

January 1988

The Impact of Bill C-49 on Street Prostitution: "What's Law Got to Do with It"

Sheilagh O'Connell

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

O'Connell, Sheilagh. "The Impact of Bill C-49 on Street Prostitution: "What's Law Got to Do with It"." *Journal of Law and Social Policy* 4. (1988): 109-145.

DOI: <https://doi.org/10.60082/0829-3929.1182>

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol4/iss1/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

**THE IMPACT OF BILL C-49
ON STREET PROSTITUTION:
"WHAT'S LAW GOT TO DO WITH IT?"**

Sheilagh O'Connell*

"...the legislation deals with the problem of soliciting for the purposes of prostitution in public places. It does not pretend to deal with anything but the problem of street soliciting; the nuisance caused to ordinary members of the public."

**Hon. John Crosbie, Minister of Justice and
Attorney-General of Canada,
Opening Statement to the Legislative Committee
on Bill C-49, Oct. 10, 1985¹**

"Those who are obsessed by a frenzy for legislative measures achieve contentment and futility. The slow way is the only way here: education, a changed social outlook, a gradual reorganization of economic conditions, these may remove such causes as are within our control."

**Teresa Billington-Greig,
on the passing of the 1912 Criminal Law
Amendment Act to expand prostitution laws
under the Code, 1913²**

* Copyright © 1988 Sheilagh O'Connell. Sheilagh O'Connell is a student at Osgoode Hall Law School in Downsview, Ontario. This paper was written for the Intensive Program in Poverty Law and is published here as part of the special arrangement which the Journal has with that program. As part of the program, students work at Parkdale Community Legal Services in Toronto, Ontario. Selected papers written by students in the program are reviewed by the Journal for possible publication.

1 Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, Issue 1:12 (10 October 1985) Hon. John Crosbie.

2 Teresa Billington-Greig, "The Truth about White Slavery" (1983) 14 *English Review* 428-429.

INTRODUCTION

Some people are offended by the visibility of street prostitutes in their communities and thus have pressured the federal government to deal more effectively with their presence.³ Responding to this pressure, the federal government passed Bill C-49 on December 20, 1985.⁴ The new law, which replaces s. 195.1 of the *Criminal Code*, makes it an offence in a public place to offer to buy or sell sexual services.⁵ It gives considerable powers to the police to remove both the customer and the prostitute from the street. There are a number of different responses to the new version of s.195.1 of the *Code*. Advocates of the criminalization of prostitution support the new law as a necessary means of controlling the nuisance problems associated with street prostitution.⁶ Some supporters of criminalization, however, feel it does not go far enough.⁷ Advocates of the decriminalization of prostitution argue that the "communicating law" (as it is referred to), both in effect and enforcement, punishes those individuals (mostly poorer women), who do not have the resources or the opportunities to work in relatively private and safe conditions and thus, less subject to legal control.⁸ At the same time, this group argues that the government fails

3 *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, House of Commons, Issue 3:4-14. See the evidence given by representatives of the Downtown Halifax Residents' Association and the Concerned Residents of the West End (CROWE) of Vancouver.

4 Joan Riggs, "Prostitution Bill Drives 'Oldest Profession' Underground" (March, 1986) 9 *Perception* 51.

5 *The Criminal Code*, S.C. 1985, c. 50, s. 195.1. For complete wording please see p. 61 of this paper.

6 *Supra*, note 3, Issue 5: 11-22. See, in particular, evidence given by Alderperson May Brown of Vancouver, Mayor Jean Drapeau of Montreal, Mayor William Smeaton of Niagara Falls and James Moody, Staff Superintendent of the Niagara Falls Regional Police Department.

7 Special Committee on Pornography and Prostitution (The Fraser Committee) *Report of the Special Committee on Pornography and Prostitution* Vol. 2 (Ottawa: Dept. of Supply and Social Services, 1985) at 515 (also known as the Fraser Report). Varying degrees of further criminalization were supported by the Canadian Association of Chiefs of Police, fundamentalist protestant churches, community and commercial groups, residents and some mayors in major cities affected by street prostitution.

8 *Supra*, note 7. According to the Fraser Report, this position was supported by a majority of women's groups and included also individual prostitutes, gay rights organizations, groups of and individual social workers, some mainline church groups and civil liberties organizations.

to address the larger and more complex issue of prostitution in general, and therefore perpetuates the problem. Prostitutes point out the hypocrisy of a law which criminalizes the activities around prostitution although prostitution itself is not illegal.⁹

Advocates of the legalization of prostitution perceive prostitution as a necessary and permanent social phenomena which therefore should not be criminalized but instead legalized and regulated by the state.¹⁰

Feminists have supported the argument for decriminalization, arguing that the criminal law only gets in the way of constructive long-term social and economic strategies.¹¹ Thus, while they denounce the commodification and exploitation of female sexuality inherent in prostitution, feminists acknowledge that many women with little or no options against a background of disproportionate poverty are compelled to enter prostitution.¹² In supporting the decriminalization of prostitution, feminists are not condoning the sexual exploitation of women (and youth) but rather the right of women who enter prostitution to be free from harassment and punishment by the state. This only serves to compound their oppression within the context of women's subordination in general.¹³ Instead of enacting legislation¹⁴ aimed at minimizing the visibility of street prostitution, feminists argue that the government should be focusing on long-term economic and social strategies which

9 Valeries Scott, "C-49: A New Wave of Oppression" in L. Bell, ed., *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: The Women's Press, 1987) at 100.

10 *Supra*, note 7. This position was supported by individual presenters, including a minority of municipal politicians, although one Vancouver residents' group also supported this.

11 See Christine Boyle and Sheila Noonan, "Prostitution and Pornography: Beyond Formal Equality" (1986) 10 Dalhousie L.J. 225; John Lowman, "You Can Do It But Don't Do It Here: Some Comments on Proposals for the Reform of Canadian Prostitution Law" in Lowman *et al.*, eds., *Regulating Sex* (Burnaby, B.C.: Simon Fraser University, 1985) at 193.

12 For a discussion of women's poverty seen as it relates to work: P. Armstrong, *Labour Pains: Women's Work in Crisis* (Toronto: The Women's Press, 1984); to family; M.J. Mossman and M. McLean "Family Law and Social Welfare: Toward a New Equality" (1985) 5 Canadian Journal of Family Law 79; Lucie Pepin, "Strengthening Poverty's Hold on Women", *The [Toronto] Globe and Mail* (16 November 1987) at B-1.

13 C. Boyle, *supra*, note 11 at 247.

14 The Fraser Report, *supra*, note 7 at 359. In particular, see the submission of the National Action Committee on the Status of Women.

address the condition of women's poverty and female/male socialization which gives rise to prostitution in the first place.

In light of these arguments, this essay will examine the effect of further criminalization of street prostitution in Canada with the passing of Bill C-49. Before looking specifically at Bill C-49 however, a brief examination of the history of Canadian prostitution law will be undertaken, particularly how it has helped to shape and reinforce the social and legal meaning of prostitute in our society. Secondly, the paper will also examine the sociobiographies of street prostitutes before turning to an examination of the impact of the criminalization of prostitution-related activities on their lives. Third, this paper will critically examine the arguments for further criminalization which led to the enactment of Bill C-49 and suggest alternate explanations for the perceived "failure" of the old version of s. 195.1. Finally, the paper will outline and critique major recommendations made by the Fraser Committee¹⁵ for the reform of Canadian prostitution law before turning to an examination of Bill C-49 and its impact on street prostitution today.

HISTORICAL BACKGROUND

Until 1972, the emphasis of Canadian prostitution law has been on penalizing the prostitute, socially and legally constructed as a deviant woman, while virtually ignoring the male clientele which frequented prostitutes.¹⁶ Towards the end of the nineteenth century, a body of criminal law developed which had a more protective bent – directed towards protecting virtuous women from exploitative men¹⁷ – but, as shall be discussed later, this ostensibly protectionist legislation actually served to oppress the very group it was designed to protect.

The earliest provisions in Canadian criminal law relating to prostitution developed out of general vagrancy statutes and specifically dealt with street prostitution and the running and frequenting of bawdy houses.¹⁸ These laws were designed to remove social "undesirables"

15 See note 7.

16 For a historical overview of Canadian prostitution law see Constance Backhouse, "Canadian Prostitution Law 1839 to 1972" in *Prostitution in Canada* (Ottawa: CACSW, 1984) at 7-19.

17 John McLaren, "Chasing the Social Evil: Moral Fervour and the Evolution of Canadian Prostitution Laws" (1986) 1 *Canadian Journal of Law and Society* at 135-137.

18 "Statutes passed in Nova Scotia, Upper Canada and New Brunswick authorized the detention of "disorderly persons, vagabonds, and persons of lewd behaviour", and prohibited the keeping of common bawdy houses". See 33 Geo. 11 (1759), c. 1 (Nova Scotia); 40 Geo. III (1800), c. 1 (Upper Canada); 9 & 10 Geo. IV (1829), c. 8 (New Brunswick). Constance Backhouse, *supra*, note 16 at 97.

from the community and to maintain a sense of public order.¹⁹ The first comprehensive statute dealing with prostitution was enacted in 1839 in Lower Canada and made it an offence for a prostitute to be in a public place for the purposes of prostitution.²⁰ Police were authorized to apprehend "all common prostitutes or streetwalkers wandering in fields, public streets or highways, not giving a satisfactory account of themselves".²¹ Similarly, in 1867 Parliament passed *An Act Respecting Vagrants* which included in its definition of vagrants "common prostitutes" seen wandering in "fields, public street ... highways, lanes or places of public meeting or gathering of people, not giving a satisfactory account of themselves".²² Thus, no overt behaviour or activity was required to arrest a prostitute. Unlike other members of the public, a prostitute who could not explain her presence in a public place to a police officer (or any woman who could not give a 'satisfactory account of herself') was arrested.

