

NINETEENTH CENTURY JUDICIAL ATTITUDES TOWARD CHILD CUSTODY, RAPE AND PROSTITUTION

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1. INTRODUCTION

Canadian judges have historically shown perceptible bias against women. Throughout the nineteenth century they handed down judicial opinions which sprung from deep-rooted preconceptions about the nature of womanhood and the restricted roles women should play in a sexually unequal society. They appear to have believed that women should be solely confined to domestic responsibilities, occupying an unmistakable subordinate role inside a hierarchical, patriarchal family unit. Sexually they espoused a strict Victorian ethic, requiring from women virginal status before marriage and chaste, wifely behaviour subsequently. Their acceptance of the double standard, which permitted men much greater sexual licence, could be accommodated by a marked tolerance for prostitution as an indispensable social institution.

Given the context within which these decisions were issued, one might initially surmise that the judges were merely reflecting contemporary social and cultural realities. Economically women were restricted from almost all of the lucrative jobs during the nineteenth century. Barred from entering the professions throughout most of the century, they were largely relegated to low-paid, low-status positions as domestic servants, seamstresses, milliners, school-teachers, retail sales clerks and factory workers.¹ Access to birth control was limited, and although the fertility rates did decline during the century, most women would spend a good portion of their adult lives bound to the twin responsibilities of pregnancy and child-rearing.² Throughout much of the century women were denied formal status at law.

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1 For general information about women's options in nineteenth-century Canada, see Light and Prentice (eds.), *Pioneer and Gentlewomen of British North America 1713-1867* (1980).

2 *Ibid.*

They could not vote, serve as elected officials, or sit as jurors or as judges.³ It was not until 1897 that Clara Brett Martin was admitted to the practice of law in Ontario, the first such woman in all of Canada.⁴

Yet closer examination shows that many sectors of the population sought improvements in the status of women in nineteenth-century Canada. Social reformers, some religious leaders, and newly emerging women's organizations fought for enhanced recognition of women's status, and greater protection of women and children from exploitation.⁵ Their concerns culminated in the passage of provincial and federal legislation which embodied many protective measures meant to improve the position of women in Canadian society. The judiciary, for its part, revealed itself to be largely hostile to much of this legislative reform, and responded with deliberate and undisguised antagonism. An investigation of the judges' nineteenth-century decisions in the areas of child custody, rape and prostitution law indicates a systematic attempt to diminish the impact of the legislation and to restrict women to traditional roles within a male-dominated society.

2. CHILD CUSTODY AWARDS

Until the nineteenth century, a father's right to the custody of his children was virtually absolute. Children were treated as a form of property, and as the patriarchal head of the family, fathers were deemed to be entitled to the persons and services of their offspring.⁶ Although courts of chancery were permitted to depart from these common law rules in extraordinary cases, equitable intervention was extremely rare.⁷ With the advent of industrialization and urbanization, the nineteenth century witnessed dramatic changes in the nature of the family. The home ceased to be the chief economic unit of production as self-sufficient cottage industry was replaced by industrial wage labour. Childhood received new standing as a distinctive stage of life, and social reformers began to emphasize the importance of child nurture to the rearing of responsible citizens. Women

3 For a discussion of women's formal legal status in Canadian history, see Cleverdon, *The Woman Suffrage Movement in Canada* (1974; orig. pub. 1950). She notes that women were permitted to vote in local school board elections in certain areas during the nineteenth century, and to be elected to such positions.

4 See Backhouse, "To Open the Way for Others of My Sex': Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985), 1 *Can. J. of Women and the Law* 1.

5 For a description of some of the social reform activities of women's organizations and social leaders, see generally *supra* note 1, and Cook and Mitchinson (eds.), *The Proper Sphere: Woman's Place in Canadian Society* (1976).

6 Blackstone, *Commentaries on the Laws of England*, University of Chicago ed. (1979), vol. I at 441, 449; Bowerman, *Law of Child Protection* (1933) at 3-4.

