronto and begged her to live with him. A week after she moved in with him, the landlady of the house seized her trunk and belongings because the rent had not been paid. McNamara then took her, penniless and stripped of her possessions, to a house on Alice Street which he purported to be a "nice, respectable" place. When Ellen McIntosh learned that the Alice Street house was a brothel, McNamara told her she would have to stay there and earn some money "on [her] back". Several witnesses testified that McNamara had told them he intended to live upon the money she would earn from prostitution. Ellen McIntosh fortunately was able to escape because the mistress of the house was moved by her plight and permitted her to leave.

Perhaps affected by the young woman's sad story, the judges took a rather different approach in this case than in many of their other prostitution decisions. McNamara's defense lawyer argued that the Crown had failed to prove that the house in question was a brothel, and insisted that evidence of specific acts of adultery — not merely general reputation evidence — was required. Mr. Justice John Edward Rose refused to accept this argument, unconcerned that general reputation evidence might be used to convict innocent individ-

68. (1891), 1 C.C.C. 66.

69. (1897), 1 C.C.C. 63 [Court of Queen's Bench, Quebec] at 65. This case involved a conviction of a kept mistress for "living off the avails of prostitution" contrary to s. 297(1) of the Criminal Code. It is somewhat ironic that the only reported case in the nineteenth century of a conviction for living off the avails involved a prostitute and not a pimp.

uals,<sup>70</sup> His position was accepted into Canadian jurisprudence, although ten years later in *R v. St. Clair*, Mr. Justice Featherstone Osler expressed a reluctance to concur in the ruling because of the danger that general reputation evidence might be misleading or erroneous.<sup>71</sup> The latter sentiment was much more characteristic of the cautious approach typically taken by Canadian higher court judges.

Procedural irregularities were often used to quash convictions for prostitution-related activities. In *R. v. Gibson* the Ontario High Court discharged a prisoner who was obviously guilty of attempting to procure a 17-year-old woman to work as an inmate of a New York brothel, on the grounds that the indictment had improperly contained the word “or” between the various counts charged.<sup>72</sup> In *The King v. Shepherd*, The Supreme Court of Nova Scotia discharged the keeper of a common bawdy house because the particulars of the offense had not been sufficiently specified and the magistrate had not informed the prisoner of the right to trial by jury before obtaining her consent to trial by him.<sup>73</sup> In *The Queen v. Spooner* the Ontario High Court refused to discharge a woman convicted of keeping a bawdy house on the grounds of an irregularity in the indictment, but decided to cut the penalty in half “[t]o avoid possibility of the appearance of straining the law.”<sup>74</sup>

The Supreme Court of Canada best expressed the typical position of the judiciary in the case of *In re Polly Hamilton* in 1882. Hamilton had been convicted of keeping a bawdy house on the testimony of two police officers who had given evidence that she and her partner, Eva Rose, were prostitutes and that numerous men were in the habit of visiting the house at all hours of the night. Dismissing the conviction as based entirely on hearsay, Mr. Justice Henry chastised the lower court officials for their failure to remember the presumption of innocence. Balancing the two conflicting interests — the need to eradicate prostitution and the importance of upholding criminal safeguards in the legal process — the Supreme Court left no doubt about which factor ought to triumph:

The desire for shutting up houses of ill-fame or disorderly houses in any community, and for the prevention of crimes generally, is highly commendable, and should be seconded by all legal means, and by the aid of all judicial officers of every rank, but it must be done in such a way as not to violate most valuable and important principles and rules of evidence upon which depend the safety of life, liberty and property.<sup>75</sup>

The decision of the higher court judges to favour individual rights above the social goal of prohibiting prostitution warrants more detailed examination. Although the judges framed their rulings with assertions about the sanctity of individual freedoms, it seems unlikely that this entailed any recognitions of women’s rights as such. Support for newly-evolving notions about women’s rights was not commonplace among the Canadian judiciary. Most nineteenth-century judges, for example, were markedly reluctant to award women custody of their children, despite legislation which gradually improved the status of women in family law matters. Repeatedly ruling against women, they deliberately took

70. Archives of Ontario, File MS 530 Vol. 4, Minute Books of Oyer and Terminer (Criminal Assize Court), and Case File 16 October 1890 and 18 October 1890; *R. v. McNamara* (1890), 20 O.R. 489 at 493-5.

71. (1900), 27 O.A.R. 308; 3 C.C.C. 551. Osler, J.A., however, did decide to uphold the conviction after he had considered all the evidence available at trial.

72. (1898), 29 O.R. 660.

73. (1902), 6 C.C.C. 463 (Supreme Court of Nova Scotia).

74. (1900), 4 C.C.C. 209 at 216.

75. (1882), Coutlee’s Supreme Court Cases 35 at 40-43. See also BEDFORD, “Prostitution in Calgary” at 5-6, for an account of several cases which indicate that the higher court judges in Alberta tended to apply the laws against prostitution in a similarly cautious manner in the early twentieth century.

a narrow interpretation in applying the new laws so as to award custody to the father in most cases. Old-fashioned views about children as the property of the master of the house prevailed over more modern notions about the place of mothering in child-nurture.<sup>76</sup> It seems unlikely that these judges were quashing so many prostitution convictions because they were partial to the rights of women to earn their own livelihood.