The penalization of the prostitute women in public existed in the Canadian *Criminal Code* until very recently. In 1972, s.175(1)(c) of the *Code* commonly referred to as the "Vagrancy C" offence, stated that "...everyone commits a vagrancy who ... being a common prostitute or nightwalker was found in a public place and when required, failed to give a satisfactory account of herself." [emphasis added]

Underlying this gender-specific offence, therefore, is the view that prostitutes who exchanged sex for money were deviant – sharply diverging from prescribed roles of female sexual conduct – while the men who frequented prostitutes were not. By focusing on only one of the participants in the transaction, the implication is that it is women prostitutes who are somehow the cause of prostitution, exploiting the male sexual "needs" for their own gain. As Christine Boyle has argued, "separated spheres of deviance and non-deviance were created – deviant women and normal men".²³ The double standard which informs this approach has been described by Mary McIntosh as one which sees that "frequencing prostitutes in a male as forgivable

19 John McLaren, *supra*, note 17 at 127; Constance Backhouse, *supra*, note 16 at 7.

20 2 Vict. (1) 1839, c. 2 (Lower Canada).

21 C. Backhouse, *supra*, note 16 at 7.

22 32 & 33 Vict. (1869), c. 20 (Canada).

23 Christine Boyle and Sheila Noonan, "Prostitution and Pornography: Beyond Formal Equality" (1986) 10 Dalhousie Law Journal at 227.

while being a prostitute, perhaps more than any other form of promiscuity, is totally reprehensible in the female".²⁴ McIntosh and others have argued that this double standard arose out of the ideology of female monogamy in heterosexual marriage and the sanctity of the family in Victorian England: "unchastity is much more evil in woman than in a man. For a man it is simply giving in to his sexual urge; for a woman, it is a betrayal of her husband or father and of her whole home and family life."²⁵ Indeed although prostitutes breached the code of conduct governing female sexual behaviour, at the same time they were seen as being a necessary outlet for male sexual needs, thus protecting virtuous woman and the purity of the Victorian family.²⁶ Thus, although initially shaped by this ideology of male and female sexual conduct,²⁷ the law contributed greatly to its maintenance and reinforcement by constructing a specific legal category of prostitute women which "it then subjected to a unique form of prosecution and regulation."²⁸

In the latter part of the nineteenth century, however, a new cultural image of the prostitute was emerging alongside of the image of the prostitute as "fallen women".²⁹ As Judith Walkowitz has demon-

24 Mary McIntosh, "Who Needs Prostitutes? The Ideology of Male Sexual Needs", C. Smart and B. Smart, eds., *Women, Sexuality and Social Control* (London: Routledge and Kegan Paul, 1978) at 53.

25 *Ibid.* at 63.

26 *Ibid.*

27 The double standard of morality governing male and female sexuality is most clearly seen with the passing of the Contagious Diseases Act in England and in Canada in 1864 and 1865 respectively. The Acts authorized the sanitary inspection of women identified and registered as common prostitutes by the police. The intention of the Act was to prevent the spreading of venereal disease among military men who frequented prostitutes, although the men themselves were not subject to such regulation. Opponents argued that the Act officially sanctioned a standard which justified "male sexual access to a class of fallen women and penalized women for engaging in the same vice as men". The Act was successfully challenged and repealed in England while in Canada, the statute expired without re-introduction. See Judith Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge University Press, 1980).

28 Carol Smart, "Legal Subjects and Sexual Objects: Ideology, Law and Female Sexuality" in Julia Brophy and Carol Smart, eds., *Women-In-Law* (London: Routledge and Kegan Paul, 1985) at 51.

29 Judith Walkowitz, "Male Vice and Feminist Virtue: Feminism and the Politics of Prostitution in Nineteenth Century Britain" (1982) 13 *History Workshop Journal* at 79-93.

strated, this was the image of the "innocent child victim or the chaste and virtuous women exploited by corrupt aristocrats and international traffickers" in prostitution.³⁰ In both England and Canada, an increasingly influential segment of the middle-class pressured their governments for laws which would correct the growing evidence of street prostitution in urban industrial centres.³¹ While in England this movement (growing out of the earlier campaign to repeal the *Contagious Diseases Act*)³² was initiated originally by more radical feminists and religious non-conformists, in Canada the movement developed along more mainstream political and religious lines.³³ Although initially opposed by male legislators and politicians who held the view that prostitution was inevitable and necessary, this movement was successful on both sides of the Atlantic in establishing a large body of prohibitive legislation designed to protect women and girls from exploitative men.³⁴

Some 19th century feminists, most notably Josephine Butler, realized that the growth of street prostitution in nineteenth century industrial England was a gender and class-stratified phenomenon – young, poor working class women and girls were servicing largely establishment and middle-class males.³⁵ These "unskilled daughters of the unskilled classes"³⁶ were part of a large body of labouring women who were compelled by desperate poverty and lack of viable economic alternatives to prostitute themselves to survive. For Butler, therefore, the prostitution was not seen as "a question of natural vice nearly so much as one of political and social economy."³⁷ However, for the majority of those

30 Judith Walkowitz, *ibid.* at 82.

31 John McLaren, *supra*, note 17 at 129.

32 See footnote 27.

33 John McLaren, *supra*, note 17 at 129.

34 Judith Walkowitz, "Male Vice and Feminist Virtue: Feminism and the Politics of Prostitution in Nineteenth Century Britain", *supra*, note 29; John McLaren, *supra*, note 17.

35 Maggie Sumner, "Prostitution and the Position of Women: A Case for Decriminalization", *Women and Crime: Papers Presented to the Cropwood Round-Table Conference*, Cropwood Conference Series No. 13 (Cambridge: University of Cambridge, 1981) at 94.

36 Abraham Flexner, *Prostitution in Europe* (New York: 1914) at 6, cited by Judith Walkowitz, *supra*, note 29 at 81.

37 Josephine Butler, quoted by Maggie Sumner, *supra*, note 35 at 94.

involved in the reform movement, the entry into a life of prostitution was not a matter of free choice, or explained by social or economic deprivation, but was caused by the dastardly wiles of a clandestine and vile league of exploiters.³⁸

Thus, in Canada, "An Act Respecting Offences Against Public Morals and Public Convenience" was enacted by Parliament in 1886,³⁹ which helped to shape later legislation relating to procuring and bawdy houses. The Act established a series of offences designed to protect young girls and women from those who lead them into prostitution while at the same time, stiffening laws relating to brothels.⁴⁰ A wider set of prohibitive laws was later enacted under the consolidated *Criminal Code* of 1892.⁴¹ Women under 21 who were not "common prostitutes" or of "known immoral character" were protected from procuring for the purposes of "unlawful carnal connection".⁴² It was an offence to "inveigle or entice" any woman or girl into a house of ill-fame or assignation for the purposes of prostitution.⁴³ These and other procuring offences, however, contained a corroboration section in which the accused could not be convicted on the evidence of one witness alone (that is, the victim) in the absence of corroboration.⁴⁴ The keeping of a common bawdy house was an offence included in the nuisance part of the *Code*, and prescribed up to one year imprisonment for operating one.⁴⁵ These offences were expanded and tightened up again in 1913 under the *Criminal Code Amendment Act* and, with the exception of the repeal of the "Vag. C" offence in 1972 and the shift towards gender-neutrality, are the same offences which exist today.⁴⁶

Rather than eradicating prostitution however, (as they were intended to do), the effect of this series of legislative offences was ironically most to those they were designed to protect. As McLaren observes, the

38 McLaren, *supra*, note 17 at 131.

39 *An Act Respecting Offences Against the Public Morals and Convenience* (1886) 49 Vict., c. 157 (Canada).

40 John McLaren, *supra*, note 17 at 134.

41 *The Criminal Code of Canada* (1892), 55-56 Vict., c. 29, ss. 269, 181-184.

42 *Ibid.*, s. 185(a).

43 *Ibid.*, s. 185 (b)(c).

44 *Ibid.*, s. 684.

45 *Ibid.*, s. 198.

46 McLaren, *supra*, note 17 at 149.

"complex of legal provisions which was designed to primarily attack the exploiters of prostitutes was used primarily to harass and victimize the prostitutes themselves."⁴⁷ McLaren argues that the assumptions underlying the legislation were misplaced in the first place since "the reformers and legislators ignored the economic and social forces which led women and girls into prostitution":

"In their concern to apply middle-class morality to working class problems, they failed to understand that if this was a moral problem, it was one of the social immorality of consigning working class families and females in particular to the type of living conditions and lack of economic opportunity in which prostitution was seen as an attractive option."⁴⁸

Although some charges were being laid for procuring, the overwhelming number of charges were brought against women for vagrancy and bawdy house offences.⁴⁹ In Vancouver, between 1912 and 1915, over 80% of those charged for keeping a common house were women.⁵⁰ The majority of these women were operating alone or out of single rooms or lodgings. Constance Backhouse's research for this period indicates that a significant number of those who ran bawdy houses in Toronto were single working class women who, as McLaren has speculated, "may well have started out as prostitutes and graduated to brothel keeping as the opportunity presented itself or advancing age overtook them."⁵¹

At the same time however, the incidence of prostitution did not decrease.⁵² Instead, the nature of prostitution itself was dramatically changed in order to adjust to the repressive enforcement patterns which the new laws created.⁵³ In 1917, the Chief Constable of Toronto reported that the decline in bawdy house charges between 1916 and 1917 "does not necessarily indicate that the morality of the city has improved, but merely that sexual intercourse is indulged in other ways

47 *Ibid.* at 151.

48 *Ibid.* at 137.

