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THE LEGAL REGULATION
OF SEXUAL ACTIVITY
AND THE PROTECTION OF FEMALES

By GRAHAM PARKER*

Sexual behaviour can be either voluntary or involuntary. The latter includes acts such as rape and indecent assault which are now classified under the Criminal Code as "sexual assaults" where the ingredients of physical harm, violence or threats of violence are considered at least as important as the sexual element. These offences will receive little attention in this essay.

Voluntary sexual behaviour will be defined as acts to which the parties, particularly females, are factually consenting. The law has not always been content to leave all such acts, whether "moral" or "immoral," free of its control; this is particularly true of the law's attempt to protect unmarried females from sexual activity. Inevitably, one must consider the age of consent. Legislators and social and law reformers have given constant attention to this problem in the last one hundred years although, previously, it was almost completely ignored. Sexual behaviour could also be categorised as moral and immoral or as legal and illegal but that would beg the question or at least prejudge the very issue to be examined.

I. THE DOUBLE STANDARD AND THE CULT OF CHASTITY

With reasonable accuracy, this essay could be called "The History of the Double Standard". The popular meaning of the term is that men desire to seduce all the virgins but still want to marry one. A father expected his son to sow wild oats but wanted his daughter to be virgo intacta when she reached the altar. The International Congress of Women in 1899 complained that the "unequal moral standard which has existed and been encouraged for centuries has vitiated our laws, institutions and social customs with disastrous effects both on men and women."2 The male fascination with female chastity and virginity is of very ancient origin with both tribal and religious foundations. Keith Thomas saw the Double Standard as "the desire of men for absolute property in women, a desire which cannot be satisfied if the man has reason to believe that the woman has once been possessed by another man, no matter how momentarily and involuntarily and no matter how slight the consequences."3 One would be foolhardy to suggest that this attitude is completely outmoded today.

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2 An Equal Moral Standard for Men and Women: Report of Papers Read at a Special Meeting for Women Held in Connection with the Social Section at the International Congress of Women Convocation Hall, Church House (June 30, 1899), (London: 1900) at 3.
The Double Standard is not of recent origin. Confucianism looked upon chastity as a female virtue although purity among men was viewed as a high but perhaps unattainable goal. The same can be found among the ancient Hebrews, Mohammedans and Hindus. This should not surprise because all were predominantly patriarchal cultures which considered women as property. Sometimes chastity or sexual fidelity was aimed at racial or group purity. At other times, adultery or seduction were prohibited because they were a trespass on the husband’s or father’s property and threatened the integrity of the inheritance of real property.

There is also a deeper meaning to the Double Standard. The male-dominated society has always had an ambivalent attitude toward the female of the species. It saw her as pure and virginal but also as evil and dangerous.

The Christian Church adopted the Pauline attitude of sexual asceticism — if the higher value of celibacy were beyond the male’s moral resolve then it was “better to marry than to burn.” But at the same time, the Church idealised the pure and chaste female.

St. Paul almost reluctantly accepted marriage as inevitable and proper but he made it quite clear that the Kingdom would not be inherited by the “unrighteous,” which included fornicators, adulterers, the effeminate and “abusers of themselves.”

As we shall presently see, the male fear of the power of women reached absurd depths in the nineteenth century, particularly with the rise of modern gynecological medicine but one certainly finds it in full flower in Pauline theology and even earlier in ancient Hebrew law. The Apocrypha advised that women were evil and that man must guard all his senses against women who were “overcome by the spirit of fornication more than men.” In Jewish law, unchastity — in women particularly — had an heretical quality.

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4 See Edward Westermarck, 2 The Origin and Development of the Moral Ideas (London: Macmillan and Co., 1908) at 422 et seq.
5 Leviticus 15: 14-24.
6 See Bullough, supra note 3, at 261.
8 See Bullough, supra note 3, at 172 for a good summary of the Christian church’s position. See also Geoffrey May, Social Control of Sex Expression (New York: William Morrow & Co., 1931) ch. 3.
9 1 Corinthians, 6: 9-10.
Paul also said:

It is good for a man not to touch a woman. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband. Let the husband render unto the wife due benevolence; and likewise also the wife unto the husband . . . For I would that all men were even as I myself. But every man hath his proper gift of God, one after this manner, and another after that. I say therefore to the unmarried and widows, It is good for them if they abide even as I. But if they cannot contain, let them marry; for it is better to marry that to burn.
1 Corinthians 7: 1-12.

Bullough, supra note 3, at 433 described Luther’s views: Those attempting to prevent the body from acting naturally would endanger themselves, since sex was a natural function ordained by God. “This is the Word of God, through whose power procreative seed is planted in man’s body and a natural, ardent desire for women is kindled and kept alive.” He advised one of his correspondents to stop thinking so much about sex and get on with it, since the body demanded it. Another time he wrote:

“You are just as foolish if you do not take a wife when passion stirs and you remain continent to the danger of your soul.”

10 May, supra note 8, at 32.
11 Id. at 29, 33.
Regulation of Sexual Activity

St. Paul’s advice that marriage was preferable to the fires of damnation was the counsel of desperation and only a second-best solution because the “unmarried careth for the things that belong to the Lord, but he that is married careth for the things of the world.”12 The nunnery served a useful function. In the days of arranged marriages, a woman could save her soul while avoiding such an unwanted union. The institution also provided a convenient depository for fathers with too many daughters.

St. Augustine, who had had to struggle with personal problems of sexual lust, concluded that “concupiscence could not take away the good of marriage and that marriage mitigated somewhat the evil of concupiscence.” In other words “marriage managed to transform coitus from a satisfaction of lust to a necessary duty.”13 Aquinas circumscribed minor actions such as touches, caresses and kisses if they were undertaken for the enjoyment of forbidden pleasure. In such circumstances, “they become lustful and therefore gravely sinful, for consent to the pleasure of a lustful act was not less than consent to the act itself.”14

Luther was an enthusiastic advocate of marriage but did not place any special store in chastity viewing it in the same way as any other sinful act. Calvin considered celibacy to be a religious act, but faith in God would certainly aid those who were struggling with the sin of incontinence. While admitting that Jewish law had not forbidden simple fornication, Calvin said at the same time in a convoluted argument that it “would be unthinkable for God to condone what mankind condemned.”15

In theory, at least, the Age of Chivalry placed a premium on the celibacy of the knight and the chastity of his lady. The knight should only love the virtues, talents and graces of his lady; such love was the “chaste union of two hearts by virtue wrought.”16 The knight would only draw his sword for a lady of “fair reputation.” Cervantes satirised this conceit when Don Quixote defended the honour of his “lady” Dulcinea who was not exactly of “previously chaste character.” This notion of courtly love placed the woman

15 Bullough, supra note 3, at 505. It is interesting to note that one of history’s most poignant examples of the fate of fallen women, Boccaccio’s Criseide, has reappeared at the apogee of English Gothic and Renaissance literature in Chaucer’s Troylus and Criseye and Shakespeare’s Troilus and Cressida.

16 Supra note 4, at 432.

12 1 Corinthians 7:33.

13 Bullough, supra note 3, at 193. Frank Bottomley, Attitudes to the Body in Western Christendom (London: Lepus Books, 1979) has an illuminating discussion of the views of Augustine and other Christian thinkers. Sex and guilt are inextricably connected in the teachings of Augustine although these problems would be solved at the resurrection when “the sex of a woman is not a vice but nature.” The female body then would be “superior to carnal intercourse and childbearing; nevertheless the female members shall remain, adapted to the old uses but to a new beauty which, so far from provoking lust, shall excite praise to . . . God.” City of God, quoted by Bottomley, at 85.

14 Quoted by Bullough, supra note 3, at 380. See also Westermarck, supra note 4, vol. II at 432 and Bottomley, id. at 121. Aquinas does not deny the pleasures of the flesh so long as they are tempered by reason. Implicit in this discussion is that Fall in the Garden of Eden is to be blamed on Eve when her passions held sway over her reason. For a nineteenth century application see Eric Trudgill, Madonnas and Magdalens: The Origins and Development of Victorian Sexual Attitudes (N.Y.: Holmes & Meier, 1976) particularly chapters 10 and 11. See also Herbert W. Richardson, Nun, Witch and Playmate: The Americanization of Sex (N.Y.: Harper & Row, 1971).
on a pedestal but only after the knight had also equipped his lady with a chastity belt before he went off to the Crusades in the service of his lady and the Holy Church. (The Victorians revived an interest in chivalry and, given the good-bad girl dichotomy, this was obviously not coincidental.17)

At no point in the history of the Church’s attitude toward sexual acts or in the Age of Chivalry is there any mention of an age of consent. The reason is obvious: women were not to have sexual relations outside of marriage. If they did so indulge, consent was unimportant to their “owners” who sought revenge or recompense.

The law of marriage and the law of controlling sexual expression are really the same question looked at from different angles. Women have always been looked upon as the property of men — whether fathers or husbands. Marriage has frequently in history been a commercial transaction or a way in which the fabric of society could be maintained. The male insistence on chastity was simply an attempt to regularize social relations, to cement dynasties, to ensure the orderly succession to property (particularly real property) and to perpetuate male domination. This is well expressed by a nineteenth-century commentator:

Chastity is merely a social law created to encourage the alliances that most promote the permanent welfare of the race, and to maintain woman in a social position which it is thought advisable she should hold.18

A corollary to this socio-legal position of men is the negative attitude toward sexual appetites that had been dictated by the Church. Lecky commented that the human sexual urge:

even in its most legitimate gratification, is a thing to be veiled and withdrawn from sight; all that is known under the names of decency and indecency concur in proving that we have an innate, intuitive, instinctive perception that there is something degrading in the sensual part of our nature, something to which a feeling of shame is naturally attached, something that jars with our conception of perfect purity, something we could not with any propriety ascribe to an all-holy being.19

Yet, as a more recent commentator has said, “the history of the control of sex expression . . . has been the history of administrative failures.”20

II. THE LEGAL FRAMEWORK

Women in Anglo-Saxon society had a price. To say that they were items of commerce is not too great an exaggeration. According to the laws of Aethelbert, and other Kings of that period, a bride-price was paid to the girl’s family and a transfer of property took place. If a man had sexual relations with another man’s wife, then compensation had to be paid, its size depending on the status of the husband. These laws changed very little for some centuries after the Norman Conquest.

19 Id. at 104-105.
20 May, supra note 8, at xi.
The first English statute referring to "ravishment" or taking away by force was passed in 1275. This statute of Edward I provided that ravishment could be subject to private suit and if this were not done, then the King "shall do common Right." If punishment were imposed, the ravisher was liable to two years' imprisonment and a fine (or a further imprisonment if the fine were not paid). The description of the subject of ravishment is of most interest: anyone who ravished or took away by force "any Maiden within Age... nor any Wife or Maiden of full Age, nor any other Woman against her Will." "Full Age" probably meant of marriageable or child-bearing age and thought so obvious in canon and common law as not to need elucidation. If the Maiden were "within Age," it did not matter that she consented.

