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.)[43]

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	26	21	20	11		
	78.5%	7.2%	5.8%	5.5%	3.0%		
1865	405	61	42	98	20	349	277
	64.7%	9.7%	6.7%	15.7%	3.2%	55.8%	44.2%
1873	307	74	17	123	10	247	271
	57.8%	13.9%	3.2%	23.2%	1.9%	47.7%	52.3%
1885	205	98	29	176	30	259	277
	38.1%	18.2%	5.4%	32.7%	5.6%	48.3%	51.7%
1895	102	76	15	129	26	172	176
	29.3%	21.8%	4.3%	37.1%	7.5%	49.4%	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	0	0	4	3	6	12
	61.1%			22.2%	16.7%	33.3%	66.6%
1873	5	0	1	2	0	3	5
	62.5%		12.5%	25.0%		37.5%	62.5%
1885	11	6	1	14	1	9	24
	33.3%	18.2%	3.2%	42.4%	3.0%	27.3%	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".[44] 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.[45] 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.[46] 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.[47]

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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.[48] (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.[49] 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.[50]

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.)[51] 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

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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.[52] 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.[53]

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".[54] A total of 65 male customers were subjected to criminal prosecution, six of whom were eventually discharged.[55] 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.[56]

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

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[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",[57] 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."[58] 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".[59]

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".[60] 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.[61] 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.[62] 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".[63]

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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 passer-by, 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.[64] Canadian Supreme Court Justice John Wellington Gwynne similarly referred to prostitutes as "these unfortunate creatures" in an 1894 judgment.[65]

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.[66] 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.[67]

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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 necessaries 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.[68] 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".[69] 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.[70] 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.[71] 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.[72] 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.[73] 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."[74]

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.[75]

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

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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.