7 See, for example, *R. v. De Mannville* (1804), 5 East. 221, 102 E.R. 1054 (K.B.), where the court refused to depart from the common law preference for paternal custody despite evidence of wanton disregard for a child's welfare on the part of the father.

and young children were increasingly relegated to the home where motherhood was elevated to the status of a profession.⁸

The traditional patriarchal custody rules no longer served the new conception of family responsibilities. Following the lead of the English Parliament, Canadian legislators began to introduce statutory amendments to the common law custody rules.⁹ An 1855 enactment in Upper Canada led the way. It gave judges the discretionary authority to award custody of children under the age of 12 to their mothers. The order could not be made in favour of a mother guilty of adultery.¹⁰

Most Canadian judges exercised their new-found discretion in a profoundly conservative manner. Hostile to any weakening of the patriarchal family, they cloaked their animosity over the legislation in rather transparent legal reasoning. Ruling that the legislative reform had left the father's legal rights fundamentally intact, they argued that the statute merely codified the very narrow jurisdiction courts of chancery had always had to award custody to mothers in exceptional circumstances.

One of the best examples of this, *Re Allen*,¹¹ involved a custody dispute between Dr. Allen, physician and mayor of the City of Cornwall, and his wife. Dr. Allen had subjected his wife to "great cruelty" and had ultimately ejected her from the matrimonial home. He retained physical custody of two children, aged six and three, who were being raised by a paid housekeeper.¹² Mrs. Allen's request for custody was denied by Justice Adam Wilson, who based his decision primarily upon the common law. "At common law", he noted, "there is no authority to remove children from their father's custody for any cause whatsoever". Wilson J. dismissed the new legislation as completely irrelevant: "The general policy of the law with reference to father and child was not altered by recent legislation. . . ." he proclaimed.¹³ Similar decisions created a pattern of jurisprudence in which the majority of judges concluded that a father remained entitled to custody unless extraordinary evidence could be mounted against him.¹⁴

The judicial foot-dragging clashed with the beliefs and goals of social and religious leaders who were demanding greater recognition of the

8 Cook and Mitchinson, *supra* note 5; Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (1976); Aries, *Centuries of Childhood: A Social History of Family Life* (1962); Douglas, *The Feminization of American Culture* (1977).

9 For a detailed description of nineteenth-century child custody law in Canada, see Backhouse, "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in Flaherty (ed.), *Essays in the History of Canadian Law* (1981), vol. I at 212.

10 An Act Respecting the Appointment of Guardians and the Custody of Infants, 1855 (18 Vict., c. 126). The statute was similar to An Act to Amend the Law Relating to Custody of Infants, 1839 (2 & 3 Vict., c. 54).

11 (1871), 31 U.C.Q.B. 458 (C.A.).

12 The facts are taken from the trial judgment, reported at (1869), 5 P.R. 443, in which Mrs. Allen was granted custody.

13 *Supra* note 11 at 486, 499-500; Morrison J. dissented.

14 See, e.g., *Re Carswell* (1875), 6 P.R. 240; *Re Leigh* (1871), 5 P.R. 402; *Re Kinney* (1875), 6 P.R. 245.

maternal role in child development. Newly emerging women's organizations sought to bolster the Canadian family and eulogized the role of women in the home.¹⁵ Ministers proclaimed women to be divinely appointed guardians of the hearth, and insisted upon greater recognition of the "holy office of motherhood".¹⁶ Against this backdrop, Canadian legislators across the country enacted statutes increasing maternal custody rights.

The Ontario Legislature moved in 1887 to restrict judicial discretion, giving the bench specific matters to consider in any custody decision. No longer permitted to rely upon the common law enshrinement of patriarchal rights, judges were henceforth to base their awards upon "the welfare of the infant, the conduct of the parents, and the wishes as well of the mother as of the father".¹⁷ The politicians undoubtedly felt that the judges had been placing too much emphasis upon paternal rights and were determined to even the balance. New Brunswick, Nova Scotia and British Columbia followed Ontario's lead and enacted legislation to equalize maternal and paternal rights to some degree.¹⁸

During the last decades of the nineteenth century, the judges grudgingly began to appreciate the need for greater custody rights for mothers, but a number of decisions still stand out as ringing endorsements of patriarchal privilege.¹⁹ In general, mothers obtained custody only where fathers had serious defects of character and engaged in socially intolerable behaviour. Even then, judges usually only awarded mothers custody when they were living under the protection of some other male, often their fathers or brothers, and only where they had not disqualified themselves by an adulterous relationship or some other conduct that the Canadian courts considered unseemly. The power of the judiciary greatly retarded the impact of legislation designed to enhance maternal custody rights in the face of widespread social pressure for reform and successive legislative initiatives. The decisions of the judges reveal a deep mistrust of egalitarian marriages and an overt preference for the entrenchment of patriarchal power inside the family.