It is possible, however, that their decisions may have reflected a substantially different attitude toward prostitution than that expressed by the social reformers and the legislators. The judges' decisions were especially noteworthy for the absence of any vituperative descriptions of prostitution or bawdy houses. Denunciations of the trade in female sexuality and its impact upon the social order were entirely missing from all discussions of the legislation. This may be a clue as to why the higher court judges were not sympathetic to the legal approach of prohibition. Given an acceptance of the double standard of sexuality between the sexes and the need to protect "pure women and children", they may have preferred the regulatory approach to prostitution seen early in the century.<sup>77</sup> Although we have no direct evidence of this, their actual decisions imply an acceptance of many features of prostitution — the rights of prostitutes to go about unhindered unless they were creating serious public disturbance, the legal immunity granted to the status of a kept mistress, the rights of many individuals to "frequent" bawdy houses for various legitimate purposes, etc. Indeed their decisions suggest that they were resigned to the fact that prostitution was inevitable and were particularly wary of overzealous enforcement of impractical laws.

The same judges, when they presided over rape trials in the nineteenth century, exhibited a marked reluctance to extend the protection of rape laws to women of doubtful reputation.<sup>78</sup> Their refusal to convict in cases where the rape victim was not modest, virtuous and chaste, clearly marked off a group of women as outcasts from the social community, with whom sexual contact, even by physical coercion, was tolerated. Prostitutes, of course, were part of this designated group of women whose sexuality was viewed as public and widely available. The judges seem also to have been reluctant to permit social legislation to intrude on sexual trade. Insofar as the prohibitive legislation sought to remove prostitutes from the sexual market the judges seemed hostile to furthering this goal. As a result, they ensured a significant range of male access to the sexual services of women.

Their reluctance to give strong support to the legal attack on prostitution also reflected a certain dysfunction between the legislators and the judiciary. The former were receptive to the demands of the social purity crusaders that public legislation be fashioned into a deliberate tool of social engineering. The latter stubbornly refused to permit the escalating number of new enactments to invade a wide sphere of private activities. Lawrence Friedman

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76. Constance B. BACKHOUSE, "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in David H. FLAHERTY, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) at 212.

77. Their attitudes may have more closely resembled those of upper-class Englishmen, who according to Robert D. Storch, favoured a regulatory approach. "It is generally agreed", he noted, "that most educated Englishmen during the Victorian period considered prostitution a necessary evil". Factors such as a belief that male sexuality could not be repressed, and the high cost of marriage among the "respectable" classes created a demand for prostitution that could not be denied. [Robert D. STORCH, "Police Control of Street Prostitution in Victorian London", in D.H. BAYLEY, ed., *Police and Society* (Beverly Hills and London: Sage, 1977) 49 at 53-4.]

78. See Constance B. BACKHOUSE, "Nineteenth-Century Canadian Rape Law, 1800-1892" in FLAHERTY, ed., *Essays* vol 2, 200-247 for a discussion of the manner in which the judges interpreted the criminal rape law, narrowing its scope to protect only certain types of women in certain situations.

has reported that a general hostility to legislation was characteristic of many judges in the last half of the nineteenth century:

Judges' business was the rule of law, legal tradition, adjudication. Legislation, whatever its subject, was a threat to their primordial function, molding and declaring law. Statutes were brute intrusions [and] often short-sighted in principle or effect. They interfered in a legal world that belonged by right to the judges.<sup>79</sup>

It is also quite probable that some of the judges' decisions may have reflected the high regard they held for the defense lawyers who argued these cases. The few individuals who brought their cases to the higher courts must have been the elite of the profession and very knowledgeable about the criminal defense bar, since they managed to retain the most brilliant and persuasive lawyers to defend them. The list of their names reads like a "who's who" entry for the most prominent barristers of the time: Britton Bath Osler Q.C., Richard Martin Meredith, D'Alton McCarthy Q.C., Sir Allen Bristol Aylesworth, Robert Alexander Harrison, Q.C., N.G. Bigelow, Q.C., and Thomas Cowper Robinette.

It is difficult to know what these lawyers thought about the position of women in society or, indeed, what any of them thought about their clients, the prostitutes. That so many of them agreed to take the cases at all indicates that the defense of individuals charged with prostitution-related offenses was at least a financially-attractive proposition. The few individuals who could afford to seek judicial review at the higher levels could afford to pay their lawyers substantially for the privilege. This suggests that a form of hierarchy must have existed inside the profession. Upper-class prostitutes, who no doubt serviced upper-class men, seem to have had the resources to secure legal representation from upper-class lawyers. It is tempting to speculate upon the attitudes these lawyers held about the practice of prostitution. Did they feel a certain sense of abhorrence about the commercialization and exploitation of sexuality, taking on the cases out of a stronger belief in the individual's right to be represented regardless of his or her crime? Or did they side with the higher court judges who believed that the criminal law should be applied narrowly and that prostitution should be left relatively unhindered by legal sanction? Perhaps their decision to argue these cases even entailed some sympathy for the individuals charged. They may have known these women personally or had friends who did. There is at least some evidence to suggest that members of the legal community were involved with prostitutes. C.S. Clark reported one such case in Toronto:

Fanny Rogers pleaded guilty to a case of illegal liquor selling at her [house of ill-fame] on King Street west, and his Worship remanded her for a week, at the request of her counsel, to consider what sentence he should impose. This is the case where several lawyers were found in the place when it was raided. One of the police said that Miss Rogers was induced to plead guilty so as the legal lights in question would not have to be called by the Crown to testify.<sup>80</sup>

Whatever their motivation, however, they certainly served their clients well. For those who had the financial means and connections to secure these eminent men as counsel, the legal

79. Lawrence M. FRIEDMAN, *A History of American Law* (New York: Simon & Schuster, 1973) at 316. It is perhaps too soon to conclude whether this comment, from an American scholar, is equally applicable to Canadian judges in the nineteenth century. My own research in the field of child custody decisions and rape jurisprudence suggests that this hostility may well have been characteristic of Canadian opinions. R.C.B. Risk's research in the field of workers' compensation has not shown the same pattern. See BACKHOUSE, "Shifting Patterns" and "Rape Law"; R.C.B. RISK, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario", in FLAHERTY, *Essays* vol. 2, 418-491.