49 *Ibid.* at 151.

50 *Ibid.*

51 Backhouse, "Nineteenth Century Canadian Prostitution Law", as cited by McLaren, *supra*, note 17 at 138.

52 McLaren, *ibid.* at 151.

53 McLaren, *ibid.*; Walkowitz, *supra*, note 29 at 83.

in other places beyond the reach of the police."⁵⁴ On the one hand, effective enforcement of bawdy houses (usually directed against single women working out of their homes) forced some women onto the street, since the incidence of street prostitution rose during this period.⁵⁵ On the other hand, it compelled other women to operate more covertly, forcing them to rely on the help of men to gain lodgings or find clientele.⁵⁶ Thus, as MacLaren's research indicates, to a large extent, greater criminalization forced women to rely more heavily on outside parties (men who are commonly referred to as pimps), a problem which was relatively non-existent before the late nineteenth century.⁵⁷ As Judith Walkowitz states, describing the British experience after the precursors to the Canadian law had been passed in Britain:

"...legal repression dramatically affected the structure and organization of prostitution. Prostitutes were uprooted from their lodgings and had to find lodgings in other areas of the city...Cut off from other sustaining relationships they were forced to rely increasingly on pimps for emotional security as well as protection against legal authorities. Indeed, with the wide prevalence of pimps in the early 20th century, prostitution shifted from a female- to a male-dominated trade."⁵⁸

THE IMPACT OF CRIMINALIZATION TODAY

As the previous section has indicated, the development of Canadian prostitution law has had a definite impact on the nature and incidence of prostitution itself, while not actually decreasing the incidence of prostitution, as the statutes were intended to do. Most obviously, its legal constructs of women as either "fallen women" who needed to be penalized or "virtuous women" who needed to be protected, had little bearing on the reality of the lives of women working as prostitutes. However the effect of increasing criminalization dramatically

54 McLaren, *ibid.* at 151.

55 *Ibid.*

56 *Ibid.* at 141.

57 *Ibid.* Ironically, the growth of pimping, directly the result of the law reform movement by moral reformers was addressed by "the enactment of further legislation which made living on the avails of a prostitute a criminal offence for the first time in England" and in Canada in 1913.

58 Walkowitz, *supra*, note 29 at 83.

changed their lives and working environment, increasingly rendering women as legal and social outcasts and largely alienating them from the working class or poorer communities to which they belonged. This section will briefly examine modern Canadian prostitution law, particularly the application and enforcement of laws relating to street prostitution as well as the effect of criminalization on street prostitutes today.

In 1972, responding to pressure from women's groups,⁵⁹ the federal government repealed s. 175(1)(c) of the *Criminal Code*⁶⁰ and replaced it with s. 195.1, the recently repealed 'soliciting' offence. This ended the era of the sex-specific vagrancy offence in which the female prostitute's status was at issue because she (or any woman who was suspected to be a prostitute) had to explain her presence in a public place. The new gender-neutral 'soliciting offence' stated that "every person who solicits any person in a public place for the purpose of prostitution is guilty of a summary conviction offence."⁶¹ Thus, the legislative emphasis shifted from penalizing the prostitute herself, to penalizing what was recognized as the 'soliciting' or 'public nuisance' aspects of street prostitution.⁶²

According to some observers, this ostensible shift in emphasis was largely influenced by the 1959 British Wolfenden Commission's approach to dealing with street prostitution.⁶³ The Wolfenden Report held that it was not the object of the law to interfere with 'private morality' – the state should only be concerned with "those activities which offend against public order or decency or expose the citizen to

59 See *Report of the Royal Commission on the Status of Women* (Information Canada, 1970).

60 *Criminal Code Amendment Act*, S.C. 1972, c. 13, ss. 12, 15.

61 *The Criminal Code*, S.C. 1972, s. 195(1)(c) (hereinafter referred to as the *Code*).

62 In *R. v. Rolland* (1975), 27 C.C.C. (2d) (Ont. C.A.), the Court stated: "Prostitution is not criminal under the Code but the evident intention of Parliament is to abate the nuisance which the practice may occasion." However, despite this shift in emphasis, the courts continued to debate about whether potential male customers or male prostitutes could be found guilty of soliciting. See for example the differing judicial interpretations in *R. v. Dudak* (1978) 41 C.C.C. (2d) 31 (B.C.C.A.) and *R. v. DiPaola* (1978) 43 C.C.C. (2d) 199 (Ont. C.A.).

63 Lowman, "Vancouver Field Study of Prostitution", Working Paper on Pornography and Prostitution #10, 2 vols. (Ottawa: Dept. of Justice, 1984) at 297.

what is offensive or injurious.”⁶⁴ Thus, the underlying assumption of the report was that prostitution in private should not be interfered with although the state should regulate the public manifestation of prostitution in order to mitigate its “worst effects such as...disorder and nuisance to the general public.”⁶⁵

Although this public/private distinction informs Canadian prostitution law, its formulation is ambiguous, if not hypocritical, although in practice the dichotomy is more clearly demonstrated. In Canada, prostitution itself, that is, the act of exchanging sexual services for money, is not illegal. However, while the act of prostitution remains legal, the combined effect of the “web” of Canadian prostitution law – street soliciting, bawdy house offences and procuring offences – effectively makes all forms of prostitution illegal. Theoretically, therefore, under the bawdy house laws,⁶⁶ prostitutes who work from their home are charged with an indictable offence, prostitutes who work with others under the procuring offences⁶⁷ and prostitutes working on the street are charged with the soliciting (now called communicating) offence, thus making it legally impossible to practise prostitution.

In practise, however, research has indicated that police will be usually more tolerant of less visible forms of prostitution-related activity (for example, escort services, massage and body rub parlours falling under procuring and bawdy house laws) unless public complaints are raised or there is a concern that criminal interests are involved.⁶⁸ Furthermore, police have indicated that it is often an extremely difficult and expensive process to enforce bawdy house and procuring laws, as undercover operations must be established, often with little result.⁶⁹ In June of 1984, a study of Toronto police attitudes toward escort services indicated the following:

“During the course of our interviews police representatives indicated that escort services are investigated strictly by complaint...Prostitutes involved in escort services are not

64 *Wolfenden Commission* (1963) at 143 as cited by Maggie Sumner, *supra*, note 35 at 255.

65 *Ibid.*

66 *Criminal Code*, s. 193.

67 *Criminal Code*, s. 195.

68 *The Fraser Report*, *supra*, note 7 at 410-411, 416-418.

69 *Ibid.*

heavily policed and according to one officer, the escort services exist through the good will of the police. Presently they are left alone because of the attention being given to street prostitutes."⁷⁰

Given that street prostitution represents the smallest proportion of all forms of prostitution in Toronto,⁷¹ this statement is significant. Despite the illegality of all forms of prostitution-related activity, the state is willing to put more time and energy into regulating the public manifestation of a very small proportion of it.⁷² According to the Fraser Report, based on research findings across Canada: "Female street prostitutes are more likely to be arrested and convicted for street prostitution-related crimes than any other category of persons in the business. Pimps and customers are the least likely to be convicted."⁷³ Thus, despite what appears to be a shift in legislative emphasis from the women-specific vagrancy offence to the gender-neutral 'public nuisance' legislation, in effect, both are still aimed at regulating the public presence of the female street prostitute.

What is the impact of the criminalization of prostitution on women who are engaged in street prostitution? This question can only be answered by first examining the social and economic context from which female (and youth) prostitution arises. It has been argued that prostitution is a manifestation of the general subordination of women in a male-dominated society.⁷⁴ It emerges from a context of the disproportionate poverty of women in a society in which female sexuality is objectified and valued by men, a socially and economically more pow-

70 John Fleishman, "Prostitution in Ontario: An Overview" Working Papers on Pornography and Prostitution #10 (Ottawa: Department of Justice, 1984) at 64.

71 According to the Bureau of Municipal Research in Toronto, street prostitution amounts to about 20% of all prostitution in Toronto and this number drops to about 5% in the winter. D. Brock, "The Fraser Report: Sex and the Single Committee" No. 3 *Broadside* (Dec. 1985/Jan. 1986) at 9.

72 Furthermore, police have indicated in both Toronto and Vancouver that, in addition to formal methods of control, many informal procedures or "general harassment techniques are used, almost all of these being directed at female prostitutes. See Lowman, "Vancouver Field Study of Prostitution", Working Paper on Pornography and Prostitution #8, Vol. 1 at 416; Fleishman, *supra*, note 70 at 64.

73 The Fraser Report, *supra*, note 7 at 391.

74 See Mary McIntosh, "Who Needs Prostitutes? The Ideology of Male Sexual Needs", *supra*, note 24.

erful group.⁷⁵ Given this context and the fact, as indicated in the previous section, that the criminal law has largely been enforced against those women who do not have the resources to carry out their activities in private,⁷⁶ the penalization of women engaged in street prostitution exacerbates their already subordinate position in society.

Sociobiographical research across Canada, sponsored by the Federal Justice Department, has extensively documented the marginalized position of women who enter into street prostitution.⁷⁷ Like their nineteenth century counterparts, street prostitutes are overwhelmingly female, from poor and working class backgrounds, have little or no formal education and little or no job experience.⁷⁸ Most prostitutes are in the 18-24 age group, although juvenile prostitutes are sometimes identified in particular areas.⁷⁹ A disproportionate number of female prostitutes are native women or women of colour.⁸⁰ Evidence also indicates

75 *Ibid.*

76 Evidence has suggested that prostitution is a class-stratified profession. 'Call girls' and women working in escort services are predominantly middle to upper-middle class, while street prostitutes overwhelmingly come from poor or working class backgrounds. See Fleishman, *supra*, note 70 at 17; see also footnote 77.