15 For a description of the emergence of women's organizations in Canada, see generally Cleverdon, *The Woman Suffrage Movement in Canada* (1974).

16 See, e.g., Austin, *Woman: Her Character, Culture and Calling* (1980) at 462-66.

17 An Act respecting the Guardianship of Minors, 1887 (50 Vict., c. 21) (Ont.). The Act was similar in some respects to the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27) (Eng.).

18 Supreme Court in Equity Act, 1890 (53 Vict., c. 4) (N.B.); An Act respecting the Custody of Infants, 1893 (56 Vict., c. 11) (N.S.); Guardian's Appointment Act, R.S.B.C. 1897, c. 96.

19 See, for example, *Re Foulds* (1893), 9 Man. R. 23 (Q.B.); *Re Hatfield* (1895), 1 N.B. Eq. 142; *Re Armstrong* (1895), 1 N.B. Eq. 208.

3. RAPE LAW

Rape originated as a crime against male property rights in women, an attack upon sexual property. Damages paid to the rape victim's father traditionally relieved the guilt of the culprit.²⁰ By the nineteenth century, however, rape had come to be viewed as a crime against women, a particular form of sexual violence against female persons. Nineteenth-century English treatise writers defined rape as "having unlawful and carnal knowledge of a woman, by force and against her will".²¹ Nevertheless, certain features of the common law betrayed the origins of the crime. Before convicting for rape, some courts required proof that a woman's hymen had been ruptured and that semen had been emitted.²² Evidence of the violation of virginity and the potential for pregnancy was necessary to prove an interference with the exclusive male ownership of female sexual organs.

Canadians inherited the English criminal law, but between 1840 and 1870, legislators made a number of statutory changes to the law of rape. Courts were prohibited from requiring proof of emission of semen before conviction,²³ any degree of penetration was to be sufficient (obviating the need for evidence of hymen rupture),²⁴ and a new crime of assault with intent to commit rape was introduced.²⁵ The latter provision removed the necessity of proving any penetration at all. This legislation hastened the altering status of the crime. It diminished the need to show violation of another male's exclusive ownership of his daughter's or wife's sexual and reproductive organs. Instead legislators wished to use the force of the criminal law to protect women's sexual integrity. Women were increasingly to be protected from sexual abuse in their own right, and to be entitled as individuals to sexual autonomy.

Despite this liberal legislative framework, most nineteenth-century Canadian women experienced the criminal law as scant protection from rape.²⁶ In the hands of the courts, they found the law restrictively conceived and even more narrowly applied. The proprietary origins of the law tenaciously resurfaced. Theoretically any woman was entitled to protection from rape. In reality only young unmarried women still living with their fathers and married women championed by their husbands found their

20 See Blackstone, *Commentaries on the Laws of England*, University of Chicago ed. (1979), vol. IV at 210 for an account of early Jewish law.

21 Russell, *A Treatise on Crimes and Misdemeanours* (1843), vol. I at 675.

22 Jurisprudence was not uniform on these points, with some courts requiring such evidence and others not. See Russell, *ibid.* vol. I at 679-86; East, *Pleas of the Crown* (1803), vol. I at 439-40; Smith, *Roscoe's Digest of the Law of Evidence in Criminal Cases*, 10th ed. (1884), at 901-902.

23 An Act for Consolidating and Amending the Statutes in This Province Relative to Offences against the Person, 1841 (4 & 5 Vict., c. 27), s. 18 (P.C.).

24 An Act respecting Offences against the Person, 1870 (32 & 33 Vict., c. 20), s. 65.

25 An Act for Better Proportioning the Punishment to the Offence, in Certain Cases, and for Other Purposes Therein Mentioned, 1842 (6 Vict., c. 5), s. 5 (P.C.).