80. CLARK, *Of Toronto* at 93.

verdicts were often favourable. The standing of these lawyers in the legal community may have had no small bearing upon the outcome of these cases.

V. — *Shelters and Prisons for Women and Refuges for Children:  
The Rehabilitation Approach*

The third approach seen in the nineteenth century was an attempt to accomplish the total rehabilitation of the prostitute. This approach consisted of various plans to rescue and reform prostitutes, and to train children in such a manner that they would never enter the ranks of prostitution. The rehabilitation campaign began with the premise that individual prostitutes, who were largely blameless for their condition, could achieve almost total reform.<sup>81</sup> Social purity advocates reminded their female audiences how Christ's heart had "sorrowed" for the woman who was a sinner: "What did Christ see in this lost woman? He saw a great spiritual nature which time nor sin can destroy". It was a duty of women, insisted one Nova Scotian reformer, to approach these lost sisters "in some humane office, win their confidence, awaken interest, love, and bring them, by the grace of God, again to the purity and peace that is ever for women".<sup>82</sup> The practical result of these sentiments was that Canadian women began to incorporate a large number of charitable organizations to aid in this work. Some employed agents to meet the immigrant women arriving at major Canadian ports and help them to secure respectable lodging and employment. Others actually set up shelters to house former prostitutes and women who were believed to be prime candidates to enter the trade.<sup>83</sup>

The Toronto Magdalen Asylum was perhaps the largest and best-known of these shelters. It was able to house 50 women at a time, all of whom were given moral and religious instruction and trained as domestic servants. Once admitted to the Asylum, women were required to stay for 12 months, during which time they were not permitted any contact

81. Prostitutes were blameless, it was argued, because they had been entirely duped by the deceit and predatory wiles of evil men. The blame for sexual promiscuity was placed squarely on the shoulders of men. [CAROLL SMITH-ROSENBERG, "Beauty, the Beast and the Militant Woman: Study in Sex Roles and Social Stress in Jacksonian Democracy", in Nancy COTT and Elizabeth PLECK, eds., *A Heritage of Her Own; Towards a New Social History of American Women* (New York: Simon & Schuster, 1979) 197 at 204. The sympathetic view that women criminals could achieve almost total rehabilitation was touted in widely-read novels by such figures as Rebecca Harding Davis, Elizabeth Stuart Phelps, Bayard Taylor and Harriet Beecher Stowe, who portrayed women as driven to crime by environmental influences and male oppression. Moreover, according to Rosen, "the fictional fallen women were often rescued by other women, who helped them find Christian redemption and an honest means of support". [ROSEN, *Lost Sisterhood* at 40.]

82. Jessie C. SMITH, "Social Purity" at 234-5.

83. See, for example, the Toronto Magdalen Asylum, 22 Vict. (1958), c. 73 (Province of Canada); Toronto Female Industrial School, 25 Vict. (1862), c. 63 (Province of Canada); Girls' Home and Public Nursery of Toronto, 26 Vict. (1863), c. 63 (Province of Canada); Ladies' Protestant House of Refuge in London, 27 & 28 Vict. (1864), c. 150 (Province of Canada); Hamilton Female Home of the Friendless, 36 Vict. (1873), c. 156 (Ontario); Halifax Woman's Home, 42 Vict. (1879), c. 90 (Nova Scotia); Female Reform Society of the City of St. John, 36 Vict. (1873), c. 54 (New Brunswick); Montreal Institute for Female Penitents, 3 Wm. IV (1832), c. 35 (Lower Canada); Montreal Protestant Home for Friendless Women, 40 Vict. (1876), c. 53 (Quebec). Similar organizations had existed in the United States since the 1830s. The Female Moral Reform Society, initially established in New York in 1834, was reorganized as a national society in 1839. The Society opened a house of reception to shelter prostitutes seeking to reform, and a house of industry where they could be taught new trades while being instructed in morality and religion. Their most controversial activity was the publication, in their national weekly, *The Advocate of Moral Reform*, of the names of men who frequented brothels. [See SMITH-ROSENBERG, "Beauty" at 197-211.]

with their former friends and associates. The Asylum claimed all admissions were voluntary, but Eric Jarvis has discovered that city police court records showed a number of cases where women were charged with escaping, deserting or breaking out of the Magdalen Asylum. Those found guilty of this offense were apparently given 30 days' imprisonment in the city gaol.<sup>84</sup> The shelters ultimately contributed little to these women's lives. The moral and religious instruction was undoubtedly offensive to many of them, and the occupational training they were given had little to offer in the way of economic improvement. Indeed, Lori Rotenberg has noted that almost half of the Toronto prostitutes had been domestic servants prior to entering the trade.<sup>85</sup>

As it became increasingly apparent that women prostitutes did not wish to partake of these rehabilitation programs voluntarily, the focus shifted from shelters for women to special women's prisons. Women who were detained under court order could then receive the benefit of special correctional programs designed to "reclaim the fallen" to a life of "pious, industrious domesticity", whether they wished it or not.<sup>86</sup> Interestingly, the impetus for forced rehabilitation was often linked to women's role as mothers. One reformer justified the work of the first female reformatory in North America as follows:

It is sublime work to save a woman, for in her bosom generations are embodied, and in her hands, if perverted, the fate of innumerable men is held. The whole community [supports] your endeavors to redeem the erring mothers of the next generation.<sup>87</sup>