The Statute of Westminster II (1285) provided a few chapters referring to women and children; one illustrated the priorities of the age by decreeing that "of women carried away with the goods of their husbands, the King shall have the suit for the goods so taken away." This suggests that the monarch was intervening in such family matters because he looked upon it as a breach of the King's peace and also as an opportunity to raise revenue. Similarly, chapter 35 of 1285 provided for cases where the child, male or female, "whose marriage belongeth to another" was taken and carried away. The taker would be punished with two years' imprisonment but only if the "ravisher have no right in the marriage" and even though he restore the child unmarried or else pay for the marriage.

The same legislation protected another kind of woman: any one who carried away a nun, "although she consented" was to be imprisoned for three years and "convenient satisfaction" had to be made to the house from which she had been taken while once again the royal will had to be satisfied by a mulct or some similar satisfaction.

One hundred years later in 1382, we find another statute referring to ravishment, although the term is used rather loosely because the legislation provided that if "after such rape," the ladies and daughters of noblemen and other women in the realm "do consent to such ravishers," the females lost all property rights. Furthermore, the husband, fathers or other (male) kin could "sue" the ravishers and have them deprived of life or member, even though the woman had consented. This statute was obviously an attempt to provide relief for adultery or fornication at a time when rape was viewed as little more than an emendable crime (or "tort" as we would express it today).

The protection of women or protection of their property seems to come in century cycles because, in 1486, a statute of Henry VII eloquently recited its purpose in a preamble:

Where [w]omen, as well [m]aidens, as [w]idows, and [w]ives, having [s]ubstances, some in [g]oods moveable, and some in [l]ands and [t]enements, and some being [h]eirs apparent unto their [a]ncestors, for the [l]ucre of such

21 1275, 3 Edw. 1, c. 13 (U.K.).
22 Also see Anon., The Laws Respecting Women (London, 1777).
24 Statute of Westminster II, 1285, 13 Edw. 1, c. 35 (U.K.).
25 Id.
26 1382, 6 Ric. 2, c. 6 (U.K.).
Such taking of females was to be a felony. This anticipated the laws of 1828 and 1886 in England and an 1890 statute in Canada which protected heiresses from the depredations of felons.

The 1486 Statute made no reference to age; it seems to have been based on the notion that all women were to be protected as property, providing they owned property. The concern of the statute seemed to be heavily weighted in favour of the latter. Seventy years later, a statute of 1557 made specific provision for the abduction of heiresses under sixteen years of age. The flavour of the legislation is again well expressed in the preamble which refers to the "maidens and women, children of noblemen, gentlemen and others" who:

often times unawares to their said friends and kinsfolks, by flattery, trifling gifts and fair promises, of many unthrifty and light personages, and thereto by the in-treaty of persons of lewd demeanour, and others that for rewards buy and sell the said maidens and children, secretly allured and won to contract matrimony with the said unthrifty and light personages, and thereupon either with sleight or force oftentimes be taken and conveyed away from their said parents . . . to the high displeasure of Almighty God, disparagement of the said children, and the extreme continual heaviness of all their friends.

The Star Chamber could sentence, to two years in prison and a fine, any abductor over sixteen years of age who took away a female under sixteen years of age, while a heavier penalty of five years imprisonment and a fine could be imposed on any person who took away and deflowered or secretly married any female under sixteen years. Yet another section of the 1557 Act declared that if a female between twelve and sixteen years consented to a marriage, then her property transferred to her next of kin.

The reign of Elizabeth I saw more stringent laws. Rape was no longer a clergiable offence. A new offence (or at least a clarification of the common law) laid down that it was a non-clergiable felony for any person to "unlawfully and carnally know and abuse any woman-child" under ten years of age.

A. The Operation of the Laws

We have little evidence that the laws described were very rigorously enforced prior to the nineteenth century. Undoubtedly, the laws relating to property were applied with vigour, but the protection of females from sexual predators was only a secondary consideration. Stephen's history of the criminal law pays no attention to rape, carnal knowledge, seduction or abduc-

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27 1498, 13 Hen. 7, c. 2 (U.K.). This statute made it a non-clergyable offence. See also Re: Taking Away of Women Against Their Wills Unlawfully, 1597, 39 Eliz. 1, c. 9 (U.K.) and 1820, 1 Geo. 4, c. 115 (U.K.).
28 See discussion, infra.
29 1559, 4 & 5 Ph. & M., c. 8 (U.K.).
30 1559, 4 & 5 Ph. & M., c. 8, s. 4 (U.K.).
31 1559, 4 & 5 Ph. & M., c. 8, s. 6 (U.K.).
32 1577, 18 Eliz. 1, c. 7 (U.K.).
tion of females of any age. One explanation for this neglect is that with exception of rape, the regulation of sexual behaviour was within the jurisdiction of the ecclesiastical courts that tried to control lewdness, unchastity and indecency. The Church took exclusive control over matters relating to adultery and fornication — an exercise of jurisdiction that attracted Chaucer's satiric pen:

boldely did execucioun
In punisshinge of fornicacioun,
Of wicchecraft, and eek of bauderye,
Of diffamacioun and avoutrye

But certes, lechours did he grettest wo.

The canonists had first developed something of a system of law on rape and seduction with the Decretals of Gratian in the mid-twelfth century, although the rules seem rather vague. "Rape" was defined as unlawful coitus and yet in another section the offence was described as involving abduction as well as unlawful intercourse. Then it was further qualified by defining it as rape only if there were no previous marriage negotiations. A century later, there were attempts to create a hierarchy of sexual crimes ranging from seduction, through adultery to rape. Some advocated that rape of a married woman was more serious than that of an unmarried woman; in one of the few references to age, a fifteenth-century canonist argued that any sexual intercourse with a girl under six should be rape because the child could not knowingly consent. The court records, however, show few crimes were tried.

Sentences handed down by the ecclesiastical courts for what we would call "sexual offences" usually consisted of an act of penance, frequently accompanied by some form of public denunciation. The Church was more concerned with the welfare of the soul than with secular punishments. The penitent offender would have to exhibit him- or her-self in the public square or the church. The exhibition was sometimes quite literal with the culprit appearing naked or suitably advertised as a lecher or adulterer. In appropriate cases, the medieval church followed the customs of the Old Testament and allowed the penance to consist of the intermarriage of the guilty parties. (This per-

34 Lines 2-12, quoted by May, supra note 8, at 95. "Diffamacioun" is slander. "Avoutrye" is adultery. "Lechours" are fornicators.
36 [T]he delinquent is usually enjoined to do a public penance, either in the cathedral, parish church, or market place; bare-legged and bare-headed; in a white sheet; and to make confession of his or her crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and at the discretion of the judge. And likewise for smaller faults or scandals, a public satisfaction or penance, as the judge shall decree, is to be made from the minister, churchwardens, or some of the parishioners.

Anon., The Laws Respecting Women (London, 1777) at 337.
sisted, until quite recent times, as a “non-punitive” solution to cases of carnal knowledge or seduction in the secular courts, particularly the juvenile court.)

The power of the ecclesiastical courts could only hope to be effective so long as the populace believed wholeheartedly in divine retribution for sins of the flesh. When religious faith faltered or forgiveness could be bought by indulgences, the disciplinary vigour of the Church was dissipated.

One antidote to this powerlessness was found, not in the criminal law administered by the central authority in Westminster, but in the semi-feudal jurisdiction of the lord of the manor. The daughter of a serf was, like her father, under the guardianship of the lord. If the girl married or engaged in extra-marital sex, the lord might lose her services and had to be compensated for such loss. If the female were of a more privileged social class, she often had an inheritance that would be forfeited to the lord if she were unchaste. 37

Local jurisdictions, supervised by justices of the peace, tried to control sexual promiscuity, by penalizing the parents of bastard children; they were obliged to support these offspring so that they would not be financial burdens on the community. In the sixteenth and seventeenth centuries, the justices sent citizens to the House of Correction not only for being parents of illegitimate children but also for mere fornication. 38 These legal weapons to control sexual acts did not survive the Commonwealth years.

Gradually, the temporal courts took over the superintendence and suppression of sexual immorality. In the seventeenth century, the Court of High Commission 39 was established as a compromise between the exclusive power of the Church over moral questions and the desire of the Tudors and Stuarts to supercede ecclesiastical authority with royal power. Elizabeth I empowered the Court of High Commission “to punish all Incests, Adulteries, Fornications, Outrages, Misbehaviours and Disorders in Marriage.” This laicized ecclesiastical court carried out its jurisdiction with some vigour, and large fines were imposed for incontinency, yet the Court was inefficient because it could not have hoped to deter immorality even if the Court had not been burdened with Chancery-like delay and corruption.

The Court of High Commission was abolished by Cromwell’s regime. But even before the death of Charles I, attempts had been made to make sexual immorality — particularly adultery and incest — subject to the criminal law. Scotland had already made these acts capital offences, for example fornication was punishable by fine, imprisonment, public penance, ducking “in the foulest pool in the parish” 40 or even banishment.

37 These manorial legal remedies had their analogues in the nineteenth century when there were civil actions for seduction and criminal conversation and criminal offences of seduction of females, even if they were consensual, and the abduction of heiresses.


40 May, supra note 8, at 193.
The Parliament of the Interregnum passed legislation in 1650 making adultery a felony punishable by death. Fornication could also lead to a conviction at assizes or before justices of the peace; the punishment was imprisonment for three months and the need to enter into a recognizance to be of good behaviour for a year. There are very few indications that these laws were effective or that much effort was made to enforce them. The 1650 Statute died with the fall of the Commonwealth. Blackstone's comment is an accurate summary of the State's attitude toward the legal control of immorality:

at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigor. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offense of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity; owing, perhaps, to the constrained celibacy of its first compilers. The temporal courts, therefore, take no cognizance of the crime of adultery, otherwise than as a private injury.

Even at the time Blackstone wrote — the eighteenth century — there was a reaction against the lax morals of the Restoration period, for example, a Society for the "Reformation of Manners in the Cities of London and Westminster" was responsible for the conviction of 100,000 "lewd and disorderly" persons during the thirty-four years of its existence. Most of these convictions were no doubt related to prostitution. Keeping a bawdy house was an offence at common law but this was strengthened by the Disorderly Houses Act of 1751 (although there was no mention of children requiring special protection, which was a special concern of the nineteenth-century reformers). Various forms of immorality, such as adultery and fornication, had been within the jurisdiction of the Church but this was, in fact, exhausted by the end of the seventeenth century and officially abolished by statute in 1788. Therefore, until 1861, there was almost no legislation that effectively controlled sexual behaviour. Rape was a crime at common law. No attention was paid to the question of the age of consent.

The nineteenth century, far from being homogeneous in tone and outlook, should be treated as at least three distinct periods. The period from 1780 to 1820 saw the moralistic reaction to the sexual attitudes exhibited in John Cleland's heroine Fanny Hill, and the struggle between the ideas of the Enlightenment and the beliefs of the Evangelicals. The Enlightenment thinkers, including Jeremy Bentham, argued that the felicific calculus of life should certainly include sexual gratification although they excluded children from such freedom of action. Similarly, the philosophes of the Enlightenment were class-conscious in that their advanced views on sexuality were not to be extended to servants and the poor who, presumably, had neither the refinement nor leisure to indulge in libidinous happiness. Finally, the Enlightenment thinkers were misogynistic and too often treated females as men's playthings;

42 Bl. Comm. vol. IV.
44 An Act to Prevent Frivolous and Vexatious Suits in Ecclesiastical Courts, 1787, 27 Geo. 3, c. 44 (U.K.).
even as cultured a man as the judge and thinker Lord Kames allowed his property lawyer views on inheritance to persuade him that adultery by a wife was more heinous than adultery by a husband. He rationalized the Double Standard by saying that the latter’s “occasional indulgence could result in little or no alienation of affection while a wife does not yield, till unlawful love prevails, not over modesty, but over duty to her husband.”