77 For information on the sociobiographies of street prostitutes in Canada between 1982 and 1984 see generally: N. Crook, "A Report on Prostitution in the Atlantic Provinces", Working Paper on Pornography and Prostitution #12 (Ottawa: Department of Justice, 1984); J. Fleischman, *supra*, note 70; R. Gemme *et al.*, "A Report on Prostitution in Quebec", Working Paper on Pornography and Prostitution #11; M. Lutt, "A Report on Prostitution in the Prairies", Working Paper on Pornography and Prostitution #9; J. Lowman, "Vancouver Field Study of Prostitution," Working Paper on Pornography and Prostitution #8, 2 vols.

78 The Maritime study found that 84% of street prostitutes had not completed high school, in Quebec 68% had less than high school education and in Vancouver, in Lowman's study, of the 79 people interviewed, only 12 had finished Grade 12; Special Committee on Pornography and Prostitution (The Fraser Committee), *Report of the Special Committee on Pornography and Prostitution*, 2 Vols., (Ottawa: Dept. of Supply and Services, 1985) at 377; In Ontario, Grade 10 was the highest grade completed by most prostitutes interviewed. For more information on background and class, see The Fraser Report, *op. cit.*

79 The Fraser Report, *ibid.* at 371, 372.

80 According to Marie Arrington, Alliance for the Safety of Prostitutes, in Vancouver, 50% of female street prostitutes are women of colour, while in Winnipeg, 80% are Black and Native women, similar statistics are true for Regina and Calgary. Marie Arrington, "Under the Gun" in L. Bell, ed., *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: The Women's Press, 1985) at 174.

that those women who had other job experience were working largely in minimum wage traditionally female-dominated occupations.⁸¹

Not surprisingly, the vast majority of prostitutes interviewed for the above-mentioned research stated that economic need led them into prostitution.⁸² Unlike the popular image or myth which gave rise to the procuring offences of the nineteenth century, most women who enter street prostitution are not forced to do so by exploitative men (although some women may be forced to stay by men who are their pimps⁸³), but do so out of little economic alternative. In fact evidence indicates that women who enter prostitution often perceive this as a temporary move, in order to survive an economically difficult period.⁸⁴ In the Parkdale area of Toronto, for example, some single mothers on welfare will turn to prostitution near the end of the month when they no longer have money to pay for food or other expenses.⁸⁵ As one observer in Halifax noted,

"Low income women who get involved in prostitution are not aberrations. They're just like anyone else except they didn't get the same breaks. Some of them come from violent homes – either as children or adults. Some of them have never had the opportunity to get an education or acquire job skills. Even if they do, the jobs aren't there. And even if they can get a minimum wage job, they can't afford child care, they can't afford housing, often they can't afford food for their children."⁸⁶

Although perceived as a temporary or transient occupation in some cases, the conditions which compelled many women to enter prostitu-

81 In Lowman's study, 70% of the prostitutes who had previous job experience held traditionally "unskilled service" positions such as waitresses, gas jockeys, etc., while a small minority had been involved in "white collar" labour (i.e. clerks). Lowman, *supra*, note 77 at 244.

82 The Fraser Report, *supra*, note 78 at 376.

83 Lowman, *supra*, note 77 at 235; Fleischman, *supra*, note 70 at 16.

84 Lowman, *ibid.* at 235-249.

85 Based on information gathered during an interview with Peter Hanson, streetworker for Street Outreach Service (December, 1987).

86 Carol Wambolt as quoted by Sharon Fraser in "Defending the Right to Do the Work They Do," *Atlantic Insight* Vol. 20 No. 6 (June 1988) at 17.

tion maintain them there even after they wish to leave.⁸⁷ The majority of prostitutes see prostitution as a form of work which is extremely difficult to leave once entered.⁸⁸ Given their already marginal position in the labour market with little or no education and no 'legitimate' employment record prostitute women are in a very precarious position. This is compounded by the fact that the majority have a criminal record, thereby exacerbating the difficulty to re-enter other employment.⁸⁹

At the same time, research has indicated that the accumulation of income while working as a prostitute is extremely difficult, thus making the 'exit' from prostitution in the face of an unwieldy job market more difficult.⁹⁰ Criminalization, despite its effort to reduce street prostitution, ironically has contributed to keeping most women on the streets for a longer period. Access to legal services is difficult if not impossible for street prostitutes. If not receiving welfare assistance, many women do not have proof of earnings or means of support which is required for Legal Aid application.⁹¹ Similarly, as street soliciting is a summary conviction offence, women will often not qualify for Legal Aid regardless of proof of earnings.⁹² Since most women cannot afford lawyers's fees, they often, if not always, plead guilty.⁹³ Thus, through

87 *Ibid.* at 242-42. In Vancouver, 60% of the prostitutes said they would quit prostitution if a viable economic alternative became available although most saw prostitution as extremely difficult to leave.

88 *Ibid.* However, little research has been done on those women who do eventually leave, since most female prostitutes are in the 18-24 years category.

89 In Ontario, 69% of interviewed prostitutes had a criminal record, 25% for prostitution-related offences; Maritimes, 62% with a criminal record; Vancouver, 67% had a record, the majority being charged with non-prostitution related offences.

90 Based on data gathered from interviews the average net income of Vancouver street prostitutes was between \$5,000-\$10,000/yr. Lowman, *supra*, note 77 at 404.

91 Based on information gathered during interview with Amber Cooke, Streetworker for Adult Female Prostitutes, Elizabeth Fry Society (November 1987).

92 This is based on my experience at Parkdale Community Legal Services, Toronto, Ontario, 1987.

93 Elizabeth Fry Society of Toronto, *Streetwork Outreach with Adult Female Prostitutes*, Final Report: May, 1987, at 20; Canadian Advisory Council for the Status of Women, *Prostitution in Canada*, at 36.

the 'revolving door' of bail hearings, convictions and fines, women must increase their workload in order to offset the financial losses incurred and the debts owed to others.⁹⁴

The criminalization of prostitution creates a dangerous and life-threatening work environment for prostitutes also. Although violence and abuse from customers were cited as the overwhelming hazard for prostitutes, only a fraction of these assaults are reported to the police.⁹⁵ The majority of prostitutes feel they get little or no satisfaction when they report a crime to the police and often are faced with a "you deserved what you got" attitude.⁹⁶ Research has indicated that an ambivalent attitude prevails among the police with respect to protecting prostitutes from abuse. As the Fraser Committee report stated, based on the research of police attitudes compiled: "On the one hand, prostitutes are entitled to be treated like any other citizen but on the other hand, police will argue that prostitutes are in a violent and quasi-legal profession and should not be surprised when they are mistreated."⁹⁷

Police harassment is not uncommon also. 'Informal' methods of control or 'general' harassment techniques to remove a street prostitute from an area have been known to extend into violence.⁹⁸ Although some

94 In Toronto, streetworkers who contacted 243 adult female prostitutes in 1987 reported:

"About 75% of the women contacted had been charged under s. 195.1 more than once...The payment of fines...involves going out to work to earn the necessary and the possibility of another charge. It seems ironic to them that the penalties imposed by society for working as a prostitute...involves fines, lawyers fees and lost time which in fact require them to work to fulfill the penalty."

Elizabeth Fry Society of Toronto, *Streetwork Outreach with Adult Female Prostitutes*, Final Report: May, 1987, at 20

95 "B.C. Prostitutes Hurt More Often Than Miners", *The Toronto Star* (26 December 1987) at H-15. In the Vancouver study, 74% of the prostitutes interviewed had been assaulted by customers while 55% of the respondents had been raped or sexually assaulted by customers. However, "very few of these crimes were ever reported to the police." Lowman, *supra*, note 77 at 251.

96 Elizabeth Fry Society of Toronto, *supra*, note 94 at 7; Lowman, *supra*, note 77 at 251.

97 The Fraser Committee Report, *supra*, note 77 at 388.

98 In the Vancouver study, a total of 17 of 39 prostitutes informed the interviewers that they had been beaten by the police. Lowman, *op. cit.* In Toronto, according to the Canadian Organization for the Rights of Prostitutes (C.O.R.P.), several street prostitutes have reported being abused by the police. Based on information gathered in interview with Valerie Scott, C.O.R.P., November 1987.

prostitutes state they have a more positive relationship with police, this relationship is problematic since prostitutes are very aware of the real power which the police can choose to exercise over them and thus act accordingly. As one prostitute stated:

"The more you're nice to them, the more you find they are nice to you. If you're a real little bitch they kind of let you have it."⁹⁹

This power extends beyond the street and into the personal lives of prostitutes and their families. Single prostitutes with children who have been caught up in 'street sweeps' and detailed in jail overnight are often fearful of losing their children. In these situations, if the Children's Aid Society is notified, children may be removed from their mothers' care on the ground that the children are in need of protection.¹⁰⁰ Furthermore, it is not uncommon in Toronto, for example, for prostitutes to be released on bail conditions which restrict their movement in public to certain areas and at certain times pending their court date.¹⁰¹ The limitations on the prostitute's mobility in public which these "curfew and boundary" conditions impose is no different in effect from the regulation and prosecution women were subjected to under the old vagrancy offences. A prostitute with curfew and boundary conditions must also explain her presence in public to the police. Finally, prostitutes who share their income with someone or support an unemployed partner may also be subject to legal regulation under the guise of 'protection'. Under s.195(1)(j) of the *Criminal Code*, a person who is "wholly or partly living on the avails of prostitution of another person" is guilty of an indictable offence and liable to imprisonment for 10 years. Although intended to protect prostitutes from exploitative pimps, this effectively denies a prostitute the self-determination or right to establish a consensual relationship with a partner, since it can be construed that the partner is living on her earnings.¹⁰² This regulation and penalization of virtually every aspect of a prostitute's life,

99 Lowman, *supra*, note 77 at 205.

100 Based on information gathered during an interview with Amber Cooke, streetworker with Elizabeth Fry Society, Toronto (December 1987); and Valerie Scott, (C.O.R.P.) (November 1987). See also *Streetwork Outreach Report*, *supra*, note 94 at 16. See *Child and Family Services Act*, S.O. 1984, c. 55, s. 40.