Penologists of the day also concluded that short prison terms did not aid prostitutes in returning to a normal life. They stressed the need for lengthier segregation in order to offset the habits of a lifetime of vice.<sup>88</sup> This demand met with some acceptance in Canada. Between 1869 and 1881 the penalty for vagrancy was raised from a maximum of two months to a maximum of six months imprisonment at hard labour.<sup>89</sup>

Roman Catholic women, however, were singled out for particular attention. Under special legislation in 1871, the federal government required Quebec women who had been convicted of vagrancy more than once to serve their sentence in the Quebec female reformatory prison. The rancorous feature of this rule was that these women were required

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84. The legal basis for this remains unclear. For an excellent account of the operations of the Toronto Magdalen Asylum, see Eric James JARVIS, "Mid-Victorian Toronto: Panic, Policy and Public Response 1857-1873", (unpublished Ph.D thesis: University of Western Ontario, 1978) at 127-30. See also ROTENBERG, "The Wayward Worker" at 59.

85. ROTENBERG, "The Wayward Worker" at 39.

86. See Carolyn STRANGE, "Sinful Sisters: Historical Definitions of Female Criminality and Implications for Treatment", forthcoming article on Canadian female offenders, CRIAW Conference Papers 1983; and Estelle FREEDMAN, *Their Sisters' Keepers: Women's Prison Reform in America 1830-1930* (Ann Arbor: University of Michigan Press, 1981).

87. Bradford Pierce, Superintendent of Lancaster Reform School for Girls, reporting to the Massachusetts legislature in 1857. [Barbara BRENZEL, "Domestication as Reform: A Study of the Socialization of Wayward Girls 1856-1905", *Harvard Educational Review*, 50:2 (1980), at 196.]

88. One English group, known as the Reformatory and Refuge Union, made a report to the House of Lords in 1891, in which they argued that short-term imprisonments for prostitutes were worse than ineffectual, and advocated "long-term remedial and reformatory treatment". [FINNEGAN, *Poverty and Prostitution* at 154.] The parallels to the growing demand for juvenile detention orders and facilities indicate women's child-like status in the eyes of the policy-makers. For discussion of women criminals and penological attitudes, see STRANGE, "Sinful Sisters" at 13; Charles Richmond HENDERSON, *Dependent, Defective and Delinquent Classes and their Social Treatment*. 2nd ed., (Boston: D.C. Heath & Co., 1904) at 299. See also FREEDMAN *Their Sisters' Keepers* at 84-5, where she notes that young women whose potential for reformation seemed promising were given longer sentences to enable their fuller treatment.

89. *Supra* note 32.

to stay there a *minimum of five years*.<sup>90</sup> In 1891 the federal government also authorized lengthier detention of Roman Catholic women from Nova Scotia in the female reformatory operated by the Sisters of the Good Shepherd in Halifax. There the minimum term for women convicted of vagrancy was set at one year, with a maximum of four years.<sup>91</sup> Presumably the legislators believed that a longer term in the women's reformatory would induce these prostitutes to reform. Why Roman Catholic women were singled out for this significantly harsher treatment, however, was not revealed.<sup>92</sup> There was no legal challenge taken to these acts within the nineteenth century, and it is difficult to know whether the higher courts would have upheld them as valid legislation. However, an American statute which authorized women prostitutes of certain age groups (rather than religions) to serve longer sentences than other women criminals, was upheld as constitutional by a New York court in 1893.<sup>93</sup>

The province of Ontario also established a separate women's prison in 1878, although there was no special legislation authorizing minimum terms for prostitutes in the Andrew

90. *An Act to make provision for the detention of female convicts in Reformatory Prisons in the Province of Quebec*, 34 Vict. (1871), c. 30, s. 2 (Canada). Roman Catholic women were not specifically singled out in the legislation; it applied to women of all religions, but in the heavily Roman Catholic province of Quebec, the religious implications were clear. For some preliminary research on prostitution in Quebec, see Le Collective Clio, *L'Histoire des Femmes au Québec* (Montreal: Quinze, 1982), 216-218.

91. *An Act respecting certain Female Offenders in the Province of Nova Scotia*, 54 & 55 Vict. (1891), c. 55, s. 1 (Canada). See also *An Act to incorporate the Sisters of the Good Shepherd at Halifax*, 54 Vict. (1891), c. 135 (Nova Scotia). Under the federal statute, where such women had been convicted of vagrancy, the maximum term in the reformatory was two years. In 1895 this was amended to provide that Roman Catholic women aged 21 or over and sentenced to female reformatories in Nova Scotia should serve a *minimum* term of one year, with a maximum of two years. [*An Act to amend the Act respecting certain Female Offenders in the Province of Nova Scotia*, 58 & 59 Vict. (1895), c. 43, s. 1 (Canada).] For Roman Catholic women under the age of 21, the imprisonment could extend until she reached age 21 "or for any shorter or longer term not less than two nor more in the whole than four years". [s. 1.] By 1900, the inmates living at the Monastery of the Good Shepherd numbered 75. They appear to have been divided into classes: the "Preservation" class, the "Magdalens", and those sentenced by the Court. Under the supervision of 40 nuns, they were employed doing laundry work, the chief source of revenue for the monastery. [National Council of Women, *Women of Canada: Their Life and Work* (Ottawa, 1900) 380-381.]

92. Although the Quebec legislation did not specify Roman Catholicism as a precondition to minimum prison terms, the vast majority of Quebec women were Roman Catholic, and the Nova Scotia parallels seem to indicate that it was religion, rather than, for example, French language as a native tongue, which provoked the new stipulations in both cases.