The Evangelicals rejected outright any ideas that sprang from the Enlightenment. Instead, they were obsessed with sin and indoctrinated their children with the need for eternal vigilance against the works of Satan. The Evangelicals looked upon themselves as people chosen by the Almighty to be repositories of virtue, wealth and influence. Their homes were castles of rectitude from which they would venture to right the wrongs of the world and to bring the rest of the world, particularly the poor and the powerless, around to their way of thinking. This puritanical revival and onslaught resulted in much self-righteous breast-beating and in the luxury of the great English vice of Hypocrisy which was well stated by Sir Walter Scott in 1822 when he said, “[W]e are not now, perhaps, more moral in our conduct than men were fifty or years since; but modern vice pays a tax to appearances, and is contented to wear a mask of decorum.”

By the mid-nineteenth century, the materialistic Victorian reformers were experiencing serious religious doubts but by then the social engineers were taking over. The State was intruding as an important force in controlling the lives of its citizens. The apparatus of the “welfare state” was being assembled and the law was taking a direct interest in controlling the lives of neglected, dependent and delinquent children by means of institutions such as orphan asylums, reformatories, children’s aid societies and juvenile courts.

The last forty years of the nineteenth century saw a boom in legislation to protect the child and, in particular, to protect the female from sexual activity. It would be too simple to label these laws as statutes to protect young females from sexual exploitation because they were much broader than that. English nineteenth-century society decided that young women and girls should be fully protected from all sexual acts. We cannot claim that this was the work of nineteenth-century feminists or of Victorian gentlemen who were abandoning the Double Standard and undoing the work of their forefathers who had seen women as property and mere sex objects.

The Victorians were taking a new attitude toward children — no longer were they seen as miniature adults but as having qualities, if not rights, of their own.


47 Walter Scott, Miscellaneous Prose Works, cited in Trudgill, supra note 14, at 129.


own. Laws were passed providing compulsory education, protection against cruelty to children, prohibitions against children working as chimney-sweeps and factory workers, and special institutions for dependent, neglected and delinquent children. One of the first of these Acts was the 1814 Statute that prohibited the carrying away of children under the age of ten by "forcible or fraudulent means." This statute was remarkable because the children were not limited to those of gentle birth or those with property. For the first time, the State was taking the initiative and acting as a surrogate parent for ordinary children who had no guardians of their own or who were in physical or moral danger.

The changes in the laws relating to sexual morality show the Victorian reformers in their least constructive and most meddlesome posture. At a time when children were gaining some recognition as human beings, they became subjected to extremely protective laws. At a time when women were starting to make contributions to social and political questions, their sexual freedom was curtailed.

III. THE SOCIAL BACKGROUND TO NINETEENTH-CENTURY REFORM

The Victorian era is important because it is the first period on which we have significant data about sexual behaviour and sexual habits. That period, which was one of great change, saw the rise of a large middle class (with pretentious manners including its attitudes toward sex), the rise of the city with its social problems (including unemployment), large groups of young persons who were unguarded or unchaperoned, and the first signs of modern social reform (at first carried out by volunteers who were motivated by misguided goodwill rather than by informed opinion).

The individual themes of the period are enigmatic. The Victorians were very concerned about prostitution and made endless attempts to eradicate it while at the same time, the middle class man was being told that his wife was not interested in sexual activity except for purposes of procreation. The respectable matron and her daughter were instructed in sexual matters to act as shrinking violets who at all times should be chaste and decorous and would be likely to blush or even faint at the merest mention of anything vaguely sexual. The Victorian woman was idealized as a mother, home-maker, and

50 Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (N.Y.: Vintage Books, 1962). The author discusses the "discovery" of childhood and of childish innocence which resulted in two attitudes toward children: "firstly, safeguarding it against pollution by life, and particularly by the sexuality tolerated if not approved of by many adults; and secondly, strengthening it by developing character and reason." (at 119).


52 Elizabeth Gaskell was a feminist who wrote 'social problem' novels. In the opening chapters of one of her novels, the heroine Margaret Hale has just rejected a proposal of marriage from a young barrister. The following passage offers some realistic comments about the author's perception of the different attitudes of men and women. Gaskell then closes with a passage which is meant to expose the soft side of the heroine; this quality of submissiveness is considerably changed later in the novel:

Here was she disturbed and unhappy, because her instinct had made anything but a refusal impossible; while he, not many minutes after he had met with a rejection of
helpmate to her busy husband. As a natural and inevitable response, she was encouraged by the militant feminists to think for herself, yet the males of middle class Victorian society were given the impression that women were basically temptresses unless kept in a subdued state. As Trudgill said, the Victorian middle class woman was treated as a "cross between an angel and an idiot."  

Yet this trend could not be foreseen in the eighteenth century. Voltaire had said: "I do not believe that there has ever been an organized nation which has made laws against morals." William Goodwin disapproved of marriage because of its monopolistic qualities which produced competition and jealousy, thus undermining the brotherhood of man (and presumably the sisterhood of woman). Goodwin's wife, Mary Woolstonecraft, a pioneer feminist, wrote a document entitled, *A Vindication of the Rights of Women* in which she favoured purity of mind but was contemptuous of false modesty that forbade the instruction of young gentlewomen in botany. Nothing could be more absurd, in her opinion, than keeping women in a state of ignorance while

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what ought to have been the deepest, holiest proposal of his life, could speak as if briefs, success, and all its superficial consequences of a good house, clever and agreeable society, were the sole avowed objects of his desires.

... 

Margaret felt guilty and ashamed of having grown so much into a woman as to be thought of in marriage. ... 


Francoise Basch is one of the many authors who are now reviewing the role of nineteenth-century women. She traces the sources of the subjected role of the woman in early Victorian times:  

It was protestantism, in its seventeenth-century Puritan version, and later as expressed in the Methodist evangelical movements at the end of the eighteenth and beginning of the nineteenth centuries, that characterized the ethic of bourgeois individualism as well as contemporary feelings about sex and its association with "sin". The cult of family, home and marriage ... was linked with the great emphasis laid on individual effort and achievement, in other words self-help. Basch, *Relative Creatures: Victorian Women in Society and the Novel, 1837-67* (London: Allan Lane, 1974) at xix. 

And at the end of the study, the author commented: 

The denunciation of the marriage-market ... which was held to be largely responsible for the unhappiness of spouses and for prostitution, is also a denunciation of a social system that was subjected to the demands of the business ethos and the cash nexus: a world where the individual's integrity and spirituality are sacrificed to the acquisition of money and prestige. 

*Id.* at 271. 

See the remarks of Carl N. Degler, *At Odds: Women and the Family in America From the Revolution to the Present* (N.Y.: Oxford Univ. Press, 1980) at 253-54 that Acton was a proselytizer and did not imagine that his "ideal" mother and wife was the norm. At 271-72 he goes on to say: 

The underlying aim in the minds of those marriage reformers — male and female — was to improve the position of women within marriage. For in their minds it was clearly the men, not the women, who pressed for excessive sexual indulgence. It was quite consistent with a broader movement, already noticed, in regard to the family: to enhance the autonomy of women, to give them a greater sense of their own self-interest. That is why the literature of sexual repression in these years should not be seen as opposed to the interest of women. In fact, it ought to be recognized as deriving from a concern for women within the marriage relation. 


54 Trudgill, *supra* note 14, ch. 4. 

Regulation of Sexual Activity

vehemently insisting on their duty to resist temptation. Her remarks on seduction made more sense than the nineteenth-century pre-occupation with criminal legislation:

I have before observed, that men ought to maintain the women whom they have seduced; this would be one means of reforming female manners, and stopping an abuse that has an equally fatal effect on population and morals. Another, no less obvious, would be to turn the attention of woman to the real virtue of chastity; for too little respect has that woman a claim on the score of modesty, though her reputation may be white as the driven snow, who smiles on the libertine whilst she spurns the victims of his lawless appetites and their own folly.56

These avant-garde thinkers were supported early in the nineteenth century by the unorthodox Robert Owen who argued that celibacy had little to do with legal restrictions. He approved of chastity as "the sincere expression and disinterested exercise of our affections." On the other hand, if it meant "concealment or loveless legality," then it was no better than "a sanctioner of vice."57 The French social thinker Fourier echoed the remarks of Goodwin and Owen when he predicted that, in the future, men and women would:

dispense with every outward or legal claim to the other's affections, and to assert an exclusively private claim, or claim based upon paramount individual worth. I suppose the time will come when both men and women will reject an enforced homage, a homage enforced by the danger of public ignominy; a time when they will utterly loathe an affection which is unwillingly rendered.58

The great obstacle to these enlightened views was nineteenth-century English society that saw something degrading in the sensual side of human relations. Lecky questioned the assumed superiority of the "austere society" that saw the "balance of enjoyment" so "unquestionably and so largely" on its side.59 He challenged the Victorian tendency to encourage early marriage as a protection against lack of chastity and to condemn prostitution, speaking sensitively of "victims" of the latter:

But for her, the unchallenged purity of countless happy homes would be polluted, and not a few who, in the pride of their untempted chastity, think of her with an indignant shudder, would have known the agony of remorse and of despair. On that one degraded and ignoble form are concentrated the passions that might have filled the world with shame. She remains, while creeds and civilisations rise and fall, the eternal priestess of humanity, blasted for the sins of the people.60

The burgeoning Victorian middle-class took great pride in its family structure which was "long-lasting and intimate."61 In this "more durable unit," as

58 Id. at 151.
59 Lecky, supra note 18, vol. I at 50. Compare Bentham in his Deontology:
To prove that the immoral action is a miscalculation of self-interest, to show how erroneous an estimate the vicious man makes of pains and pleasures, is the purpose of the intelligent moralist. Unless he can do this he does nothing; for... a man not to pursue what he deems likely to produce to him the greatest sum of enjoyment, is, in the very nature of things, impossible.
Quoted, id. at 15n. 2.
60 Id. vol. II at 283.
61 Stone, supra note 3, at 679.
Stone observed, there developed "a combination of repression of wives and children and an intense emotional and religious concern for their moral welfare." The family was largely self-sufficient in material and emotional terms. The most valued characteristics were respectability, moral asceticism, Evangelical piety and a patriarchal attitude. All of these forces, when focused on the less fortunate, lower classes resulted in paternalism and an application of "less eligibility."