101 Based on information gathered in interview with Valerie Scott, *ibid.* See also CACSW Prostitution in Canada, *supra*, note 94 at 35.

102 See *Fraser Report*, *supra*, note 78.

creates an isolated and separate world which would be difficult for an outsider to imagine. As one prostitute described it, "it's like living in a police state."¹⁰³ The stigmatization created by the prostitute's 'quasi-criminal' status effectively separates her from the rest of the community. This makes it more difficult to obtain needed social, medical or legal services. Often prostitutes who work on the street of a community are not aware that these services exist.¹⁰⁴ However, if prostitutes are aware of existing services, they will often not attempt to use them, given the separation they feel from the community.¹⁰⁵

This past analysis was not meant to imply that prostitutes are "passive victims" of forces beyond their control in their lives. In a society which devalues women's work and profits from women's sexuality, women who enter prostitution make choices about their own survival, albeit not under conditions of their own choice. As well, despite their oppression, prostitutes have actively struggled to create their *own* survival mechanisms in order to combat the dangerous and brutal life on the street.¹⁰⁶

THE PERCEIVED "DEMISE" OF THE 'SOLICITING LAW': AN ARGUMENT FOR FURTHER CRIMINALIZATION?

The argument for further criminalization of street prostitution which led to the enactment of Bill C-49 is based upon the alleged 'failure' of the old 'soliciting law' (s. 195.1) of the Code to eradicate or visibly

103 Valerie Scott interview, *supra*, note 102.

104 Based on my experience developing an outreach program for prostitutes at Parkdale Community Legal Services, Fall, 1987.

105 *Ibid.* In the Parkdale Community of Toronto, for example, in 1985 Alderman Chris Korwin-Kucynski and members of PACSI (Parkdale Action Committee for Street Improvement) launched a "Hooker Patrol" in the area. This involved harassing prostitutes on the streets in order to move them out of the area.

106 In Parkdale and other areas of Toronto, for example, women who work on the street employ the "buddy system" by watching out for each other when a customer approaches. Some women keep a "bad date" list which includes a physical description or name of a customer who is known to be violent or abusive. Other women copy down license plate numbers when their working partner enters a customer's car, in order to deter potentially violent customers. Based on information gathered during an interview with Valerie Scott, member of the Canadian Organization for the Rights of Prostitutes (C.O.R.P.), Nov., 1987.

reduce street prostitution after restrictive judicial interpretation of the nature of 'soliciting'.¹⁰⁷ In 1978, the Supreme Court of Canada in *R v. Hutt*,¹⁰⁸ held that for a person to be charged with soliciting, his or her behaviour had to be "pressing and persistent." Since the soliciting offence was based on the 'nuisance' aspects of street prostitution, the Court held that a mere demonstration in a public place of willingness to engage in prostitution was not an offence. According to Mr. Justice Spence, speaking for the majority, the legislative history of the soliciting law indicated that "Parliament wished to require some acts on the part of the person which contributes to public inconvenience."¹⁰⁹ In *obiter dictum*, the Court indicated further that the interior of a car was a private and not a 'public' place, thus allowing a prostitute and a customer to engage in solicitation while sitting in a parked car in a public place.¹¹⁰

In 1979, the Supreme Court of Canada again decided in *R. v. Whitter*¹¹¹ and *R. v. Galjot*,¹¹² two appeals from British Columbia, that a series of approaches to different individuals, none of which was pressing and persistent, could not in their totality add up to "pressing and persistent behaviour". Mr. Justice McIntyre in *Galjot* stated for the majority that if this course of conduct was a nuisance to persons other than the individual approached, then legislation would be required to make that behaviour an offence.¹¹³

Police forces, resident groups and the media across Canada argued that the combined effect of the three decisions rendered the 'soliciting law' virtually meaningless.¹¹⁴ Police forces and resident groups in particular stated that since the *Hutt* decision, the incidence of street prostitution,

107 See for example, "Public Opinion, Aggressive Soliciting Force Crackdown on B.C. Prostitutes" *The [Toronto] Globe and Mail*, (30 June 1979) at 12; John Lowman, "Prostitution in Vancouver: Some Notes on the Genesis of a Social Problem" (1986) 28 *Canadian Journal of Criminology* 1-16.

108 *R. v. Hutt* (1978), 2 S.C.R. 476, 38 C.C.C. (2d) 418.

109 *R. v. Hutt* (1978) 38 C.C.C. (2d) 418 at 424.

110 *Ibid.*

111 *R. v. Whitter* (1981), 64 C.C.C. (2d) 1 (S.C.C.)

112 *Ibid.*

113 *Ibid.* at 6.

114 "Public Opinion, Aggressive Soliciting Force Crackdown on B.C. Prostitutes" *supra*, note 107; Lowman, *supra*, note 11 at 1-2,8; The Fraser Report, *supra*, note 78 at 424.

particularly in Vancouver and Toronto, had increased dramatically as a result of the inability of the police to effectively enforce the law.¹¹⁵

However, official crime statistics and research findings have indicated that this "version of Canadian social history"¹¹⁶ is not correct. These findings have led some observers to suggest that it was not the restrictive judicial interpretation which led to a decline in charges laid but in fact, discretionary enforcement practices by the police.¹¹⁷ Furthermore, according to John Lowman, it was not the perceived failure of the soliciting law which led to what was seen as an increase in street prostitution, but rather the contradictory nature of Canadian prostitution law itself.¹¹⁸ Since the combined effect of all prostitution laws make any practice of prostitution technically illegal, effective enforcement of one law (for example bawdy house) or in one area, will shift the incidence of prostitution to another locale. Thus, only selective non-enforcement of the laws (usually in less visible areas) serves to resolve the contradiction.

Research findings by Lowman in Vancouver strongly confirms this conclusion.¹¹⁹ Lowman demonstrates that it was effective enforcement of other prostitution laws by the police during the period between 1974 and 1978 which led to the increase in street prostitution during this period.¹²⁰ After prostitution charges were brought against Vancouver cabaret clubs (where approximately 1500 prostitutes were working) resulting in their shut-down in 1975, the prostitution trade was shifted back onto the street resulting in the heightened visibility of prostitution in some areas.¹²¹ This visibility of street prostitution on particular streets (those Lowman describes as less "salubrious" than before) occa-

115 *Ibid.*

116 Lowman, *supra*, note 11 at 204.

117 The Fraser Report, after examining the variable pattern in enforcement in difference areas of the country after *Hutt*, stated (*supra*, note 78 at 423):

"This variable pattern in enforcement suggests that the decline...had as much if not more, to do with the dissatisfaction of some police forces with the liberal impulses of the Supreme Court of Canada than with any inherent weakness in the law."

118 Lowman, *supra*, note 77 at 204.

119 Lowman, "Prostitution in Vancouver: Some Notes on the Genesis of a Social Problem" (1986) 28 Can. J. Crim. 1; Fraser Committee, *supra*, note 78 at 423.

120 Lowman, *ibid.*

121 *Ibid.*

sioned increased public and media attention to what was perceived as a 'new problem' in 1978.¹²² However, Lowman's research indicates that "the *Hutt* decision had no significant impact on the geography of the street prostitution 'strolls', at most it consolidated a pattern already established."¹²³ This analysis has been confirmed by similar patterns occurring in other cities.¹²⁴

Lowman's analysis is an important one because it reveals a significant assumption underlying the arguments of those who favour greater criminalization of prostitution. This is the belief that the soliciting law prior to the *Hutt* decision did control the incidence of street prostitution. Statistics indicate however, that during the period between 1973 and 1974, over 1400 soliciting charges were laid in Vancouver.¹²⁵ Thus, a high incidence of street prostitution continued to exist. According to Lowman then, given the internal contradictions of Canadian prostitution law, "[s]treet prostitution is unlikely to disappear without somewhere to go."¹²⁶ However, although this is an important first step, any changes in the law which are not accompanied by long-term economic and social programs directed at the women (and youth) in street prostitution will be of no effect at all.

THE FRASER COMMITTEE: BALANCING INTERESTS

Against the case for further criminalization (made largely by resident groups, municipalities and police forces) prostitutes, feminists and civil libertarians have consistently fought for the decriminalization of prostitution.¹²⁷ Thus, in January of 1983, after the failure of municipalities to control street prostitution,¹²⁸ the federal Liberal government

122 Lowman notes that the newly perceived problem by local residents and business groups caused them to lobby for a "clean up the streets campaign" although "this lobbying was conspicuously absent when street prostitution was confined to the less salubrious areas of the downtown core", *ibid.* at 8.

123 *Ibid.* at 2.

124 In Calgary, for example, effective enforcement of municipal by-laws against massage parlours and escort services have been cited as the major causes in increasing street prostitution during that period: C.A.C.S.W., *supra*, note 93 at 56.