93. *People v. Coon*, 67 Hun, 523, N.Y. Supp. 865 (N.Y. 1893). The New York legislature had passed a statute which authorized judges to sentence women convicted of common prostitution who were between the ages of 15 and 30 to the house of refuge for women for a maximum term of five years. [*An Act to provide for the establishment of a house of refuge for women*, 1881 N.Y. Laws, c. 187, as amended by 1887 N.Y. Laws, c. 17.] Women who served their sentence in the common gaol were only subjected to a maximum fine of \$500, one year, or both. Nellie Victory, a 17-year-old prostitute who had been sentenced to five years in the house of refuge at Hudson, challenged the constitutionality of this legislation, arguing that it violated the fourteenth amendment, which provided that "no state shall make or enforce any law, nor deny to any person within its jurisdiction the equal protection of its laws". The Supreme Court of New York upheld the validity of the statute: I think it within the power of the legislature to provide a punishment for children and young women at a different place, and for a different period, than the imprisonment provided for persons of a different age for the same offense. [...] So I think the legislature may prescribe a different punishment for different ages, as well as different places, and for the purpose of reforming, as well as punishing, may provide for the imprisonment of young women in the reformatory for a longer period than that prescribed ... for older women ... Using some rather unusual logic, Putnam J. concluded: "The statute under consideration does not violate the provisions of the federal constitution ... because it applies equally to all females between the ages of 15 and 30, convicted of a misdemeanour. As all of the ages stated are subject to its provisions, it does not have the effect of denying to any person the equal protection of the law". [at 868-711.]

Mercer facility.<sup>94</sup> However, the Ontario legislature permitted an indefinite extension of a woman's sentence if she were discovered to be labouring under any "contagious or infectious disease".<sup>95</sup> The necessary implication is that women detained in these institutions must have been subjected to compulsory medical inspections for venereal disease. In an ironic twist, the regulatory approach, earlier embodied in the Contagious Diseases Act, appeared to retain its hold, even when the prohibition and rehabilitation approaches were at their zenith.

The high hopes of women's prison officials for the potential rehabilitation of prostitutes were soon dashed. Ontario Provincial Commissioners who interviewed the senior staff of the Andrew Mercer facility in 1891 learned that many women returned to a life of prostitution after their release. "There are many who do well for a few months", claimed Superintendent O'Reilly, "but afterwards a good few of them fall away".<sup>96</sup> The failure of the rehabilitation policy was due to the limited nature of its aims. It was practically useless to attempt to reform prostitutes without simultaneously altering the various factors which drove them to prostitution — poverty, restricted employment options, sexual victimization of young women inside their homes and in society generally, lack of access to birth control and abortion, and the all-pervasive sexual double standard. Furthermore, the single most important aspect in the deterrence of prostitution — the demand side of the business — was entirely overlooked. No one dared to suggest that higher prison terms and rehabilitation programs be directed toward the prostitutes' customers. Even the social purity advocates largely focused their admonitions on young boys, and aimed their rehabilitation campaign at the mothers who reared them rather than making explicit demands for lengthier or more frequent prison terms for the males involved.<sup>97</sup>

With the demise of the rehabilitation goals, the campaign to rescue fallen women was extended to one of prevention — to prevent women from becoming prostitutes in the first place. As Victorian society came to realize the importance of education and environmental influences upon children, the natural impetus in the drive to eliminate prostitution was to focus on adolescent children.<sup>98</sup> Since it was believed that children who were raised by unfit parents in unseemly circumstances could grow up to become social misfits themselves, the legislators began to enact a rash of statutes to remove young girls from the custody of parents who lived in a dissolute manner and to transfer them to newly-established industrial refuges.<sup>99</sup> These statutes turned over a great deal of power to the courts, the police

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94. Ontario legislation authorized women convicted of provincial offences to serve their term in the women's reformatory, and the federal government provided similarly with respect to federal offences. [*An Act Respecting the Andrew Mercer Ontario Reformatory for Females*, 42 Vict. (1879) c. 38, s. 2 (Ontario); *An Act respecting the "Andrew Mercer Ontario Reformatory for Females"*, 42 Vict. (1879), c. 43 (Canada).]

95. Section 31 reads as follows: No prisoner shall be discharged from the reformatory termination of her sentence, if then labouring under any *contagious* or infectious disease ... but she shall be permitted to remain in the prison until she recovers from the disease or illness, and ... shall be under the same discipline and control as if her sentence were still unexpired. [*An Act Respecting the Andrew Mercer Ontario Reformatory for Females*, R.S.O. 1887, c. 239 (Ontario), emphasis added.] The earlier 1879 version of this section had used the word "cutaneous" instead of "contagious". (s. 30). Presumably this was an inadvertent mistake, but it is clear, at least in 1887, that prostitutes suffering from venereal disease could be vulnerable to extended terms of imprisonment.

96. STRANGE, "Sinful Sisters" at 12.

97. See, for example, SMITH, "Social Purity".

98. See Neil SUTHERLAND, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: 1976) at 20; and WALKOWITZ, *Prostitution* at 239.

99. In 1879 Ontario passed an act to establish an industrial refuge for girls under the age of 14. Judges could commit any girl apparently under 14 years of age to the refuge for a term of five years: 1) who was found

and Children's Aid officers. They were authorized to interfere with the lives of young girls, wrench them from their families and compel them to submit to forced detention in state custody for years at a time. The prime emphasis was upon lower class families, where "salutary parental control" had not been exercised; indeed the legislators were attempting to transform the character of an entire class, to make them conform to stringent expectations about child-rearing, sexual behaviour and general lifestyle. The most ominous aspect of the prevention campaign, however, was the call for reproductive sterilization of criminals. Under the title "Asexuality as a Remedy for Crime", one Canadian doctor reported as follows in the *Canada Medical Record* in 1888:

There was a well known case recorded of a prostitute or female tramp, having left a progeny of over one hundred and fifty criminals, including perpetrators of nearly every crime in the calendar. Had she been spayed on her second or third conviction — she was convicted a great number of times — the country would have been saved the care of this small army of outlaws. Were each man or woman returned to society from penitentiaries deprived of reproductive capabilities, how different would be the story.<sup>100</sup>

The shift from a rehabilitative approach to one of prevention signified the high point of the intrusion of the state into the affairs of the lower class. The full account of the failure of this policy, however, rightly belongs to the twentieth century.