The home was the centre of social life in which great reverence was given to the role of wife and mother in providing a haven to which the male could retreat from the busy workaday world. The female of this social class was sufficiently affluent that her work was done by servants or labour-saving devices. She paid a heavy price for her privilege, however; she became an ornament. Modern research has shown the heavy psychic damage this causes in many sensitive, intelligent women. Their less adventuresome sisters became the prey of the women's doctors who were best represented by Dr. William Acton, the physician partly responsible for the passage of the Contagious Diseases Act, 1864 which was an attempt to control prostitution by penal and medical measures. Today he is more significant as the author of an influential book, The Functions and Disorders of the Reproductive Organs, which set the tone for "good" and chaste women:

I should say that the majority of women (happily for them) are not very much troubled with sexual feeling of any kind . . . . Many men, and particularly young men, form their ideas of women's feelings from what they notice early in life among loose or, at least, low and vulgar women . . . . The best mothers, wives, and managers of households, know little or nothing of sexual indulgences. Love of home, children, and domestic duties, are the only passions they feel.

These words were written at a time when, in England, there were unprecedented numbers of prostitutes on the streets, pregnant brides and bastard children, but not, of course, among Dr. Acton's patients. Doctors of the era

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62 Id.
63 Barbara Ehrenreich and Deirdre English, For Her Own Good: 150 Years of the Experts' Advice to Women (Garden City, N.Y.: Anchor Press, 1978) ch. 1.
64 For one of the best descriptions of the onslaught of modern medical methods see, G.J. Barker-Benfield, The Horrors of the Half-Known Life: Male Attitudes Toward Women and Sexuality in Nineteenth Century America (N.Y.: Harper & Row, 1976). See also, Christopher Lasch, Haven in a Heartless World: The Family Besieged (N.Y.: Basic Books, 1977) who says at 20, "Lawgiver and priest retired from sexual supervision only to make way for the doctor, whose supervision was far more thorough."
65 Contagious Diseases Act, 1852, 15 & 16 Vict., c. 11 (U.K.).

Any husband who required coitus except for the purpose of procreation was not only making his wife his private prostitute and killing her love of him but was endangering the health of any children she might bear him.
romanticised women because they believed that women were sexual volcanoes which would erupt with the wrong treatment. The doctors warned that "vice in any form could derange the entire woman, flesh and spirit." Education was only appropriate for women who were characteristically sterile — the old maid, nun or school mistress.

This ambivalent attitude towards women was not new. The classic work on witchcraft, *Malleus Maleficarum*, had warned that "[a]ll witchcraft comes from carnal lust, which in women is insatiable." The Church had always discouraged strong sexual passion in marriage. All lust of the flesh was evil and that view was not restricted to the Catholic Church. Calvin had decreed that "the man who shows no modesty or comeliness in conjugal intercourse" was committing adultery with his wife. Women who derived pleasure from sexual activity seemed almost to be criminals. Every effort had to be made to avoid exciting women who were risking hysteria by vicious or near-vicious habits. Hall cited an 1885 article in *The Lancet*, which argued in favour of raising the age of consent because "the mind of young girls are [sic] so unstable and their consciences so elastic." Even if the young lady were fortunate enough to avoid insanity, she was risking her child-bearing ability. The gynecologist Gardner diagnosed most "female debility" as caused by the "severe exercise of dancing the polka," which resulted in "violently shaking down the internal viscera, when excited by the ordinary monthly functions, and preventing the natural engagement."

These ideas are moderate compared with the absolute nonsense that was spoken about masturbation.

Acton believed that children should be brought up in "perfect freedom from, and indeed total ignorance of, any sexual affection." No sexual notion

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67 Ehrenreich and English, *supra* note 63, at 113. Isaac Ray had pointed out that women were peculiarly susceptible to mass behaviour and must be protected from sexual influences because seduction often led to insanity. See Barker-Benfield, *supra* note 64, at 74.


69 Barker-Benfield, *supra* note 64, at 211 quotes the Reverend John Todd as saying in that American divine’s book *Serpents*: "The great object of the marriage institution — the rich blessing left from Eden — is not that the husband may live in legal fornication, and the wife in legal prostitution, but fulfil the first great command in the Bible."

70 Quoted by Stone, *supra* note 3, at 499.

71 Quoted by G. Stanley Hall, 1 *Adolescence, Its Psychology* (N.Y., 1925) at 373.

72 Quoted by Barker-Benfield, *supra* note 64, at 264. Hall, *supra* note 71, vol. I at 511-12 waxed eloquent over menstruation ("periodicity" as he termed it):

When woman asserts her true physiological rights she will begin here, and will glory in what, in an age of ignorance and sense, man made her think to be her shame. The pathos about the leaders of woman’s so-called emancipation is that they, even more than those they would persuade, accept man’s estimate of this state, disapprove, minimize, and perhaps would eliminate if they could the very best thing in their nature. . . . She will not profane her own Sabbath of biological ordination, but will keep it holy as to the Lord, for he has hallowed it as a day of blessing from on high. . . . This is one of the several reasons why she is more religious by nature than man, because at these seasons her frame of mind inclines her to a natural piety and sense of independence and of being an organism in the hands of a higher power.

or feeling would enter children's heads unless they were purposely suggested. This would be done by spicy foods, overheated rooms, feather beds, lascivious books, lying in bed after waking, constricting clothes, climbing trees and immodest dressing by females. Of course, all these influences could lead to masturbation. Acton gave a portrait of a self-abuser:

The frame is stunted and weak, the muscles undeveloped, the eye is sunken and heavy, the complexion is sallow, pasty, or covered with spots of acne, the hands are damp and cold, and the skin moist. The boy shuns the society of others, creeps about alone, joins with repugnance in the amusements of his schoolfellows. He cannot look any one in the face, and becomes careless in dress and uncleanly in person. His intellect has become sluggish and enfeebled, and if his evil habits are persisted in, he may end in becoming a drivelling idiot or a peevish valetudinarian.74

Dr. G. Stanley Hall, a pioneer in psychology, was not in favour of drugs or mechanical devices to cure masturbation. Work would reduce temptation; excessive mental and physical effort would so fatigue the patient that he would not give into the vice. Good music would be a moral tonic. Early rising would also help. Legislation was sadly needed but he was not specific. Hall blamed clergymen for lack of guidance; they have “often come to regard as superior ethical purity and refinement the sloth and cowardice that dreads to grapple with a repulsive and festering moral sore.”75

Early in this century the Canadian Parliament enacted the Juvenile Delinquents Act which included in the definition of a “juvenile delinquent” any child or youth who indulged in “sexual immorality or any similar form of vice.”76 The reformers and child-savers no doubt had in mind self-abuse or the secret vice. In light of these absurdities, we must approach the reforms they effected with some caution.

A. W.T. Stead and the “Eliza” Case

The Stead case was ostensibly a criminal case in which Stead, Bramwell Booth of the Salvation Army and a reformed prostitute were charged with abduction of a young female, an act which had, in one form or another, been an offence for centuries. Bramwell Booth, Butler and Stead decided to conduct their own investigation of the procurement and prostitution of young girls. In particular, Stead decided to “buy” a pure young virgin. Stead made careful plans. He consulted Scotland Yard to ensure that the trade did exist and that the girls were unwilling parties. He took members of Parliament into this confidence. Ann Stafford is not able to tell us exactly what he told these sympathetic members of the Commons and Lords but it seems very doubtful that he was very explicit about what eventually became the Eliza case. He also discussed his campaign with the Archbishop of Canterbury and Cardinal Man-

74 Quoted by Marcus, supra note 66, at 19. The first publication devoted exclusively to masturbation was Onania: or the Heinous Sin of Self-Pollution and All Its Frightful Consequences, in both sexes, considered with Spiritual and Physical Advice to Those who have already Injur’d themselves by this Abominable Practice. . . . See also, Mac-Donald, The Frightful Consequences of Onanism: Notes on the History of a Delusion (1967), 28 J. of the History of Ideas 423; Neuman, Masturbation, Madness, and the Modern Concepts of Childhood and Adolescence (1974), 8 J. of Soc. History 1; Hare, Masturbatory Insanity: The History of an Idea (1962), 108 J. of Mental Science 1.

ning who promised to support him. He also talked to prison chaplains, including the Rev. Horsley.

Stead persuaded Rebecca Jarrett to act as procuress. She was a former prostitute who had been “saved” by Josephine Butler. Jarrett went back to her old haunts. She had some difficulty in finding the right kind of girl. The first ones shown to her were “so obviously vicious and overage that Rebecca had no use for them.” Stead had told her to “get a girl from stock, not a girl from a respectable home”; instead she chose fourteen year old Eliza Armstrong who came from a relatively respectable home, but Jarrett was poorly briefed by Stead because she failed to obtain the formal consent of Eliza’s “father” despite his presence during some of the negotiations. Jarrett told Mrs. Armstrong that she wanted Eliza as a servant, although Stafford suggests that Mrs. Armstrong should have known that this was not the true purpose because the intermediary between Mrs. Armstrong and Jarrett in obtaining Eliza was a madam, Mrs. Broughton, and the clothes she bought for Eliza were more suitable for the sporting life than for the life of a household drudge. Jarrett’s cover-story was not terribly convincing and when the whole story was exposed in Stead’s *Pall Mall Gazette*, Mrs. Armstrong claimed that she had always had her suspicions.

Jarrett took Eliza to a midwife who examined her to determine that she was a virgin. Later, she was also examined, to the same purpose, by a Harley Street doctor. The unfortunate girl was naturally very distressed by these bizarre events.

Stead acted much as a general supervising a war against vice and took a very keen interest in the unfolding of events. Ann Stafford described his participation after Eliza’s examination by the midwife when Eliza was being kept in rooms in London:

> It was essential to Stead’s plan that he should be in the room alone with the child and he was anxious not to frighten her, and so he thought it would be a very good idea if she could be lightly chloroformed so that she would know nothing about it. 

The most unsatisfactory part of the Eliza story is the subsequent history of the Secret Commission. Almost all the evidence of the alleged social investigations carried about by Stead and Booth comes from these two crusaders themselves. Stead claimed that he had seen great degradation and had witnessed the procuring of young girls. His documentary evidence was very sparse and his behaviour during that period, just before he wrote his sensational article, *The Maiden Tribute of Modern Babylon,* suggested that he was in a state of religious and emotional frenzy.

Ronald Pearsall looked upon the Eliza case as a “pseudo-event.” George Bernard Shaw, who had supported Stead, lost patience with the journalist for the “put-up job” of the Armstrong case. That rabid anti-feminist, Mrs.

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78 Id.
79 Published in British Sessional Papers, House of Commons, at 172.
Lynn Linton, said that Stead “exudes semen through the skin.” Viscount Esher judged him as a “pretty good loony. All his female friends he endows with the attributes of Charles’ mistresses.” Pearsall agreed, describing the crusader as “bent as a corkscrew.” The most sympathetic study, by Ann Stafford, does not criticise Stead but the description of the last weeks of the Secret Commission is extremely sketchy.

To Stead, the trial, and the surrounding publicity was an exposé of the White Slavery Traffic. No one knows whether this was a serious problem, but Stead, as an imaginative and innovative editor, sensed that a curious public could easily be convinced.

If we go a little deeper, we discover that the case was another battle in the long war on the social evil of prostitution and vice in general. The Stead case is important because it caused a complete re-examination of the legal control of sexual activity and the protection of females. This not only affected England but also Canada, largely through the work of an avid disciple of Stead — D.A. Watt.