125 Lowman, *supra*, note 11 at 204.

126 Lowman, *supra*, note 119 at 14.

127 Fraser Committee, *supra*, note 78 at 515-517.

established the Fraser Committee on Pornography and Prostitution in Canada, a four woman/three man committee to examine these competing views before the government took any further legislative action on prostitution.¹²⁹

In its sincere desire to somehow respond to the concerns of all of the above competing interest the Committee was faced with a difficult task. Although the Committee concluded that ultimately the only effective response to prostitution is through the adoption of long-term economic and social strategies on the part of the government,¹³⁰ it also affirmed the short-term struggle to recognize the right of prostitutes to be free from oppressive state interference. The Committee stated that the law "has not achieved what is presumably its theoretical object, that of reducing prostitution...and instead has operated in a way which victimizes and dehumanizes the prostitute",¹³¹ particularly the prostitute who does not have the "resources to be discreet".¹³² Balanced against the concern for prostitutes' welfare, however, was the concern for the welfare of the public and residents groups who were affected by the "nuisance" aspects of street prostitution:

"There is to our minds no justification for ignoring the disturbance and interference with the peace and quiet of citizens which is associated with street prostitution. Few, if any of those who are not currently affected by the nuisance caused

128 In response to complaints from residents' groups about the perceived failure of the soliciting law to control street prostitution, several municipalities enacted by-laws, the authority for doing so ostensibly delegated by the provinces. Although the by-laws were rigorously enforced, imposed heavy fines in some cases, and applied equally to both prostitutes and customers, evidence suggests that they were not effective in reducing street prostitution. This is a significant comment on the effectiveness of increased criminalization on the incidence of street prostitution. See C.A.C.S.W., *supra*, note 94 at 57; Lowman, *supra*, note 11 at 204. In 1983, the Supreme Court of Canada unanimously struck down the Calgary by-law in *Westendorp v. The Queen* [1983] 1 S.C.R. 43 on the grounds that it invaded exclusive federal power over criminal law and was therefore *ultra vires*. Other municipalities de-activated their by-laws following this decision: see C.A.C.S.W., *supra*, note 93 at 30.

129 John McLaren, "The Fraser Committee: The Politics and Process of a Special Committee" in *Regulating Sex*, *supra*, note 11 at 39.

130 The Fraser Committee, *supra*, note 78 at 525-530.

131 *Ibid.* at 533.

132 *Ibid.*

by street prostitution would be ready to ignore its negative impact on them..."¹³³

The Committee thus adopted an approach of partial decriminalization and legalization which followed from the Committee's view that "if prostitution is a reality with which we have to deal for the foreseeable future, then it is preferable that it take place, as far as possible, in private, and without the opportunities for exploitation which have been traditionally associated with commercialized prostitution."¹³⁴ At the same time, it recommended amendments to the *Criminal Code* to include a clause controlling the "definable nuisance aspects" of street prostitution.¹³⁵

More specifically, the Committee recommended that the bawdy house laws (s. 193 of the *Code*) be repealed so that one or two prostitutes 18 years or older could work from their private residence.¹³⁶ This addresses the problem of the contradictory nature of Canadian prostitution law which, in its totality, has condemned the prostitute to "a legal outcast",¹³⁷ making it impossible for her to work anywhere without the threat of criminal sanction or eviction. By allowing one or two prostitutes to use their own residence, prostitutes would be provided with a safe and self-determined work environment, free from the danger of the street or the exploitation of escort services and massage parlours. Secondly, the Committee recommended that "small-scale" prostitution establishments be permitted to operate in non-residential areas according to schemes established by the relevant provincial or territorial governments. In so doing, it hoped to avoid commercial and exploitative characteristics of prostitution, envisioning a form of "cottage industry" controlled by prostitutes themselves.¹³⁸

In relation to street prostitution, the Committee proposed the repeal of s. 195.1 on the *Code* (at that time known as the soliciting law) and recommended a shift of street prostitution to a revised s. 171 of the *Code* – the general nuisance category. The new section would clearly apply

133 *Ibid.* at 540.

134 *Ibid.* at 547.

135 *Ibid.* at 534.

136 *Ibid.* at 538.

137 *Ibid.* at 533.

138 *Ibid.* at 546.

to both customers and prostitutes and according to the *Comité*, it would deal strictly with the "nuisance" aspects of street prostitution.¹³⁹

Finally (for the purposes of this paper), the Committee recommended a repeal of the procuring offences as their protective nature had little bearing on modern reality, and recommended replacing this section with one limited to those who use coercion, force or threatening behaviour to achieve their intention to exploit prostitutes.¹⁴⁰ This recommendation goes a long way in correcting the "living on the avails" law, permitting a prostitute to establish a personal relationship with someone else if she so chooses (without the fear of having her partner defined as a pimp).

A CRITIQUE OF THE FRASER REPORT

Although the Fraser Report should be praised for its emphasis on long-term social and economic strategies, several criticisms have been made regarding their law reform initiatives. First, the proposed amendment to s. 171 of the Code to include 'definable' nuisance aspects of prostitution, does not in effect differ from the old 'soliciting law' (or as will be discussed later, Bill C-49, the new 'communicating' law). By specifically referring to the public manifestation of prostitution in the amended s. 171, the Committee continues to single out the activity of prostitutes (and their customers) for special sanction and regulation under the criminal law. Given the history of police enforcement practices, it is not unreasonable to speculate that female prostitutes will continue to be the main focus of police attention. Moreover, the Committee's definition of public nuisance is so broad that it could be used to capture virtually all of a prostitute's conduct in public, notwithstanding the Committee's earlier recommendation to permit prostitutes and their customers to solicit "discreetly" on the streets.¹⁴¹

John Lowman has argued that in attempting to concern itself solely with the nuisance aspects of street prostitution, while avoiding the criminalization of the prostitute herself, the Committee fails to recognize that, for the offended resident, there is no real distinction between the 'nuisance activity' of the prostitute and the 'moral status'

139 *Ibid.* at 538.

140 *Ibid.* at 543.

141 *Ibid.*

of the prostitute herself.¹⁴² In making this incorrect distinction between nuisance and morality, the Committee has failed to see that it continues along the same line as legislation before it – that is, legislation which is designed to minimize the visibility of the street prostitute. As Lowman states:

“for the opponents of street prostitution, it is the visibility of the prostitute *per se* (and to a lesser extent the customer) that is the primary nuisance. It is the symbolic “blight” of street prostitution – even when prostitutes stand motionless and silent – that is the problem.”¹⁴³

Clearly, if residents were only concerned about obstructive behaviour or behaviour that was “pressing and persistent”, then they would not have interpreted *Hutt* to mean a “failure” of the soliciting law.

A second criticism of the Committee concerns the reform of the bawdy house laws. Although the Committee’s recommendation that one or two prostitutes be permitted to use their residence for the purposes of prostitution is a progressive one, the fact that municipalities are empowered to withhold business licenses from businesses operating out of private residences clearly presents a problem to the two-person exemption.¹⁴⁴ Furthermore, the Committee’s attempt to resolve this dilemma by suggesting that the provinces be empowered to license small-scale establishments in non-residential areas has the dangerous potential to create the kind of repressive state legalization (at a municipal or provincial level) of prostitution which the Committee itself rejected.

Legalization entails state regulation of prostitution as a legitimate business activity, including such forms as government-licensed brothels, and the zoning of a “red-light district”.¹⁴⁵ As the Committee’s own comparative research findings have indicated, however, prostitutes who live and work in government run or government licensed establish-

142 Lowman, *supra*, note 11 at 207.

143 *Ibid.*

144 The Committee recognized this problem when it states (at 549-550):

“it is not fanciful to suggest that some municipalities will use by-laws, especially zoning by-laws, to prevent prostitutes from operating from a place of residence...Accordingly we do have some doubts about whether the residential exemption will actually achieve the objectives we had hoped it would.”

145 *Ibid.* at 519.

ments are often subjected to a repressive regime in which virtually every aspect of their lives are regulated by the state.¹⁴⁶ In Nevada, for example, as the Committee pointed out, in a state-controlled system of licensed prostitution, prostitutes are registered, restricted in personal relationships and mobility patterns, while subject to weekly venereal disease examinations.¹⁴⁷ This is not unlike the system of registration and control which prostitutes in nineteenth century England faced before the repeal of the *Contagious Diseases Act*.¹⁴⁸ Women who are controlled under this system are socially stigmatized and separated from the large community. Furthermore, by leaving regulation to the provinces as the Fraser Committee suggests, an uneven pattern of control and licensing may emerge, creating, in the Committee's own words, "havens"¹⁴⁹ similar to those which exist in Nevada. Evidence has also demonstrated that legalization does not decrease the illegal prostitution trade (usually juveniles who are working on the streets) that exists alongside legalized prostitution.¹⁵⁰ Finally, state sanctioned and controlled prostitution raises serious implications, contributing to the assumption that prostitution in our society – male sexual access to 'prostitute women' is a necessary and permanent phenomenon, and not a manifestation of a sexist society.

The Fraser Committee's recommendations for small-scale "prostitution establishments" clearly did not envision the kind of scenario painted above. The Committee recommended that the establishments be small-scale and non-residential in nature (thus mitigating the danger of exploitation) and that for prostitutes working there, a full range of public health, labour standards and worker's compensation be provided as well as clearly established operating conditions.¹⁵¹ However, Lowman has argued that by "legislating away the two-person exemption at the municipal level, and by using the Fraser Committee's suggested nuisance law to "warn off" prostitutes and their customers, the creation of even "small scale" state licensed establishments might produce a system of straightforward legalization with virtually none of

146 *Ibid.*

147 Richard Symanski, *The Immortal Landscape: Female Prostitution in Western Societies* (Toronto: Butterworths) 110-124.

148 See Footnote.

149 Fraser Committee, *supra*, note 78 at 520.

150 *Ibid.* at 495-501.