26 For a detailed account of nineteenth-century Canadian rape law, see Backhouse, "Nineteenth-Century Canadian Rape Law 1800-92" in Flaherty (ed.), *Essays in the History of Canadian Law* (1983), vol. II at 200.

complaints treated with respect. The case of the "Sayer Street Outrage", as it was labelled in the newspapers, revealed the fate of independent women who made complaints of rape.²⁷

The woman concerned was Ellen Rogers, an unmarried woman who lived in a common law relationship with a gambler in Toronto. On the night of 13th December 1858, 16 or 17 rowdy youths broke into her home when her gambling friend was absent. While one of the hooligans held Rogers down, four others proceeded to rape her. Charges of rape were laid against Robert Gregg and three of the other men involved. Gregg's defence counsel based his case on Rogers' open avowal of extra-marital relationships. How could the court believe such a woman, "of the loosest grade and character", he thundered, in the face of protestations of innocence from his client, a young man from a responsible family? Ellen Rogers faced the inevitable "not guilty" verdict with justifiable bitterness, bravely insisting to the end that regardless of her life-style she should be given equal protection of the law.

Canadian judges frequently speculated that women would make false accusations of rape. In the 1855 case of *R. v. Francis*,²⁸ Justice William Henry Draper gave voice to the ever-present fears of the bench. He noted that situations often arose "when a detected adultress, might, to save herself, accuse a paramour of a capital felony".²⁹ To protect themselves from the schemes and wiles of devious women, Canadian courts proved reluctant to convict for rape unless the victim appeared to be a virtuous and upstanding woman. If there was even a hint of evidence that the woman voluntarily indulged in social drinking at taverns and such, the complaint would be rejected out of hand.³⁰ The legislation appeared on its face to grant women a large measure of sexual autonomy, but the courts were prepared to extend this only so far. A woman who strayed beyond the bounds of strict Victorian sexual propriety could find herself at the mercy of whichever men chose to take advantage of her. The judges would convict only where the victim was a modest woman, living an exemplary life above reproach.

The Canadian judges also believed that if a chaste woman were attacked by a rapist, she would resist to the utmost. She could be overcome only by overwhelming physical force. In *R. v. Fick*,³¹ Chief Justice William Buell Richards advised the jury that they "had a right to expect some resistance on the part of the woman, to shew that she really was not a consenting party". Elaborating upon this direction, Justice Adam Wilson

27 *R. v. Gregg*, Archives of Ontario, RG22, York County Minute Books, 6th January 1859; *Globe*, 14 Jan. 1859.

28 (1855), 13 U.C.Q.B. 116.

29 *Ibid.* at 116-17.

30 See, e.g., *R. v. Cudmore*, Archives of Ontario, RG22, York County Minute Books, 19th October 1865; *R. v. English*, Archives of Ontario, RG22, York County Minute Books, 18th April 1866. See also *Globe*, 19 April 1866.

31 (1866), 16 U.C.C.P. 379.

added: "the woman [must have] been *quite overcome by force or terror, she resisting as much as she could . . . to the utmost . . .*"³²

According to the judges, a rapist who accomplished his act through fraud or deception was properly beyond the reach of the criminal law. In one 1855 case,³³ the accused climbed into bed with a woman while she was asleep without waking her, intending to impersonate her husband. As he was attempting to have sexual intercourse the woman awoke, discovered her intruder, and made her escape. Justice Draper subsequently acquitted the man of assault with intent to commit rape, concluding that "there was danger in implying force from fraud, and an absence of consent, when consent was in fact given, though obtained by deception".³⁴

Such rulings caused considerable problems for women with mental disabilities. In one such case³⁵ the court refused to register a conviction where the accused was caught in the act of having sexual intercourse with a married woman who had been considered insane for some years. Justice John Hawkins Hagarty speculated that an insane woman might be capable of consenting to sexual relations out of "animal instinct or passion".³⁶ A "medical man" testified that the victim in this case was a "fully developed woman, and that strong animal instinct might exist notwithstanding her imbecile condition".³⁷ Despite the prosecution's outraged protest that upon this reasoning "every idiot found on the street might be ravished with impunity", the court quashed the conviction.³⁸ Special legislation was required to correct these judicially created injustices.³⁹

As with custody rulings, a pattern emerged in the nineteenth century where judges interpreted rape law in the narrowest of fashions, while legislators were forced to enact statutory amendments to expand the scope of the law of rape. As the judges saw it, the proper role for women was to remain safe within the patriarchal home, protected by their fathers and husbands from any illicit sexual contact. The chaste woman would never be exposed to the violation of rape, and should the unthinkable happen, she would succumb only in the face of unbridled physical force. Women who experienced sexual assault under any other conditions did not deserve protection from the law of rape.