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wandering and not having any home or settled place of abode or proper guardianship; 2) who was found destitute and was an orphan or who had a surviving parent who was in prison; 3) whose parent or guardian represented to the judge that he was unable to control the girl and that he desired that she be sent to the refuge; 4) who by reason of neglect, drunkenness or other vices of her parents or guardians, was growing up without salutary control and education, or in circumstances which rendered it probable that she would lead an idle and dissolute life. In 1893 another statute established machinery for operation of Children's Aid Societies throughout the province and gave their officers the power to apprehend girls under 14 who would previously have been committed to the refuge. The list of reasons for apprehending such girls was changed slightly, in a manner that illustrated that one of the overriding concerns was to catch young girls who might be planning to enter the occupation of prostitution. The officers were to apprehend girls "found wandering about at late hours and not having any home or settled place of abode, or proper guardianship", as well as girls "found in any house of ill-fame or in the company of a reputed prostitute". The Children's Aid Society was entitled to send these girls to a temporary home or shelter until they could be placed in a foster home. All the girls were first to be examined by a physician. They could not be sent to a shelter or home unless they had been certified as free from chronic or contagious disease, a factor reminiscent of the regulatory nature of women's prisons discussed earlier. If the child had been leading "an immoral or depraved life", and was not fit to be sent to a home, the Children's Aid Society could turn her over to a judge who would commit her to the industrial refuge. One would expect that the children of prostitutes would often have come under the confines of these statutes. [*An act for the Prevention of Cruelty to, and better Protection of Children*, 56 Vict. (1893), c. 43, s. 13, 14, 16 (Ontario).] Nova Scotia enacted legislation along similar lines in 1884 and 1888, and by 1891 the federal government had passed legislation permitting young girls convicted of federal crimes in Nova Scotia to serve their time in an industrial refuge. *Of the Prevention and Punishment of Wrongs to Children*, R.S.N.S. 1884, c. 95; *An Act for the Protection and Reformation of Neglected Children*, 51 Vict. (1881), c. 40 (Nova Scotia); *An Act respecting certain Female Offenders in the Province of Nova Scotia*, 54 & 55 Vict. (1891), c. 55 (Canada); *An Act to amend the Act respecting certain Female Offenders in the Province of Nova Scotia*, 58 & 59 Vict. (1895), c. 43, s. 1 (Canada). The province of Manitoba followed suit in 1898, although its statutes applied to both boys and girls. *An Act for the better Protection of Neglected and Dependent Children*, 61 Vict. (1898), c. 6 (Manitoba); *An Act to amend "The Children's Protection Act of Manitoba"*, 62 & 63 Vict., c. 4 (Manitoba). See also *An Act to prevent and punish wrongs to Children*, 55 Vict. (1892), c. 62 (New Brunswick).

100. The *Canada Medical Record*, July 1888, No. 10, Vol. XVII, Montreal at 240. The Canadian doctor was quoting Dr. Orpheus Everts, whose article had appeared in the *Cincinnati Lancet Clinic*, but left no doubt that he eagerly embraced the substance of the remark.

VI. — *Native Indian Prostitution: Racially-Exploited Women*

The discriminatory cast of prostitution law is clearly evident in its special treatment of native Indian women. We have already seen how certain groups, notably the immigrant Irish and blacks, showed up in very high numbers in the criminal courts. This may also be true of native Indian women, although primary research upon nineteenth century gaol records in the western provinces would be necessary to test this hypothesis. Legal discrimination against native Indian women, however, was even more deep-rooted, in that separate legislation was enacted to cover their activities.

Sylvia Van Kirk has outlined the history of the early contact between Indian women and white male fur-traders in Canada. The first sexual encounters between the two often resulted in supportive and long-lasting family unions, frequently sanctioned as marriages *à la façon du pays*. When settlement followed the fur trade, and white women began to arrive by the 1820s and 1830s, native Indian women gradually assumed secondary status as legitimate marital partners, and sexual exploitation began in earnest.<sup>101</sup> White-native unions came increasingly to be regarded as illegal and immoral, and as native culture underwent extreme dislocation, the prostitution of Indian women became a significant feature of a prairie life. James Gray has described the common practice of the latter portion of the nineteenth century whereby Indian men “squatted with their families” around trading posts, “selling the services of their wives and daughters for pennies with which to buy booze”.<sup>102</sup> Indian teepees pitched on the river flats often functioned as the first brothels for the quickly growing prairie cities.<sup>103</sup>

In 1880 the federal government enacted the first of a series of laws specifically designed to prevent the prostitution of Indian women. The statute prohibited the keeper of any house from allowing Indian women prostitutes on the premises.<sup>104</sup> This provision was different from the more general bawdy house legislation in two respects. The customary phrase “common bawdy house” had not been used, so it would no longer be necessary for the Crown to prove the character of the institution — any house would suffice. In addition, the penalty was harsher. Keepers of bawdy houses were subjected to a maximum penalty of \$50.00 or six months under the general vagrancy statute. Under the Indian provision, the prison term of six months remained the same, but a minimum fine of \$10.00 and a maximum fine of \$100.00 were indicated. In an effort to encourage the number of

101. See Sylvia VAN KIRK, “*Many Tender Ties*”: *Women in Fur-Trade Society 1670-1870* (Winnipeg: Watson & Dwyer, 1980).

102. GRAY, *Red Lights* at 27. Gray’s eagerness to point to the responsibility of Indian fathers and husbands is noteworthy, but stands out against a general dearth of recrimination against the husbands and fathers of white prostitutes.