151 *Ibid.* at 52.

the features of the decriminalization model which the Committee wished to retain."¹⁵²

A third and final criticism of the Fraser Report concerns the focus, throughout the report, on the problem of street prostitution and the desire to make the provision of private working conditions for prostitution as "attractive" as possible to the prostitute and the customer. Debi Brock has argued that by focusing on street prostitution as a primary concern, the Committee unwittingly contributes to the notion that it is not prostitution *itself* which is the problem but rather its *public* manifestation.¹⁵³ Thus, she argues that the Committee's recommendation to shift prostitution to a private setting "provides a formula for the more effective reproduction of patriarchy...since while prostitution would carry on, its existence would be obscured."¹⁵⁴

This position has been criticized by Lowman who argues that while "public prostitution might serve well as a symbol of the oppression of women and youth, it does so at tremendous cost, most of which is borne by the prostitute."¹⁵⁵ In addition, he points out that "off-street prostitution, particularly the two-person exemption recommended by the Fraser Committee, is not inevitably invisible (just as public prostitution when confined to a particular class habitat is not necessarily visible)."¹⁵⁶

While it is doubtful that the Committee's recommended shift of prostitution to a 'private' setting will actually have an impact on those women and youth who do not have the option to work anywhere but the street, Brock nevertheless raises a fundamental point. At an ideological level to shift prostitution from the public to the private sphere, reinforces the idea that what is offensive about street prostitution is not the exploitative power relations embodied within it, but 'the public display of sexuality'. Thus, instead of focusing their energy on long-term social and economic change, communities attempt to control or regulate its public display. As one spokesperson for CROWE (Concerned Residents of the West End), a Vancouver residents group,

152 Lowman, *supra*, note 11, at 209.

153 Debi Brock, "Sex and the Single Committee: The Fraser Report", Vol. 7, No. 3 *Broadside* (December 1985/January 1986) 9.

154 *Ibid.*

155 Lowman, *supra*, note 11 at 211.

156 *Ibid.*

stated: "We want the hookers to leave the West End. It is not our responsibility as a citizens's group to deal with the larger problem of prostitution."¹⁵⁷ This, therefore, directly undermines the Fraser Committee's primary support for social and economic initiatives in responding to prostitution.

THE FEDERAL GOVERNMENT'S RESPONSE: BILL C-49

Despite the Fraser Committee's recommendation that a unified and carefully integrated approach be taken for the reform of Canadian prostitution law, the Federal government opted for the "piecemeal" approach explicitly rejected by the Committee.¹⁵⁸ Instead, based on the recommendations of the Standing Committee on Justice and Legal Affairs of 1983 (before the Fraser Committee had completed its report) the government repealed s. 195.1 – the old soliciting law – and replaced it with a new version of s. 195.1 – the "communicating law" which would widen police powers extensively in dealing with street prostitution. The new section 195.1(1) provides:

"Every person who in a public place or in any place open to public view

- a) stops or attempts to stop any motor vehicle,
 - b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
 - c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
- for the purposes of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction."

Like the old section 195.1(1), this section is made gender-neutral so that it may apply to both female and male prostitutes. In addition, however, it makes it clear that customers can also be charged under s. 195.1(1), thus cancelling the uncertainty of judicial interpretation of

157 CROWE, as stated in the hearings of the Committee on Justice and Legal Affairs, 1983, cited by CACSW, *supra*, note 93 at 57.

158 The Fraser Committee, *supra*, note 78 at 547.

the old law.¹⁵⁹ More importantly, however, the new law clearly contemplates a much wider scope for police regulation of the activities of prostitutes (and their customers). Although couched in gender-neutral terms, it could be argued that the legislation is gender-specific in its intent since the first two sub-clauses (a) and (b) more often apply to the activities of prostitutes than their customers (although curb-crawlers can be caught under s. 195.1(1)(b)). In addition the use of the word "communicating" is significant since its ambiguity can effectively apply to any action, word or gesture interpreted by a police officer to be communicating for the purposes of engaging in prostitution. This effectively cancels the *Hutt* interpretation of the old soliciting law and in many respects may bring about a return to the 1972 vagrancy offence, given the past history of enforcement practices and the vagueness of the meaning of communicating. Since a prostitute's very presence on a street corner communicates her purpose, this could be construed to be "communicating" under s. 195.1(1)(c).

It has been argued that the ambiguous wording of the section infringes the right to freedom of expression guaranteed under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Although prostitution itself is not illegal, the new law prohibits any communication or expression between a customer and a prostitute in public – even a discreet act of solicitation. Although it is too soon to determine how this issue will be decided, some judicial decisions on the constitutionality of the new s. 195.1(1)(c) should be mentioned.

In *R. v. Maclean*; *R. v. Tremayne*,¹⁶⁰ the B.C. Supreme Court held that the freedom of expression guaranteed in s. 2(b) of the Charter does not protect the "bargaining between a prostitute and her customer".¹⁶¹ The Court held that "it is to demean the grand concept of freedom of opinion and expression to relate it to the bargaining of a prostitute and a customer".¹⁶² Furthermore, the Court rejected counsel for the accused's argument that no harm flows from a "single act of discreet solicitation" and therefore, it should not be unlawful. According to the Court, "It is not any particular act of solicitation which creates the problem

159 See *R. v. Dudak* (1978), 41 C.C.C. (2d) 31 (B.C.C.A.). The Court held that the prospective customer could not be found guilty of soliciting under the old soliciting law because the "purpose of prostitution meant the seller's prostitution".

160 *R. v. Maclean* (1986), 23 C.R.R. 301 (B.C.S.C.).

160 *Ibid.* at 308.

162 *Ibid.*

– it is the cumulative effect of many single episodes which creates the public nuisance. Viewed in that manner each incident is part of the problem and contributes to the eventual harm.”¹⁶³ This view explicitly rejects the Supreme Court of Canada’s interpretation of the meaning of “pressing and persistent” under the old soliciting law in *R. v. Galjot* and *R. v. Whitter*.¹⁶⁴

In *R. v. Jori Ann Jahelka*,¹⁶⁵ again two women were charged under s. 195.1(1)(c), in July of 1987. Although the Court here held that the new communicating law limited the freedom of expression as guaranteed by s. 2(b) of the Charter, this was held to be a reasonable limitation and therefore saved by section 1. According to the Court:

“No doubt exists that the presence of prostitutes on the street strolling about trying to sell their services is the *sine qua non* of the problems reported...Once it is accepted that street prostitution inevitably leads to unruly congregations and serious public nuisance, a measure like that under review is necessary...”¹⁶⁶

It is interesting to note that in the above quotation the court saw the law as explicitly directed towards prostitutes and their behaviour despite the fact that section clearly applies to customers as well.

Although these decisions may indicate a trend in the case law towards upholding the constitutionality of Bill C-49, some decisions have moved towards setting aside the law. For example in *R. v. Skinner*,¹⁶⁷ the Court held that s. 195.1(1)(c) violates s. 1(b) and is not saved by section 1 as being reasonably and demonstrably justified. According to Judge Harris:

“The section goes far beyond what was reasonably necessary. It attacks not only the disorderly prostitutes but also those who quietly and discreetly stroll or stand around residential areas. No matter how much one disapproves of the prostitute and her customer, the law must preserve through the

163 *Ibid.*

164 See note 110.

165 *R. v. Jahelka et al.* (1987), 11 C.R.D. 525 (Alta. C.A.).

166 *Ibid.*

167 *R. v. Skinner* (1987), 10 C.R.D. 525. See also *R. v. D. Kazelman* (1987), 10 C.R.D. 525 (Ont. Prov. Ct.)

Charter their right to live, sexually and otherwise, without interference when no harm is done to anyone else."¹⁶⁸

Although it is difficult to comprehensively assess the impact of Bill C-49, some observations can be made. According to Inspector James Clark of the Morality Squad of the Metropolitan Toronto Police, although the new law is a considerably more effective enforcement mechanism, the incidence of street prostitution has not significantly decreased in Toronto.¹⁶⁹ In fact, Inspector Clark has stated that figures suggest an increase in numbers although this may be due to more effective enforcement.¹⁷⁰ Although in some areas of Toronto there has been a significant decline, in other areas street prostitution has become more visible, thus suggesting that the new law, like the old one before it, merely shifts or relocates the prostitution trade when pressure is exerted in one particular area. For example, according to Valerie Scott of the Canadian Organization for the Rights of Prostitutes (C.O.R.P.), since Bill C-49 came into effect many street prostitutes working on the Isabella-Jarvis strip were forced to be relocated in the Cabbagetown area of Toronto, more specifically on Seaton and Ontario streets, as a result of police pressure.¹⁷¹ This observation is confirmed by the actions of the South of Carleton Community Association, a residents' association in the Cabbagetown area. In October and November of last year, the residents' group launched a "vigilantes campaign" aimed at what they perceived as a noticeable increase in street prostitution in their area, despite a highly publicized police "crackdown" against prostitutes and customers in Toronto.¹⁷²

168 *Ibid.*

169 Based on information gathered in telephone conversation with Inspector Clark (Toronto) (November 1987). See also "Ranks of Toronto Prostitutes Increase," *The [Toronto] Globe and Mail* (15 October 1987) 14. The article states: "The number of female prostitutes have more than doubled during the past year, signifying that the city is losing its war against prostitution, a senior Metro Toronto Police Officer said".

170 *Ibid.*

171 Valerie Scott, as quoted by Susan Cole, "Tramping On The Sex Trade", *Now Magazine* (17-23 December 1987) 7. According to Scott: "There wouldn't be any women working on the side streets of Cabagetown if it weren't for Bill C-49. We can't work the well-lit track on Isabella because the yellow cars tell you to move out."

172 *Ibid.* See also Lois Sweet, "Wrong Way to Rid Area of Prostitutes", *The Toronto Star* (28 November) B-1.