B. A Twenty Year Campaign

Stead’s journalistic crusade against vice was the final act in a long struggle to improve the laws relating to prostitution. Josephine Butler had worked for twenty years aided by countless groups, mostly with a religious base. As early as 1812, the Philanthropic Society had succeeded in persuading the Lord Mayor of London to prosecute street-walkers and brothel-keepers in the city.

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81 Quoted in Pearsall, id. at 304.
82 Quoted in Pearsall, id. at 305.
84 See also, Giles Playfair, Six Studies in Hypocrisy (London: Secker & Warburg, 1969) ch. 3, and, generally, J.W. Robertson Scott, The Story of the Pall Mall Gazette (London: Oxford Univ. Press, 1950); Raymond L. Schultz, Crusader in Babylon: W.T. Stead and the Pall Mall Gazette (Lincoln, 1972); Frederic Whyte, The Life of W.T. Stead (London, 1925). Stead’s prose was the deepest shade of purple. It is difficult to know how they were received by readers in 1885. Did they affect only the readers who would today have a taste for the News of the World? The only problem with that analogy is that Pall Mall Gazette was of a slightly higher calibre. In “The Maiden Tribute of Modern Babylon,” Pall Mall Gazette, 6 July 1885, Stead said:

London’s lust annually uses up many thousands of women, who are literally killed and made away with — living sacrifices slain in the service of vice . . . . I do ask that those doomed to the house of evil fame shall not be trapped into it unwillingly, and that none shall be beguiled into the chamber of death before they are of an age to read the inscription above the portal . . . . If the daughters of the people must be served up as dainty morsels to minister to the passions of the rich, let them at least attain an age when they can understand the nature of the sacrifice which they are asked to make. And if we must cast maidens nightly into the jaws of vice, let us at least see to it that they consent to their own immolation, and are not unwilling sacrifices procured by force and fraud. That is surely not too much to ask from the dissolute rich.

85 The literature on White Slavery is voluminous and most of it is alarmist and rather silly. See, e.g., Ernest A. Bell, War on the White Slave Trade (Chicago: Ball, 1910); Clifford G. Roe, Panders and Their White Slaves (N.Y., 1910); Charles Terrot, Traffic in Innocents: The Shocking History of White Slavery in England (N.Y.: Dutton, 1960); “Commercialized Vice and The White Slave Traffic,” in Report of Addresses and Proceedings of Social Science Congress (Ottawa, 1914) at 199-237.
but this campaign waned after a few years when the newspapers lost interest. In 1842, the Committee of the London Society for the Protection of Young Females produced a Bill that would have given police more control over brothels. A similar effort was made in 1844 but both failed to be passed in the legislature.\textsuperscript{86}

In her pious history of the struggle to raise the age of consent, Ann Stafford saw the opposition to the \textit{Contagious Diseases Act, 1864} as forcing “legislators, the churches, professional bodies, intellectuals, the Press, the prosperous middle classes and newly enfranchised artisans to change their views about the position of women in a society which previously had been ruled by men for the enjoyment of men.”\textsuperscript{87} That legislation applied to garrison towns to protect soldiers from venereal disease and required prostitutes who were suspected carriers of the disease to be examined and treated.

At the end of the reign of William IV, the government had been considering the adoption of the continental system by grouping prostitutes in licensed houses but it was abandoned when Victoria succeeded to the throne as it was thought an unsuitable subject for a bill to which the young Queen would be asked to give her assent. Furthermore, it was known that the Prince Consort was against the idea.

Mrs. Butler objected to the \textit{Contagious Diseases Act, 1864} because it discriminated against women. Her motives were a strange mixture of the constructive and sentimental. She wanted women to receive better education so that they would not have to resort to the streets to earn a living. She also wanted to help these women to learn the advantages of a good Christian home influence, which would deter them from the attractions of prostitution — idleness, pretty clothes and “a craving for some little affair of the heart to enlighten the insipidity of their lives.”\textsuperscript{88}

She could also be hard-headed and accused the State, by its legislation, of degrading women and forcing them to submit to medical attention so that men could indulge in vice with impunity. Butler was also perfectly correct in pointing out that the Act effectively applied only to poor women. The carefully chaperoned rich girl was never likely to come within its operation.

The reformers’ efforts resulted in a Royal Commission in 1871,\textsuperscript{89} before which Butler appeared as a witness, demanding better housing and better education to solve the social problem of prostitution. She told the members that she had seen girls bought and sold, and demanded that the age of consent be raised (to fourteen) to stop the thriving trade of the procurers. The Commission accepted the age increase and also recommended that the compulsory examination of prostitutes be discontinued. Instead, the medical examinations would become voluntary but if a woman were found to be diseased, a magistrate could order her detention for treatment for as long as three months. Nothing came of these recommendations.

A bill was introduced four years later to increase the age of consent to fourteen; in Committee, this was reduced to thirteen. In the House of Lords,

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\item \textsuperscript{86} See Trudgill, \textit{supra} note 14, at 111, 114.
\item \textsuperscript{87} \textit{Supra} note 77, at 14.
\item \textsuperscript{88} \textit{Id.} at 31.
\item \textsuperscript{89} Royal Commission on the Contagious Diseases Acts, 1871.
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Lord Coleridge, an eminent judge, disapproved of that age and suggested it should remain at twelve, which was the age at common law when a woman could marry. Nonetheless, the House of Commons passed the bill raising the age of consent, by one year, to thirteen.\(^9\) Another decade passed before there was further change.

The Stead case's origins are found in the revelations of a Mr. Dyer who had a friend who had visited a Brussels brothel and found there an English woman of nineteen years. She claimed she had been promised marriage by a Belgian. Instead, she was installed in a brothel and she now wanted to escape. The Belgian authorities denied allegations that there was traffic in English girls who were being kept against their wills in Brussels brothels. Two English policemen were sent to inspect the situation and reported that they found nothing amiss. Josephine Butler thought that the policemen had been hoodwinked by the Belgian authorities; that the Belgian police worked hand-in-glove with the brothel keepers and that the unfortunate English females had been moved from the houses before Inspector Greenham and his colleague had visited the brothels. Mrs. Butler's protest, the work of Mr. Dyer's Committee for the Exposure and Suppression of the Traffic in English Girls for the Purposes of Continental Prostitution and a petition signed by one thousand women finally persuaded the Government that a Select Committee of the House of Lords should examine the problem.

C. The 1881-1882 Select Committee

An English lawyer named Snagge had been sent by Sir Godfrey Lushington, Permanent Under-Secretary of the Home Office, to investigate the problem in Brussels. He discovered that British women were living in Belgian brothels and he reported his findings to a Select Committee of the House of Lords which investigated, in 1881 and 1882, The Law Relating to the Protection of Young Girls from Artifices to Induce them to Lead a Corrupt Life.\(^9\) Snagge discovered that, over a seven year period, thirty-three women had been recruited for prostitution in Belgium and had been issued with false birth certificates that suggested to the Belgian authorities that they were of the age of majority. Some of the women were in fact over that age. The younger ones were inveigled to Belgium on the promise of jobs unrelated to prostitution. The Bishop of London, a member of the Select Committee, was relieved to discover that most of the recruiting was done by foreigners rather than British debauchers.

A small portion of the women were kept in brothels against their wills and some of these were rescued by English philanthropists and Belgian justice officials. The Select Committee heard witnesses from many different walks of life — police officers, prison officials, charity workers, lawyers and politicians. Their evidence suggested that juvenile prostitution existed in London but was not as common as some had suggested. There was, however, little or no evidence that pure young virgins were recruited by sinister \textit{plac\'eurs} of foreign extraction. There were heart-rending descriptions of poverty and sub-

\(^{90}\) \textit{An Act to Amend the Law Relating to Offences Against the Person}, 1875, 38 & 39 Vict., c. 94 (U.K.).

\(^{91}\) \textit{Supra} note 79.
human housing conditions for the lower classes, which resulted in young girls being first deflowered in incestuous circumstances and eventually being driven, by economic necessity and an understandable desire for material comforts, to earn a living by prostitution.

The Committee also discovered that brothels were not as common as popularly believed but that many women were engaged in prostitution in a freelance way. The women in this vicious trade included prostitutes "in the carriage trade" who lived and worked in neighbourhoods such as St. John's Wood. The Committee commented that it would be "in the interests of morality not legality"\textsuperscript{92} to eradicate the prostitutes from this desirable residential area.

Most witnesses agreed that the age of consent should be raised to sixteen. Very few thought that eighteen or twenty-one years made any sense as an upper limit. J.F. Stephen, by then a High Court judge, wrote to the Select Committee and agreed with a raise in the age of consent, although he seemed more interested in the legal question whether the recruiting in England for immorality committed outside the country was an offence in English criminal law.\textsuperscript{93}

The evidence before the Select Committee was, on the whole, very sensible and free of the hypocrisy that is often erroneously ascribed to all Victorians. There was a commendable amount of attention paid to police officers who worked in the most degraded and poverty-stricken parts of London. Persons such as Howard Vincent, Director of the Criminal Investigation Department gave evidence of the social conditions and the employment opportunities of the "other half." He and other witnesses suggested that overcrowding, unemployment and physical and moral danger to children could be alleviated by emigration to North America.

The Rev. John Horsley, a Chaplain of Clerkenwell, wrote widely on the problem of juvenile dependency and depravity. During his work in prison, he had collated data on prostitutes incarcerated there. Some of the information is irrelevant because it only shows, at least to the clergymen's satisfaction, that lack of religious instruction and church attendance was an important factor in the ruination of the 3,000 women surveyed.

Horsley's study, which was appended to the Select Committee Minutes, is probably crude sociology on modern standards but he did include some useful information and made some shrewd observations. Almost half the women surveyed were illiterate. Some 2,412 of 3,075 were domestic servants or engaged in other menial occupations such as machinists or laundresses. Only forty-four had come from the "better class." Ninety-seven were widows and 212 were married but had been deserted by their husbands. One-half were orphans and another third had only one parent living or in evidence.

\textsuperscript{92} Id. at 442. Charles Booth in \textit{The Life and Labour of the People in London} (London: Macmillan, 1902) commented on the sexual mores of the people of the East End of London: "With the lowest classes pre-marital relations are very common, perhaps even usual. Amongst the girls themselves nothing is thought of it if no consequences result; and very little even if they do, should marriage follow, and more pity than reprobation if it does not." (3rd series, vol. I at 55).

\textsuperscript{93} \textit{Supra} note 79, at 513.
Their professed cause for turning to prostitution is enlightening: to support mother, 11; to support lazy husbands, 35; poverty and lack of work, 164; voluntary concubinage and then deserted, 360; led away by companions and decoy girls, 439; seduced under promise of marriage, 806; went on streets as a matter of choice, 1,260. These statistics have a touch of the confessional about them and must be read with some skepticism.

The inquisitive Rev. Horsley also extracted information on the age at which these women were first seduced. Eight had lost their virginity before they were thirteen and a further 95 of 3,075, by the age of fourteen. After that there was a steady two hundred per year from ages fifteen to age twenty-two.