103. The first brothels in the City of Lethbridge in southern Alberta, for example, were the teepees that the Indians pitched on the flats of the Belly River, 300 feet below the flatland upon which the city was eventually built. The North West Mounted Police documented in their annual reports that the Indians built these teepees to be closer to the white population and to encourage them to seek sexual services from the Indian women and young girls who were housed there. [GRAY, *Red Lights* at 27 and 188.]

104. *An Act to amend and consolidate the laws respecting Indians*, 43 Vict. (1880), c. 28, s. 95, 96 (Canada). The roots of much of the Indian Act can be found in earlier Assiniboia Territorial laws. Further research would be necessary to pinpoint whether this 1880 provision was a novel one, or whether it was merely carried over from the earlier territorial enactments. The act prohibited the keeper of any house from allowing an Indian woman to be there, “knowing or having probable cause for believing, that such Indian woman is in ... such house with the intent of prostituting herself therein”. (s. 95). The act deemed as keeper “any person who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any house in which any Indian woman is, or remains for the purpose of prostituting herself therein”. (s. 96).

charges against native Indians under the legislation, the Indian Act was amended in 1884 so that keepers of "tents and wigwams" as well as houses fell specifically within the statute.<sup>105</sup>

In 1886 the matter took on greater urgency. Reverend Samuel Trivett, a missionary on the Blood Indian Reserve near Fort Macleod in Alberta, charged that Indian girls were being sold into slavery by their parents. "White men came onto the reserve", he said, "bought the [Indian] girls, and when tired of them, turned them out as prostitutes into the streets of Fort Macleod". Trivett's charges caused quite a sensation and an official investigation was quickly set up. The results of this investigation were not of much assistance, however, for it was reported that the evidence was inconclusive and the issue was dropped.<sup>106</sup> That same year, however, a national scandal erupted when it was learned that some employees of the federal Indian Affairs Department had been involved in the traffic in Indian women.<sup>107</sup>

Spurred on to further legislative action, the federal government decided to place the primary emphasis on the Indians, rather than the whites involved. In 1886 criminal sanctions were placed upon "every Indian who keeps, frequents, or is found in a disorderly house, tent or wigwam used for such a purpose".<sup>108</sup> Although this represented some backtracking, in that the disorderly character of the house would have to be proved, in a number of respects the legislation had gone beyond the provisions of the more general criminal law. White men who were charged for their activities in brothels had to be "habitual frequenters". Indians merely had to "frequent" or, even less, be "found" on the premises. The ironic part was that these provisions had traditionally been meant to catch the male customers of prostitutes. The role played by Indian men in Indian prostitution was rarely that of customer, and most frequently that of keeper or pimp. These new provisions, a broad extension of the earlier frequenting sections, could now be used to attack Indian men in virtually any role connected with Indian prostitution. The federal government must have decided that this new provision was too harsh on Indian men, however, and the entire section was repealed in 1887.<sup>109</sup> When the Criminal Code was first enacted in 1892, Parliament removed all of these provisions from the Indian Act and inserted them into the Code with one alteration. The provision against Indians keeping, frequenting, or being found in disorderly houses was reintroduced, but restricted to unenfranchised Indian women only.<sup>110</sup>

105. *An Act further to amend "The Indian Act, 1880"*, 47 Vict., c. 27, s. 14 (Canada). According to George Burbidge, a legal commentator who wrote in 1890, both Indians and non-Indians could be convicted under this section. [George W. BURBIDGE, *A Digest of the Criminal Law of Canada* (Toronto: Carswell, 1890) at 169.]

106. GRAY, *Red Lights* at 27; *Toronto Globe*, 30 Jan. 1886; 24 February 1886; 4 June 1886.

107. GRAY, *Red Lights* at 27.

108. *An Act respecting Indians*, 49 Vict., c. 43, s. 106(2) (Canada).

109. *An Act to amend "The Indian Act"*, 50 & 51 Vict., c. 33, s. 11 (Canada). A new provision was also enacted, meant to apply solely to Indian women: "Or who, being an Indian woman, prostitutes herself therein, is guilty of an offence".

110. *The Criminal Code, 1892*, 55 & 56 Vict., c. 29, s. 190(c) (Canada). In the nineteenth century, for an Indian to retain his or her Indian status meant to be denied the right to vote. Only Indians who voluntarily renounced their Indian status and left the reserves were permitted to vote. The Parliamentary debates indicated that at least some of the legislators were very confused about these sections. L.H. Davies, member of the House of Commons from Prince Edward Island, stated during the debate on the Code that he thought the Indian Act was intended to apply only to the Indian reserves. By moving the provisions into the Code, he argued, "an Indian woman who went into prostitution in one of the large cities would be liable ... where a white woman would not". [*Hansards Parliamentary Debates*, House of Commons 1892, vol. 1 at 2972-3.] Davies was mistaken about this point, since the Indian Act did indeed apply to areas other than reserves. Section 14 of the Act provided that