32 *Ibid.* at 382-83. Emphasis in original.

33 *R. v. Francis* (1855), 13 U.C.Q.B. 116.

34 *Ibid.* at 117.

35 *R. v. Connolly* (1867), 26 U.C.Q.B. 317.

36 *Ibid.* at 323.

37 *Ibid.* at 320.

38 *Ibid.* at 318.

39 The legislators broadened the protection of the rape laws to cover women who had submitted because of fraud or mental handicap. See An Act to Punish Seduction and Like Offences, and to make further provision for the Protection of Women and Girls, 1886 (49 Vict., c. 52), s. 1(2) (D.C.); An Act to Further Amend the Criminal Law, 1890 (53 Vict., c. 37), s. 14 (D.C.); The Criminal Code, 1892 (55-56 Vict., c. 29), s. 266 (D.C.).

4. PROSTITUTION LAW

During the nineteenth century, most social reformers saw prostitution as a leading symbol of male sexual exploitation of women. The double standard required a life of unblemished chastity for middle and upper class women, but winked at the sexual indiscretions of their male counterparts. As a result a whole class of "fallen women", often manipulated by deceit or forced into this life by economic deprivation, was required to service the needs of promiscuous men. Progressive reformers set their goals to eradicate the exploitation of these women, to root out the commercialization of sex, and to establish a "single standard" of sexuality whereby men and women both conformed to lives of sexual respectability.⁴⁰

Canadian legislators responded to the resulting campaign to eliminate prostitution by enacting a series of laws which prohibited almost every aspect of the trade except for the actual act itself.⁴¹ The expansive enactments covered prostitutes working inside brothels and on the streets, their customers, their landlords, their employers, and all those who contributed to the sale of female sexuality or lived off the avails of its financial reward.⁴² The judiciary, in turn, largely subverted the potential of this legislation to eradicate prostitution. The judges systematically narrowed the scope of the criminal provisions to leave most aspects of sexual trade untouched.

In *R. v. Levecque*,⁴³ Victoria Levecque was charged with being a "common prostitute" who was "wandering in the public streets" and unable to give "a satisfactory account of herself" contrary to An Act respecting Vagrants, 1869.⁴⁴ The evidence revealed that a passerby had been out walking one evening in Ottawa when he came across Levecque, who was drunk, with a soldier in the barrack-yard. He saw the soldier put Levecque "against the wall and [take] up her clothes". The passerby also testified that he knew the defendant as a prostitute by reputation. Justice Adam Wilson refused to register a conviction, holding that the Crown had not proven the barrack-yard to be a public place, nor Levecque to be a prostitute. Moreover he claimed that "the prisoner was under no necessity to give any account of herself unless she was asked to do so". He saw

40 See, for example, Smith "'Social Purity', Women's Christian Temperance Union (Nova Scotia 1898)" in Cook and Mitchinson (eds.), *The Proper Sphere: Woman's Place in Canadian Society* (1976) at 234; Brooking, "Conditions in Toronto" originally published in *Canada's War on the White Slave Trade* (1911), reprinted in Cook and Mitchinson (eds.) at 241; Watt, *Moral Legislation: A Statement Prepared for the Information of the Senate* (1890). For accounts of English and American counterpart movements, see Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (1980), and Rosen, *The Lost Sisterhood: Prostitution in America 1900-1918* (1982).

41 For a detailed account of nineteenth-century prostitution law in Canada, see Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society", forthcoming *Social History/Histoire sociale*.

42 *Ibid.*

43 (1870), 30 U.C.Q.B. 509.

44 (32 & 33 Vict., c. 28), s. 1.

the case as one of prostitutes' rights: "[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."⁴⁵ This ruling entailed a judicial decision to shift the offence from one of "status" to one requiring publicly obstructive or indecent behaviour. Given that Victoria Levecque was caught having sexual relations in an outdoor barrack-yard where she had been observed by an offended passerby, the judge's analysis seems somewhat at odds with the evidence.

