

Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society

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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^e siècle révèle que les législateurs et les réformateurs sociaux optèrent 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 services sexuels, ou proxénétisme et aux profits tirés de ce travail. Et ils tentèrent également de réhabiliter 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 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 lawmakers 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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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.¹ 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.² 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 publick 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.³

The first Canadian statute to mention prostitutes specifically was passed in Lower Canada in 1839.⁴ 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.⁵

Although the criminal law in Canada was usually modelled upon English precedents, there were some differences between the two countries at this stage.⁶ 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.⁷ In addition,

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.⁸ In 1865 the united provinces of Upper and Lower Canada passed the Contagious Diseases Act.⁹ 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.¹⁰ The statute was virtually an exact duplicate of an English act by the same name passed in 1864.¹¹ 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.¹² 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

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 gonorrhea. (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.¹³

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".¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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?"²¹

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.²² 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.²³ 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.²⁴ 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".²⁵ 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.²⁶

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.²⁷ 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.²⁸ The actual methods by which some of these women were initiated into prostitution varied; according to Ruth

"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 PIVAR, *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".²⁹ 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.³⁰

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.³¹ 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.³²

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.³³ 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".³⁴

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".³⁵ 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 1900.³⁶ 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.³⁷

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.³⁸ 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.³⁹ 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".

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 Thorner, 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.⁴⁰ 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.⁴¹

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.⁴² 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.]