For our purposes, the most interesting part of Horsley's study is the "causes of fornication and prostitution." Some of his explanations sound very much like special pleading and reflect Victorian shibboleths. For instance, a modern audience is unlikely to be convinced by such causes as evil language; self-pollution; laxness; hereditary disposition to unchastity; want of spiritual intercourse between the clergy and the young; and suggestive songs, novels, plays and impure literature; want of exercise and bathing.

A few other "causes" have not entirely been discarded by commentators on prostitution: lawless youth, delinquency, and the general decline in standards; intemperance; liberty as against domestic and moral restraint; leaving to "impure lips" instruction in sexual matters; ignorance of physiology and especially the laws of sexual relationships among the young; absence of parental care and instruction; quarrels at home, especially with step-parents; the condition of dancing rooms and music halls; the want of opportunities for social intercourse among the young of both sexes, especially in the matter of recreation.

Some of Horsley's observations applied particularly to the time: seduction by masters and lodgers; want of religious, moral and secular education; the life of maids-of-all-work; neglect by mistresses of their personal duty toward their young servants; overcrowding in the cities; homelessness of unemployed working girls and servants.

Finally, some of Horsley's remarks have a peculiar relevance to the laws which became part of the 1892 Canadian Criminal Code and, in most instances, still form part of the law. These remarks are self-explanatory and sometimes quite accurately reflect the judicial remarks in the cases subsequently decided under our Code:

1. The ignoring by society of the principle that the law of purity is as binding on men as on women.
2. The tone of upper class parents toward their sons who fornicate.
3. The poverty of women, and the disorganized state of women's work, causing a supply of prostitutes.
4. The poverty of men, and every other cause which hinders early marriages, causing a demand for prostitutes.
5. The treatment of prostitutes as an outcast separate class, against whom fornication is no sin.

The Select Committee recommended that it should be a serious misdemeanor for anyone to procure any women to leave the United Kingdom for the purposes of entering a brothel. The age of consent should be raised to sixteen. Magistrates should be empowered to issue search warrants so that police could
enter houses where it was suspected that girls were being kept for immoral
purposes.

At the same time, a House of Commons Committee was considering the
operation of the Contagious Diseases Act, 1864 and made a recommendation
that it should be an offence for anyone to receive into any house, for the pur-
poses of prostitution, any female under sixteen years. Strangely, the Commit-
tee made no specific suggestion for raising the age of consent although the
reference to sixteen years implied a change in the law. The work of these Com-
mittees suffered the same fate as the 1871 Royal Commission: oblivion.

There was another attempt to pass legislation in 1883 but it foundered in
the House of Commons after passage in the House of Lords. Parliament
showed a similar disinterest in the spring of 1885.

The story of W.T. Stead, “Eliza” and “The Maiden Tribute of Modern
Babylon” may be one of the first illustrations of the modern phenomenon of
“hype” — but successful hype. In addition to selling lots of newspapers and
satisfying Stead’s desire for martyrdom in prison, it was instantly successful in
the passage of legislation — the Criminal Law Amendment Act, 1885.\(^4\)

The analogue with modern techniques of persuasion and propaganda goes
deeper. Hype is certainly not based on the maxim that quality is more impor-
tant than quantity. We have seen that Stead’s case was, in modern parlance, a
media event based on thin, or more probably, spurious evidence. That possess-
ed publicist, Stead, was the opportunist who was the right person in the right
place at a time when the Government could not ignore his exposé, which is
rather a charitable term for his activities.

No matter what view we take of Stead, the simple fact is that his efforts
resulted in the resurrection of the Bill which had died in Parliament in May of
1885. Before the last of Stead’s articles in the Pall Mall Gazette had appeared,
Parliament had again taken up the Bill. On July 30, it had its third reading and
within two weeks, the Criminal Law Amendment Act had received royal as-
sent. Under section five the age of consent was raised to sixteen and there were
other provisions to protect young females, particularly from the evils of pros-
stitution and brothels.

The debate on July 9, 1885, in the House of Commons on what became
the Criminal Law Amendment Act, 1885 was remarkable for its brevity but for
very little else. The Home Secretary was obviously trying to rush through a bill
to take pressure off the Government. He did not refer to the Stead articles or
to matters that were discussed there. He only mentioned the 1881-1882 Select
Committee Report and informed (almost instructed) the members that public
opinion would not be satisfied unless the Bill was passed immediately.\(^5\)

Considering the twenty year struggle by Butler and her colleagues, the
discussion in the House of Commons was very ill-informed and almost offhand.
Most debates were devoted to members’ fears that the new provisions would
lead to trumped up charges and attempts at extortion by young women. One
speaker could not understand why the Government had had such a change of
heart after years of inaction and did not believe that there was evidence that

\(^4\) Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69.

\(^5\) Can. H. of C. Deb., July 9, 1885, at 197-98.
penal laws could put a stop to prostitution. Others considered that this was a morals issue which was inappropriate for the criminal law. One said that the Bill was such that it might be expected "to meet the approval of a Church Congress." He went on to cast suspicion on "Societies pretending to be formed for the protection of young girls which boasted that they never failed to obtain a conviction." If this "tissue of nonsense" were allowed to become law, "no man, however innocent or respectable, was safe from such organizations."97

On a slightly more reasonable note, another member argued that there should be no additions to the criminal law unless it was shown to be "necessary and likely to achieve its object." Furthermore, the moment the Government "set up a State protection of virtue they would do a great deal towards diminishing the care which the possessors of it were bound themselves to exert."98

A few members mentioned the newspaper articles but no one mentioned Stead or the name of his journal, although they assumed the statements would not have been published unless they were true.

Very few speakers mentioned the protection of children. One exception was Mr. Broadhurst who gave the Bill qualified approval but asked whether it was possible to stop the social evil (namely prostitution) which they all deplored when "we herded together whole families in a manner worse than the beasts of the field." He termed the proposed legislation a "great mockery, if not a snare, so long as they refrained from going to the root of the evil. They must provide dwellings fit for human beings to live in, with a chance of growing up pure and moral." He believed that few women chose an "immoral life from mere choice" (and this was certainly the finding of the Rev. Horsley).99

At first, the Home Secretary had decided that no action would be taken against Stead, but the situation changed when the editor was attacked with his own weapons. Rival newspapers carried articles suggesting that Eliza's mother had been hoodwinked and that her daughter had been taken from her (and her husband) by false pretences. Mrs. Armstrong decided that she liked the publicity and that she had, all along, relied on Jarrett's representations that Eliza was going into respectable service. Lloyd's Newspaper tried to find Eliza without success. Stead and Booth showed lack of judgment in keeping her location in France a mystery for so long that the British public started to question their motives and the authenticity of the original exposé. Just eight days after the Criminal Law Amendment Act had received royal assent, a warrant was issued for the arrest of Rebecca Jarrett. In early September, Stead, Jarrett, Booth and some lesser actors in the drama were charged with four counts under the Offences Against the Person Act, 1861. Booth was acquitted, but Stead and Jarrett were convicted of abduction, although the jury recorded

96 Id. at 205.
97 Id. at 206.
98 Id. at 200.
99 Id. at 204.
100 Id. See also the similar remarks of W.E. Forster at 207.
101 The final irony was that Eliza's "father" was not the man named on her birth certificate. One of the strongest points in the Crown's case against Stead was that he and Jarrett had illegally abducted Eliza because they had failed to obtain the father's consent. Stafford, supra note 95, at 210.
their "appreciation of the high motives by which Mr. Stead had been actuated." In a second trial the latter two, along with the midwife, were convicted of indecent assault on Eliza. The midwife and Jarrett were each sentenced to six months with hard labour. Stead received only three months which he served in the comparative luxury of a local prison.

IV. THE CANADIAN LAW BEFORE 1885

From colonial times until Confederation, most Canadian provinces relied on the common law and on Imperial legislation that had been received in the colony. There was very little of either. Hale, in his Pleas of the Crown, stated the law quite succinctly: the age of consent was ten years. Blackstone discussed the "abominable wickedness of carnally knowing or abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion." With the exception of abduction of propertied females, there were no other laws controlling the sexual activity of females over ten years of age. Newfoundland, British Columbia, the Northwest Territories and, in the period before 1841, Upper Canada, had no specific legislation of their own. Nova Scotia had provided in 1758 that the age of consent was to be twelve years of age. Rape was a non-clergiable felony, adopting the stringent policy of a statute of a Elizabeth I. The same Nova Scotia statute made it a felony without benefit of clergy to have carnal knowledge of a female under twelve years of age, even if the female consented. New Brunswick, in 1829, and Prince Edward Island, in 1836, made it a capital offence to have carnal knowledge and abuse of a female under ten years of age. If the female was between ten and twelve years, carnal knowledge and abuse was a misdemeanour resulting in a mild but unspecified punishment that was solely within the discretion of the trial judge.

The seventy years between the Nova Scotia provision and the other maritime legislation also showed some other innovations. The word "abuse" was not defined but the term "carnal knowledge" came to be specifically described for the offences of rape and carnal knowledge as some accused had escaped conviction because of the "difficulty of the proof, which has been required, of the completion of these several crimes." The change in the law provided that it was "not necessary . . . to prove actual emission of seed" and carnal knowledge was to be "deemed complete upon proof of penetration only." New Brunswick changed this to read "least degree of penetration."

102 Id. at 234.
104 1759, S.N.S. 32 Geo. 2, c. 13, s. 7. Compare the earlier English act, 1285, 13 Edw. 1, c. 13 (U.K.).
105 1792, 32 Geo. 3, c. 13, s. 8 (U.K.). Compare 1576, 18 Eliz. 1, c. 7, s. 4.
106 1829, S.N.B. 9 & 10 Geo. 4, c. 21, s. 11.
107 1836, R.S.P.E.I. 6 Wm. 4, c. 22, s. 11.
108 1836, R.S.P.E.I. 6 Wm. 4, c. 22, s. 12.
109 1836, R.S.P.E.I. 6 Wm. 4, c. 22.
110 1829, S.N.B. 9 Geo. 4, c. 21, s. 12, changed to "least degree" by 1854, R.S.N.B. 17 Vict., c. 149, s. 11. See, 1829, S.N.B. 9 & 10 Geo. 4, c. 21, repealed by 1849, S.N.B. 12 Vict., c. 29.
New Brunswick\textsuperscript{111} and Prince Edward Island\textsuperscript{112} laws also made it an offence for a man to unlawfully abduct a girl under sixteen years of age without the consent and against the will of her parents. The former colony made it a misdemeanour, punishable at the discretion of the sentencing judge, while Prince Edward Island's judges could award imprisonment and fines. Imprisonment could be in solitary confinement, with or without hard labour but the maximum term imposed could not be more than one year.

The Province of Canada\textsuperscript{113} passed very similar definitions in 1841. Emission of seed was not necessary and conviction could be obtained by "proof of penetration only."\textsuperscript{114} The Province of Canada legislated against the abduction of girls under sixteen years.\textsuperscript{115} There was an additional section which became universal throughout the Canadian colonies that passed similar legislation: section 19 of the 1841 Act provided that in the case of a propertied heiress who was abducted for purposes of marriage or sexual activity, the abductor could be convicted of a misdemeanour and imprisoned for two years. At first, there was no maximum age of the heiress but later legislation limited the crime to the abduction of those under twenty-one years of age.