The same type of legal attitude also appeared when judges considered charges against men who frequented bawdy-houses. Justice Hugh MacMahon insisted that such individuals be asked to give an account of their presence before charges were laid. Indeed he was prepared to itemize a long list of legitimate reasons why men might be found on such premises: "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, &c., who might readily give a satisfactory account of his or her presence in such a house. . . ."⁴⁶ Procedural irregularities were often used to quash convictions. In *R. v. Gibson*,⁴⁷ an Ontario judge discharged a prisoner who was obviously guilty of attempting to procure a 17-year-old woman to work in a New York brothel, on the basis that the indictment improperly contained the word "or" between the counts charged.

The judiciary further whittled away the reach of the criminal law by interpreting the word "prostitution" to exclude cases where a woman was paid to provide sexual services exclusively to one man. In *R. v. Rehe*,⁴⁸ Justice Jonathan S.C. Wurtele held that a woman kept as a mistress by a man in Quebec was not a prostitute in the legal sense. "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", he declared.⁴⁹ The judge seemed genuinely unconcerned about this commercialized sexual relationship, preferring to classify the activity as a private matter.

Although members of the bench often referred to prostitutes in sympathetic terms, as "unfortunate people" and "unfortunate creatures",⁵⁰ this did not entail any sensitivity for the women themselves. Their decisions on prostitution can only be characterized correctly when viewed within the context of their other judgments on child custody and rape law which reveal little solicitude for women. They may have couched their prostitution

45 *Supra* note 43 at 513-16.

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

47 (1898), 29 O.R. 660. See also *R. v. Shepherd* (1902), 6 C.C.C. 463 (N.S.S.C.); *R. v. Spooner* (1900), 32 O.R. 451 (C.A.).

48 (1897), 1 C.C.C. 63 (Que. Q.B.).

49 *Ibid.* at 65.

50 See, for example, *Arscott v. Lilly* (1886), 11 O.R. 153 at 182, affirmed 14 O.A.R. 297 (C.A.) and *Clark v. Hagar* (1894), 22 S.C.R. 510 at 541 [Ont.].

decisions with assertions about the sanctity of individual freedoms, but this did not entail any recognition of women's right to freedom *per se*. By no means did they intend their rulings to liberate women for equality of employment or full sexual autonomy. They wished to see the criminal law keep its distance from prostitution because they believed that commercialized sex was a necessary social evil and that a certain number of morally unconventional women were required to satisfy pressing male needs. They acceded to the inevitability of prostitution in a sexually divided world and were zealous to prevent criminal legislation from intruding on sexual trade. Their judgments combined to ensure institutionalized male access to the sexual services of women.

5. CONCLUSION

An examination of judicial opinions in the areas of child custody, rape and prostitution law provides evidence of unmistakable bias against women. Examined as a whole, judicial decisions in nineteenth-century Canada reflect a circumscribed view of women's rights in general. The judges overwhelmingly supported fathers over mothers in child custody awards and significantly retarded the impact of legislation designed to increase maternal custody rights. They consistently favoured the evidence of accused rapists over rape complainants and were markedly reluctant to pronounce findings of rape unless the women concerned had behaved in a strictly circumspect manner. Perhaps most surprisingly, nineteenth-century judges appear to have been remarkably solicitous of prostitutes' rights. They utilized a variety of methods of statutory interpretation designed to permit prostitutes to practice their occupation unfettered by law.

The decisions in the fields of child custody and rape disclose stubborn judicial convictions that women should occupy a strictly limited role in nineteenth-century Canadian life. Judges preferred to see women ensconced in sheltered passivity inside a patriarchal family; however where the family unit broke down, the hierarchical nature of the institution became starkly apparent. Fathers rather than mothers were to receive the bulk of child custody awards. Before or after marriage, judges enforced sexual dictates which harshly penalized women who strayed from restrictive moral standards, and left them exposed to the attention of rapists without much protection at law.

The judges' attitudes regarding prostitution seem, on the surface, somewhat out of harmony with their views on child custody and rape. Closer examination reveals that the rulings were not designed to protect the female prostitute. Indeed the "loose" women so carefully removed from the reach of prostitution laws were the very type of women judges so insistently denied criminal protection from rape. The narrow interpretation that the judges gave to prostitution law was designed to protect not the women, but the institution of prostitution itself. That male judges, who were so quick to disregard women's rights in other areas, should view

the institution of prostitution as critical to the preservation of traditional and unequal sex roles is a sobering thought. Modern feminists who argue for the decriminalization of prostitution would do well to reflect upon the historical record in this regard.