There were many reasons why the federal legislators may have sought to regulate Indian prostitution separately. The most charitable interpretation is that they were motivated by a paternalistic, "benevolent" attitude, and regarded prostitution as an especially corrupting influence on Indian communities and culture. A more invidious motive may have been their desire to prevent miscegenation.<sup>111</sup> The Metis uprisings of the time had created a certain panic, and the government may have been anxious to impede sexual relations between Indians and whites. Parliament may also have wished to legislate separately concerning Indian prostitution because of the difficulties of enforcing general vagrancy statutes against Indians. In European cultural terms, all Indians would have been vagrants. They did not farm or work for wage labour but hunted and fished for livelihood. As they were increasingly confined to the reserves, their hunting and fishing opportunities presumably diminished, accentuating their lifestyle. If different customs of sexual relations persisted within some Indian tribes, it might also have been difficult for courts to determine which women were "common prostitutes" under the general criminal legislation. Indeed Ruth Rosen has noted that in colonial America, an Indian woman who admitted to having sexual relations with a white man was often referred to as a prostitute whether or not there was evidence of payment or indiscriminate sexual relations with many men.<sup>112</sup> The Indian legislation contained no mention of the phrase "common prostitute" and would thus have made it easier to convict Indian women. There were no reported cases in the nineteenth century dealing with these sections, so it is difficult to know whether the courts interpreted them differently from the general law against prostitution. However, the separate criminal legislation on Indian prostitution, with its attendant emphasis on the activities of Indians rather than whites, revealed that racial discrimination ran deep through the veins of nineteenth century Canadian society.

## VII. — Conclusion

Prostitution law in nineteenth century Canada was laced with discriminatory intent and impact. Each of the three legal approaches — regulation, prohibition and rehabilitation — featured discrimination on the basis of class, race and ethnic origin. Sex discrimination, however, was even more prominent as each set of laws — whether by design or through application — created legal impediments for women which did not exist for men.

Abraham Flexner may have captured the basis for this sex discrimination in his rather surprising comments on male frequenters, given in a report he wrote for a Rockefeller study, *Prostitution in Europe*, published in 1914:

The professional prostitute being a social outcast may be periodically punished without disturbing the usual course of society. The man, however, is something more than a partner in an immoral act: he discharges important social and business relations, is as father or brother responsible for the maintenance of others, has commercial or industrial duties to meet. He cannot be imprisoned without deranging society.<sup>113</sup>

Indian reserves were to be subject to the provisions of the statute, which would necessarily indicate that reserves were not the exclusive areas regulated by the legislation. The error was not corrected during the debate, however, since Sir John Thompson, the Minister of Justice who had introduced the Code to the House, did not respond.

111. See Michael GROSSBERG, "Governing the Hearth: Law and Family in Nineteenth-Century America", unpublished manuscript, at 178-9, for a discussion of the legal attack on Indian-white miscegenation in the decade of the 1870s in the United States.

112. ROSEN, *Lost Sisterhood* at 1.

113. ABRAHAM FLEXNER, *Prostitution in Europe* (New York: Century, 1914) at 108. The study was sponsored by John D. Rockefeller through the Bureau of Social Hygiene.

Although there were few accounts of what the women prostitutes themselves thought, one striking illustration was recorded by Josephine Butler, who related what one prostitute had angrily stated:

It is *men*, only *men* from the first to the last that we have to do with! To please a man I did wrong at first, then I was flung about from man to man, then police lay hand on us. By men we are examined, handled, doctored, and messed on with. In the hospital it is a man again who makes prayers and reads the Bible for us. We are up before magistrates who are men, and we never get out of the hands of men.<sup>114</sup>

Things might well have been different if women themselves had had the opportunity to formulate social policy as voters and politicians, and to create and enforce legislation as legislators, police officers and judges. There is no doubt that many women believed that the sexual market of exchange in women's bodies for profit was reprehensible and an extreme violation of fundamental human rights and dignity. If women had been permitted to enter the legal arena, they might have intensified the campaign against prostitution, and would perhaps have been less lenient with the men who produced the demand for prostitutes' services. Indeed they might have insisted that the unbalanced emphasis on the prostitute herself was unfair and poorly calculated to effect the ultimate goal of eliminating prostitution or its attendant evils. Instead of directing all the resources of the legal system against the weakest link in the lengthy chain of actors involved in the barter and sale of women's bodies, they would no doubt have placed greater emphasis elsewhere. The men who reaped the real financial rewards in their role as property owners of brothels, procurers and pimps would likely have been subjected to more systematic criminal sanctions, as would the male customers who made the existence of prostitution possible in the first place.

Merely 15 years after the turn of the century, Nellie L. McClung wrote passionately:

[T]he white slave traffic [is] kept up by men for men — women pay the price — the long price in suffering and shame. The pleasure and profit — if there be any — belong to men. Women are the sufferers — and yet the law decrees that women shall not have any voice in regulating these matters.<sup>115</sup>

Making the explicit connection to women's direct involvement in the political process, she noted that in California, where women had had the vote for three years, a bill had just been passed to ensure that the owners of brothels were to be taken to task for their part in prostitution. In California, she noted,

If prostitution is proven against a house, that house is closed for one year, the owner losing the rent for that time. This puts the responsibility on property owners. That is the greatest and most effective blow ever struck at white slavery, for it strikes directly at the money side of it!<sup>116</sup>

Sadly, the subsequent granting of the franchise to women in Canada seems not to have been the panacea that McClung and others expected. Mere voting rights were not sufficient to ensure that the discriminatory features of the laws against prostitution were eradicated. The complete integration of women as powerful forces inside the political and criminal justice system still awaits us, however. One could venture to argue that until this occurs, discriminatory laws, discriminately enforced, will continue to contribute little or nothing to the diminution of prostitution and the ultimate removal of commercial barter and trade from human sexuality.

114. WALKOWITZ, *Prostitution* at 128.

115. Nellie McCLUNG, *In Times Like These* (Toronto: U. of T. Press, 1972; orig. pub. 1915) at 76.

116. *Id.*