These laws remained more or less unchanged until the last quarter of the nineteenth century although a few additional sexual crimes were added during that period. New Brunswick\textsuperscript{116} provided in 1849 that adultery, incest, and fornication should be offences punishable with up to two years imprisonment. Thirty years later, fornication seems to have disappeared as an offence. In the 1877 Revised Statutes of that province, incest was a misdemeanour punishable with a maximum penalty of fourteen years.\textsuperscript{117} Adultery had become a lesser offence because the penalty could be a fine of one hundred dollars or up to two years imprisonment.\textsuperscript{118}

Two years after Confederation, the laws of Quebec, Ontario, Nova Scotia and New Brunswick relating to offences against the person were amended and consolidated. The age of consent was not changed. One of the new sections stated:

Whosoever by false pretences, false representations, or other fraudulent means, procures any woman or girl under the age of twenty-one years, to have illicit carnal connection with any man other than the procurer, is guilty of a misdemeanour, and shall be liable to be imprisoned in any gaol or place of confinement, other than a penitentiary, for any term less than two years, with or without hard labour.\textsuperscript{119}

This so-called consolidation was also expanded by section 54, the law of abduction. The section talked of "any woman of any age" who has a property interest or is an heiress being taken "from motives of lucre and with intent to

\textsuperscript{111} 1829, S.N.B. 9 Geo. 4, c. 21, s. 13.
\textsuperscript{112} 1836, R.S.P.E.I. 6 Wm. 4, c. 22, s. 14.
\textsuperscript{113} 1831, Stat. Prov. Can. 4 & 5 Vict., c. 27, s. 17.
\textsuperscript{114} 1831, Stat. Prov. Can. 4 & 5 Vict., c. 27, s. 18.
\textsuperscript{115} 1831, Stat. Prov. Can. 4 & 5 Vict., c. 27, s. 19.
\textsuperscript{116} 1849, S.N.B. 12 Vict., c. 29.
\textsuperscript{117} 1877, R.S.N.B. 40 Vict., c. 145, s. 2.
\textsuperscript{118} 1877, R.S.N.B. 40 Vict., c. 145, s. 3.
\textsuperscript{119} 1869, S.C. 52 & 53 Vict., c. 20, s. 50.
Regulation of Sexual Activity

marry or carnally know her' but does not then prescribe a penalty. After a semi-colon the section described the fraudulent allurement of any "such woman being under twenty-one years of age" who is taken out of the possession or against the will of a parent with intent to marry or carnally know. This behaviour was a felony punishable by up to fourteen years imprisonment with a minimum punishment of two years. 120

The section closed with a proscription on the status of the abductor who was incapable of taking any estate of interest in the property of the female. The section did not go so far as to annul any marriage contracted although any unions that had occurred as a result of the fraudulent allurement of a female under twenty-one years would probably be voidable under other legislation.

Section 55 made it a felony punishable by two to fourteen years in the penitentiary to forcibly take away or detain any female of any age with intent to marry or carnally know her. (This was a hybrid offence because it could also be treated as a misdemeanour subject to a jail term, with or without hard labour, for up to two years.) This provision now seems otiose because kidnapping laws would cover it. In the days before kidnapping laws and before women, married or otherwise, had control over their own property, adventurers of gentle but inpecunious birth had augmented or replenished the family fortune by wedding or bedding heiresses after abduction. 121 The law described in section 54 was very sloppily drafted because it made no mention of the female's consent although the inclusion of "force" in section 55 would suggest by negative implication that the first section envisaged circumstances of abduction where the female was a willing party. The "fraud" mentioned in relation to the abduction of the female under twenty-one years could apply either to the blandishments of the abductor in his dealings with the female or with her parent. This problem was partly resolved in R. v. Prince122 where consent under the equivalent of section 56 (abduction of a female under sixteen years) was considered irrelevant along with the defendant’s avowal that he did not know the female was under sixteen years of age. (Section 56 also contained the word "unlawfully").

120 [1869] S.C. 52 & 53 Vict., c. 20, s. 54.
121 In the Statutes of the Province of Canada found in the Great Library of Osgoode Hall, there is a copy of 4 & 5 Vict., c. 24, s. 19 which describes the offence of abduction of an heiress, with an ink notation "Take that, Mr. Wakefield." This is a reference to the conviction of Edward Gibbon Wakefield under a similar provision in an English statute. Wakefield had been secretary to Lord Durham during his Mission to Canada. See Paul Bloomfield, Edward Gibbon Wakefield: Builder of the British Commonwealth (London: Longman's, 1961) ch. 1.

Stead interviewed a procurress who seemed to be familiar with the law and particularly the law which we find in the Prince case. The procurress described a customer who was a doctor and would pay ten pounds for a "maid" but she must be over sixteen. Stead asked why the girl had to be over sixteen. "Because of the Law," explained the procurress, "no one is allowed to take away from her home, or from her proper guardians, a girl who is under sixteen. She can assent to be seduced after she is thirteen, but even if she assented to go, both the keeper of the house where we took her, and any partner and I, would be liable to punishment if she was not over sixteen." Pall Mall Gazette, 7 July 1885.
This 1869 legislation also contained another provision akin to abduction but not limited to females. Section 57 made it an offence, punishable as a felony (by seven to ten years in the penitentiary) or as a misdemeanour (up to two years in jail) for anyone who "unlawfully, either by force or fraud, leads or takes away or decoys or entices away or detains any child" with intent to deprive the parent or guardian of the possession of the child or with intent to steal any article upon or about the person of the child. The reason for passing this law is far from clear. It was not new in 1869 but had been passed in the various provinces.\textsuperscript{123} What was new was the age being set at fourteen years. This section was an attempt to stem the traffic in prostitution rather than to control non-commercial consensual sexual activity.

The laws passed in Canada, from the 1758 Nova Scotia legislation through to the consolidation last mentioned, did not show any great originality. Most of them were adapted from the common and ecclesiastical laws of England. The Maritimes made more concerted efforts to prohibit fornication and adultery, however, no Canadian colony showed any anxiety over the low age of consent for sexual behaviour by females.

The next stage in the history of the control of sexual activity is the period from Confederation to the early years of this century. After remarkably little change for so long, we then find extraordinary legislative activity. Canada's \textit{Criminal Code} of 1892\textsuperscript{124} reflected this concern for the virtue of females between the ages of ten and twenty-one years and Canadian laws became the most comprehensive in the Commonwealth.

A. \textit{The English Legal Background}

Before looking at the Canadian law, it would be best to examine the English legislation designed to protect the child or to curb sexual expression (depending upon one's point of view).

The ecclesiastical courts lost their quasi-criminal jurisdiction over morals offences in the eighteenth century. Nothing replaced it for more than a hundred years, although there were recurring but futile attempts to curb prostitution, particularly by legislating against bawdy or disorderly houses.

In 1861, the English Parliament passed the \textit{Offences Against the Person Act}\textsuperscript{125} under which the age of consent was twelve years for carnal knowledge and sixteen for purposes of abduction or \textit{Prince}-type offences.\textsuperscript{126} This Act was the model for the 1869 Canadian legislation. The two Acts had many identical sections; for instance, the poorly drafted section 54 of the Canadian Act was taken from the British legislation. Canada continued to follow the English example for the next twenty years.

As described earlier, the British \textit{Criminal Law Amendment Act, 1885} was passed in response to Stead's exposé. Whatever the motivations of the

\textsuperscript{123} E.g., 1831, Stat. Prov. Can. 4 & 5 Vict., c. 24, s. 21.
\textsuperscript{124} 1892, S.C. 55 & 56 Vict., c. 29.
\textsuperscript{125} \textit{Offences Against the Person, 1862}, 24 & 25 Vict., c. 100 (U.K.).
\textsuperscript{126} There was very little new in the 1862 Act, which was mostly a consolidation. For instance, s. 55 of the Act described the \textit{Prince} offence and was based on 1829, 9 Geo. 4, c. 31, s. 20 (U.K.).
reformers, there is little doubt that the 1885 legislation did appeal to the mores, fears, hypocrisy or perceptions of respectability of the period. The 1885 Act made drastic changes so that at last there was a clear departure from the very low age of consent recognized at common law.

Section 2 of the 1885 Act was a conscious response to Stead's *Maiden Tribute* articles. Subsection 2(1) provided that a person would be guilty of a misdemeanour punishable by a term of imprisonment not exceeding two years who:

Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion.

This introduced two important innovations. The upper age limit was remarkably high at twenty-one years and the provision was unlike any other law because it was not limited to prostitution or inmates of a brothel.

But was "procure" meant to be a term of art only applicable to prostitution? *R. v. Mackenzie and Higginson* suggested a broader meaning applicable to any "unlawful carnal connection." Presumably, the meaning of that vague term could only be found within the four corners of the Act. (The case of *Jones* decided that the words "under twenty-one years of age" only governed the word "woman".) Finally, what was the meaning of the phrase "known immoral character"? This phrase has an analogue in the Canadian *Criminal Code* which speaks of "previously chaste character." As we shall see, the term, like many others in legislation pertaining to sexual activity, defies precise definition but does not necessarily mean that the female was *virgo intacta*.

The British Act increased the age of consent for carnal knowledge to sixteen years of age. An offence with a female under thirteen years was a felony punishable by penal servitude for life, (but an attempt was only a misdemeanour punishable by a maximum of two years). Carnal knowledge of a female between thirteen and sixteen years of age was a misdemeanour with a maximum term of two years.

Three legal problems were not resolved by the 1885 Act. "Carnal knowledge" was not defined despite the existence of Canadian legislative precedents (that were obviously ignored by the Home Office and the Law Officers of the Crown). Future and past case law also had to resolve the *mens rea* problem where the accused had relied on the girl's consent or her statement

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130 *Suppression of Brothels*, 1885, 48 & 49 Vict., c. 69, s. 5 (U.K.).
131 In s. 4 there was a proviso that the punishment for carnal knowledge of a female under thirteen years would be different if the offender was under sixteen years. Instead of imprisonment, the young man could be whipped.
132 *R. v. Beale* (1865), 13 L.T. 335, 14 W.R. 57, 10 Cox C.C. 157 (C.C.A.); *R. v. Prince*, supra note 122. Compare *R. v. Packer* (1886), 16 Cox C.C. 57 (S-E Cir.). See also *R. v. Marsden*, [1891] 2 Q.B. 149, 39 W.R. 703, 17 Cox C.C. 297. Reasonable belief as to the girl being over sixteen years was specifically excluded as a defence by 1922, 12 & 13 Geo. 5, c. 56, s. 2 (U.K.).
that she was over the prescribed age. (Section 7, however, did provide that reasonable belief as to age could be a defence to a charge of abduction of an unmarried female under eighteen years.)

The British Criminal Law Amendment Act, 1885 was also remarkable because it provided very broad powers of search. In addition, here was one of the first modern instances of the state making a clear interference with the role of parents; if the court were satisfied that the seduction of a girl under sixteen years was “caused, encouraged or favoured by her father, mother, guardian, master or mistress,” such persons could be divested of their authority over such a girl.