Thus, despite a more repressive criminalization scheme and "record arrests" by the police in Toronto, many members of the public and residents' groups continue to be dissatisfied with the law's impact on the presence of street prostitution in their communities. In November of 1987, for example, in a meeting with the Metro Police Commission, homeowners and politicians stated that Bill C-49 "has done nothing to solve what they all described as an increasing problem."¹⁷³

Although the new law applies to both customers and prostitutes, there is also some question as to whether it has been equally enforced against both groups. In the first months after Bill C-49 was passed, the evidence seems to indicate otherwise. In Vancouver, since October 16, 1986, police statistics show that 1,437 charges were laid against prostitutes (the breakdown as to female and male prostitutes is not known although female prostitutes in Vancouver constitute the majority) and 487 customers.¹⁷⁴ According to Toronto police statistics, however, in the first nine months of 1987, 1,210 customers were charged as opposed to 1,191 female prostitutes. This represents an increase of the arrest of customers by about 300%.¹⁷⁵

Nevertheless, police enforcement officials have admitted that prostitutes still remain the "easiest target"¹⁷⁶ under the new law. While it only takes one police officer acting undercover to arrest a prostitute, it often takes up to four or five officers – one female officer along with a back-up team – to arrest a customer. Furthermore, the imbalance between male and female officers on a police force exacerbates this enforcement problem since it is much easier for the police to use male (customer) than female (prostitute) decoys.¹⁷⁷

The difficulty in enforcement against customers may be reflected in sentencing patterns. According to a Vancouver Crown Counsel, judges are

173 "Prostitution 'Threatening' Streets Despite Record Arrests", *The Toronto Star* (4 November 1987) A-6.

174 Joanne Macdonald, "Challenge To Anti-Soliciting Law Going To Appeal Court" *National* (November 1987) 8.

175 *The Toronto Star* (4 November 1987).

176 Joanne Macdonald, *supra*, note 174.

177 In 1985, the Vancouver Police Department had 57 regular female members out of approximately 1000 police officers. Only one woman was a member of the unit which deals with prostitution. In Toronto 100 out of 5000 officers are women. Two women are members of the Morality Squad. See *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49* (Oct. 30, 1985) Issue 6:12-13.

often reluctant to sentence customers as harshly as prostitutes.¹⁷⁸ He attributes this to the fact that customers are not repeat offenders, thus, they will not serve as serious a sentence as prostitutes who usually have been charged several times.¹⁷⁹ However, as the evidence seems to indicate, customers are not repeat offenders because of unequal enforcement patterns.¹⁸⁰

Even if the drive towards equal enforcement is successful, the impact of Bill C-49 on prostitute women is much harsher than on their male customers. As has already been indicated, women and youth working on the streets are the poorest and most vulnerable of prostitutes working, unlike their customers who clearly have the economic power to buy their services. Prostitutes who do not have the resources or options to work in "less visible" forms of prostitution are punished for attempting to earn a living against a context of the general subordination of women in our society.

According to some observers, the dangers of the street working environment are greatly exacerbated under Bill C-49. Many customers, more fearful of arrest, are now picking up prostitutes and driving them out of their area of work to more remote and unfamiliar areas.¹⁸¹ Since, under the new law (s.195.1(2)) "public place" now includes "any motor vehicle located in a public place" (thus cancelling the uncertainty about this after *Hutt's obiter* concerning motor vehicles) this is particularly true. In Toronto, many prostitutes cannot employ as easily the traditional "buddy system" to protect each other from dangerous customers (writing down license plate numbers, checking for "rented" cars, etc.) since police are using the communicating law to disperse prostitutes who are working together.¹⁸² According to a recent news report, since the passing of Bill C-49, violence against street prostitutes has increased considerably.¹⁸³

178 J. Macdonald, *supra*, note 174.

179 *Ibid.*

180 Some judges still appear to be more tolerant of customers.

181 Based on information gathered in interviews with Amber Cooke, Streetworker with Elizabeth Fry Society and Valerie Scott (C.O.R.P.) (October and November 1987).

182 *Ibid.* According to Valerie Scott, under the new law police have considerably increased harassment techniques against prostitutes.

183 "B.C. Prostitutes Hurt More Often Than Miners", *The Toronto Star* (26 December 1987) H-15.

In Vancouver, in the three years since the new law came into effect, four prostitutes have been murdered and six others have disappeared.¹⁸⁴ It is an appalling comment on the federal government that, in passing Bill C-49, it is more concerned with the peace of mind and property values of some residents than with the lives of prostitutes on the streets.

CONCLUSION

This paper has attempted to demonstrate that the history of the criminalization of prostitution has been a history of its failure. Legal control mechanisms aimed at minimizing the visibility of street prostitution has only served to exacerbate the already marginal and disadvantaged position of street prostitutes in a community and has alienated them from the appropriate support systems and social services which could provide some alternatives to life on the street. At the same time, the focus of the present law on the public manifestation of prostitution on the street only serves to contribute to the already pervasive myth that prostitution will never disappear, thus only its "offensive" aspects must be controlled.¹⁸⁵ With Bill C-49, instead of attempting to address the factors which give rise to prostitution, the government has attempted to conceal them through a coercive instrument of social control which attempts to shift prostitution to a less visible site.

In order to effectively reduce street prostitution, the government must follow 1) a unified approach to law reform and 2) a long-term strategy of effective social and legal responses to the issue of women's (and youths') poverty and sex role socialization in our society.

184 *Ibid.*

185 In the "National Population Study on Pornography and Prostitution" (1984) undertaken for the Fraser Committee on Pornography and Prostitution, 92% of the respondents of the sample thought that prostitution will always be a part of our society. This view is reflected in the following statement by Mayor Smeaton of the City of Niagara Falls in his address to the Legislative Committee on Bill C-49:

"I do not think anyone in this room is naive enough to think prostitution will disappear because of the passage of Bill C-49. Surely not. But what will happen, in very definite terms we are told by officers who have the mandate to police our streets, is it will disappear from the streets..."

As this paper has demonstrated, given the contradictory nature of Canadian prostitution law, in which virtually all forms of prostitution-related activity are illegal, the government will only continue to "shift" the prostitution trade from one locale to another unless the law itself is relaxed. It is recommended therefore, that s. 193 of the *Code* (bawdy house) be repealed so that prostitutes can work from their homes, if they have this option. This provides a relatively safer environment for prostitutes to work, effective control over their working conditions and the possibility of sharing support and child-care among groups of prostitutes working together.

It is further submitted that s. 195.1 – the communicating law – be repealed also, largely for the reasons stated in the opening paragraph of this section. At the same time, it is submitted that punishment for any activities associated with prostitution should not be added to the *Code* given the history of control practices and enforcement techniques directed largely at the visibility of the female street prostitutes. This is not to suggest that prostitutes should be immune from more general categories of criminal conduct as other individuals are not, but that those activities specifically directed at prostitution itself be suspect. Even if legislation is couched in "nuisance" terms, the historical obfuscation of nuisance and morality when concerning prostitutes is quite evident.

It is further submitted that Bill C-49 is a violation of women's right to equality guaranteed in the *Canadian Charter of Rights and Freedoms*. Christine Boyle has argued that despite the gender neutrality of the new law and its equal application to both customers and prostitutes, if one goes beyond the notion of formal equality and looks at whether the law promotes substantive equality, it is clearly discriminatory.¹⁸⁶ Notwithstanding unequal enforcement practices (although it may be too soon to determine this year) the impact of the law on women and men is clearly asymmetrical. If prostitution is a manifestation of a sexist society, woman's subordinate and unequal position is compounded by the punishment she receives. As Boyle argues, given the marginal and disadvantaged position of prostitute women, "there is no constitutionally appropriate way, consistent with equality, to punish women prostitutes."

Finally, community-based clinics have an important role in law reform and social and economic initiatives around street prostitution. On an

186 C. Boyle, *supra*, note 23.

immediate level, clinics can provide access to legal services to prostitutes charged under the new communicating law. Since legal aid certificates are not issued to women who have been charged with communicating as a first offence or to women who do not provide the proof of earning necessary for Legal Aid's financial eligibility assessment, many women are denied access to legal services. Community clinics engaged in poverty law work are in the best position to provide an 'entry-point' for a traditionally marginalized or disenfranchised group.

As well, by providing a supportive and non-judgemental supportive base for prostitutes, clinics may help to break down the traditional separation between street prostitutes and the larger community. Through community education, clinics may be able to act effectively as a liaison between prostitutes and other members of the community and encourage alternative and creative ways to respond to the issue of street prostitution. Finally, clinics actively engaged in casework around street prostitution have a concrete base from which to develop law reform and organizing strategies around Bill C-49.

Although the decriminalization of prostitution laws is an important first step, long-term commitment to addressing the economic and social conditions giving rise to prostitution is essential. If communities are offended by the presence of street prostitutes in their community then they must direct their attention to the economic and social factors which give rise to it rather than attempting to remove prostitutes themselves from the communities.¹⁸⁷

187 In limiting its scope to the impact of the law on female street prostitutes, it is acknowledged that this paper suffers from a serious limitation in not discussing the men who go to prostitutes. Little research has been done in this area, a fact which is significant in itself. However, it has been persuasively argued by McIntosh that the male "need" for prostitutes is not a physiological one but an ideological one, based on social constructs of male and female sexuality which are supported by, and in turn, support, male dominance and male privilege in our society. (See McIntosh, "Who Needs Prostitutes? The Ideology of Male Sexual Needs, *supra*, note 24.) It is recognized that male/female socialization and the structures which give rise to this *must* be understood and examined critically in order to understand and effectively respond to prostitution and the relations of power embodied in it in this society. However, given the limited scope of this paper to the impact of criminalization, this area could not be properly dealt with at this stage.

Furthermore, although this paper has not dealt with the issues of juvenile and male prostitution, it recognizes that they are also serious areas of concern. However, since prostitutes are overwhelmingly female adults, and are the most greatly affected by Bill C-49, they were the focus of concern.