

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

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

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

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

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

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

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

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

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

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

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

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

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

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

80. CLARK, *Of Toronto* at 93.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89. *Supra* note 32.

to stay there a *minimum of five years*!⁹⁰ In 1891 the federal government also authorized lengthier detention of Roman Catholic women from Nova Scotia in the female reformatory operated by the Sisters of the Good Shepherd in Halifax. There the minimum term for women convicted of vagrancy was set at one year, with a maximum of four years.⁹¹ Presumably the legislators believed that a longer term in the women's reformatory would induce these prostitutes to reform. Why Roman Catholic women were singled out for this significantly harsher treatment, however, was not revealed.⁹² There was no legal challenge taken to these acts within the nineteenth century, and it is difficult to know whether the higher courts would have upheld them as valid legislation. However, an American statute which authorized women prostitutes of certain age groups (rather than religions) to serve longer sentences than other women criminals, was upheld as constitutional by a New York court in 1893.⁹³

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

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

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

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

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

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

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

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

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

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

96. STRANGE, "Sinful Sisters" at 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Spurred on to further legislative action, the federal government decided to place the primary emphasis on the Indians, rather than the whites involved. In 1886 criminal sanctions were placed upon "every Indian who keeps, frequents, or is found in a disorderly house, tent or wigwam used for such a purpose".¹⁰⁸ Although this represented some backtracking, in that the disorderly character of the house would have to be proved, in a number of respects the legislation had gone beyond the provisions of the more general criminal law. White men who were charged for their activities in brothels had to be "habitual frequenters". Indians merely had to "frequent" or, even less, be "found" on the premises. The ironic part was that these provisions had traditionally been meant to catch the male customers of prostitutes. The role played by Indian men in Indian prostitution was rarely that of customer, and most frequently that of keeper or pimp. These new provisions, a broad extension of the earlier frequenting sections, could now be used to attack Indian men in virtually any role connected with Indian prostitution. The federal government must have decided that this new provision was too harsh on Indian men, however, and the entire section was repealed in 1887.¹⁰⁹ When the Criminal Code was first enacted in 1892, Parliament removed all of these provisions from the Indian Act and inserted them into the Code with one alteration. The provision against Indians keeping, frequenting, or being found in disorderly houses was reintroduced, but restricted to unenfranchised Indian women only.¹¹⁰

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

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

107. GRAY, *Red Lights* at 27.

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

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

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

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

VII. — Conclusion

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

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

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

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

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

112. ROSEN, *Lost Sisterhood* at 1.

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

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

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

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

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

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

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

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

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

114. WALKOWITZ, *Prostitution* at 128.

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

116. *Id.*