A year later, in 1886, the Canadian Parliament passed an Act “for the protection of women and girls” and the preamble explained the new law as a further provision for the punishment of “offences against chastity.” This law was not as stringent as the English law because it made it an offence to seduce or to have illicit connection with a girl above twelve and under sixteen years only if the girl was “of previously chaste character.” This was a misdemeanour punishable by up to a year’s imprisonment in a penitentiary or prison.

The law did not, however, take account of chastity in section 4 which made it a felony punishable by a maximum of ten years to induce or suffer a girl under twelve to resort to premises for unlawful carnal knowledge. (It was only a misdemeanour if the girl was above twelve and under sixteen years.) No mention was made of brothels or prostitution although this was obviously one of the aims of the legislation. A reasonable belief that the girl was over sixteen years would be a sufficient defence to this charge, although no such mistake of fact was mentioned in section 1 about carnal knowledge.

One other noteworthy section in the Canadian Act had no counterpart in the British legislation. Under section 2, a person over twenty-one years committed a misdemeanour if he seduced under promise of marriage any unmarried female “of previously chaste character” who was under eighteen years.

B. The Canadian Criminal Code

The Department of Justice encouraged the participation of the public in the drafting of the new Code and was receptive to criticism of the first bill which was given first reading in 1891. The Act did not come into operation until July 1, 1893. In the intervening two years, the Minister of Justice, Sir John Thompson, ensured the wide circulation of the Bill to the legal profession and the public at large. The archival files of the Department of Justice contain many letters from private citizens, judges and lawyers on lotteries, procedural matters and the jurisdiction and remuneration of justices of the peace and other public officers, but there are very few suggestions for improving the

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133 Suppression of Brothels, 1885, 48 & 49 Vict., c. 69, s. 10 (U.K.).
134 Suppression of Brothels, 1885, 48 & 49 Vict., c. 69, s. 12 (U.K.). Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, s. 2 and 3 made it an offence for any person having the custody or care of a girl under sixteen years to cause or encourage the girl to have carnal knowledge, or become a prostitute or be an inmate of a brothel. Section 61 defined a child or young person to be one “in need of care or protection” if the child or young person was “exposed to moral danger.”
135 1886, S.C. 49 Vict., c. 52.
substantive law. A very clear exception is the many contributions of The Society for the Protection of Women and Girls and its crusading officer D.A. Watt, most of whose ideas were incorporated into the new Code.

C. D.A. Watt and His Canadian Campaign

1. Immoral Legislation

In his campaign to protect girls, Watt wrote a number of pamphlets including *Immoral Legislation* prepared for the General Assembly of the Canadian Presbyterian Church. He constantly republished these works, circulating them widely to politicians and the public.

The General Assembly of the Presbyterian Church in 1885 (held in Montreal) appointed a committee under the chairmanship of Mr. Justice Maclean-nan that eventually presented a petition to Parliament. The churchgoers expressed concern over the increase in offences "against the chastity of women" and pointed to "instances of seduction under circumstances of great heartlessness and aggravation" and "atrocious misconduct to young women by their employers and guardians." In addition, many women were being procured for immoral purposes, "ruined and [would] go down to premature graves for want of legal protection."136

A petition instigated by Watt accused Canadian legislation of protecting heiresses but leaving "their less fortunate sisters, who have no expectations or property, to their fate, except when actual force has been employed."137 The Committee recommended that these evils could be prevented by the adoption of the British Criminal Law Amendment Act, 1885.

Watt also sought the support of other religious groups in Montreal. The Protestant Ministerial Association of Montreal wanted Parliament to place Canada "on a par... with the mother-country and with other civilized and Christian lands."138 The Congregational Union of Ontario and Quebec asked Ottawa to ensure that "all attempts on chastity be punished, as well as the completed offence."139 The Methodists were a little more explicit. While all religious groups argued strongly for protection of poor as well as rich females, this group was the only one to mention expressly the raising of the age of consent, although no specific age was recommended.

The law-makers did not immediately heed these demands. In 1889, the Society for the Protection of Women and Children took matters in hand and under the chairmanship of Watt sent a letter with draft bills to Senator George Drummond. The discrimination against impoverished females was deplored. Watt argued that the legal protection of females as contingent on their property holdings had been "eliminated from the criminal codes of most civilized countries," and that "the conditions of girl life in Canada are such that the poor and friendless are in greater need of legal protection than the rich and guarded. . . ."140 The Society wanted the age of consent to be raised from twelve to

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137 Id. at 39.
138 Id.
139 Id. at 40.
140 Id. at 6.
sixteen, an age "somewhat nearer to civilized decency." Attempted carnal knowledge was to be added as an offence in sections 39 and 40, and the word "fraudulently" was to be omitted from the offence of alluring, taking away or detaining any woman under twenty-one out of the possession of her father.

Senator Drummond submitted these bills to the Minister of Justice, the Hon. J.J.C. Abbott. The Government showed no great interest although it was prepared to amend the law relating to procuration.

In early 1890, Watt forwarded a bill that provided:

Everyone who
(a) Unlawfully takes or causes to be taken any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father and mother, or of any other person having the lawful charge of her, is guilty of a misdemeanour, and liable to be imprisoned for any term less than two years; or
(b) procures or attempts to procure any girl or woman to leave the Dominion, or to leave her domicile or place of abode whether such domicile or place be within the Dominion or elsewhere, with intent that she may, either within or without the Dominion, have unlawful carnal knowledge of any person or persons, or become an inmate of a disorderly house.

Is guilty of abduction and liable to five years' imprisonment as a felon if the woman or girl be a minor under twenty-one years of age, or to two years' imprisonment as a misdemeanant if she be a major.

Soon after, the irrepressible Watt forwarded another bill that would have made it a felony, punishable by five years' imprisonment to procure, encourage or incite any minor (not defined as to age but we can assume he meant twenty-one years) to "immorality or gross indecency by any means whatever." He made one concession to leniency: if the accused were also a minor, such factor would go to mitigation of punishment.

Watt's pamphlets made reference to the 1881 Select Committee of the English House of Lords, and American precedents — federal legislation and the laws of New York, New Jersey and Pennsylvania (all of which had an age of consent of sixteen), and Kansas, Iowa and Massachusetts (where the age was eighteen). All of the American statutes treated carnal knowledge of a female under the specified age as constructive (or statutory) rape which presumed a lack of consent. Only one of these laws — that of Massachusetts — made reference to the sexual "character" of the victim describing her as "an unmarried woman, of chaste life or conversation."
Watt also commented on the law of 1887 which had provided that:

Everyone who by false pretences, false representations, or other fraudulent means,
   (a) Procures any woman or girl, under the age of twenty-one years, to have illicit carnal connection with any man other than the procurer,
   or
   (b) inveigles or entices any such woman or girl to a house of ill-fame or assignation, for the purpose of illicit intercourse or prostitution, or who knowingly conceals in such house any such woman or girl so inveigled and enticed
Is guilty of a misdemeanour and liable to two years' imprisonment.\[146\]

He found this law quite ineffective, and deplored the fact that the procurer was exempted from its provisions. He reminded the Government that France protected females from such vicious circumstances until they were twenty-one years of age. In a petition to the Governor General in Council, Watt said:

Whereas the principal clause of the said bill, by implication,
   (a) Legalizes the crime of procuration, unless the victim be a minor and fraud be provable; and
   (b) Legalizes the defilement of minor girls, when over eleven years old, unless the crime be compassed by means of fraud, enticement, a brothel, and what-not, provable and cumulative; — the said clause being in effect a notification to traffickers in vice and lechers generally, that if certain procedure be avoided by them, they will be within their legal rights. . . .\[147\]

Watt demanded measures that provided "decent, reputable and moral legislation" and found the 1887 law to be "halting, half-hearted and tentative." He wanted Parliament to show the same resolution in protecting young girls as it did in looking after Canada's cattle (and their owners):

[W]hen parliament essays to deal with matters affecting even grown men of mature years, its enactments are direct enough, as witness the following:
From Chapter 100.

No oleomargarine, butterine or other substitute for butter *** shall be manufactured in Canada or sold therein, and every person who contravenes the provisions of this Act *** shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.\[148\]

He agreed with Waugh\[149\] in thinking that the protection of the "brothellers" was a "vile and all too common kind of hypocrisy."\[150\]

Watt was very disappointed with the feeble attempts at reform; for in-

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\[146\] R.S.C. 1886, c. 157, s. 7.
\[147\] Supra note 136, at 24.
\[148\] Id. at 25.
\[149\] This is a reference to Benjamin Waugh, a Congregational minister who was the first Secretary of the Society for the Prevention of Cruelty to Children. He was the anonymous author of a remarkable book, The Gaol Cradle: Who Rocks It?: A Plea for the Abolition of Juvenile Imprisonment, by A Member of the School Board for London (3d ed., London, 1876). See pages 141-51 on the protection of girls.
\[150\] Supra note 136, at 26.
stance, a proposed amendment which would have raised the age of consent to thirteen years, he called merely a "beggarly" extension of the protection of females. He quoted an 1884 paper of Cardinal Manning, who had complained that while a man could not marry a female until she was twenty-one, he could "ruin" a child of thirteen with impunity. Watt thought it "incredible" that Parliament could accept such an inadequate provision.

In referring to the unsatisfactory provisions for the punishment of "unfaithful trustees" (in clauses 2 and 7 of the Bill), Watt commented:

The large numbers of girls and women who are in asylums, prisons, police courts, schools, and so forth, are entitled to receive special protection under the law; and such public trustees as teachers, innkeepers, prison and asylum employees, conductors, policemen, brakemen and other persons, to whom girls or women are entrusted, should be awarded exemplary punishment when they betray the trust reposed in them.

Watt was a zealot, and his indignation against the presence of young girls in brothels was legitimate. Sometimes his zeal in the protection of females in other situations was a little extreme but this is not surprising given his great admiration for Stead's *Maiden Tribute*, which Watt described as a "thunderbolt."

On the other hand, Watt was a sensitive advocate of children's rights who wanted neglectful and abusive parents brought under legal control. He proved to be an effective prophet in seeking the intrusion of the State in protecting children, not only from immoral but also from physical ill-treatment by parents and guardians, and by demanding the end of the inhumane incarceration of juveniles in adult penal institutions.

For four years Watt and his Society kept up a steady flow of correspondence to the Department of Justice. Their perseverance was most successful; Canada's laws relating to the protection of females and the control of sexual activity are very comprehensive. Watt's correspondence with the Department started in early 1889. He was very well briefed on legislative developments in England and no doubt frequently corresponded with sympathetic individuals and organizations in London. He first requested legislation to protect "lunatic women" from sexual exploitation; an aspect not initially covered by the *Criminal Law Amendment Act, 1885* but which had been partially remedied three years later. In 1889, the Parliament at Westminster had also passed laws to protect children from cruelty. Watt argued that these laws should also be applied to Canada.

Watt was not solely preoccupied with sexual matters. In March of 1889 he had written about the *First Offenders Bill* being "promoted" by the

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151 Bill 65 of 1892 to amend *An Act respecting offences against the Person*, R.S.C. 1886, c. 162.
152 *Supra* note 136, at 43.
153 *Id.* at 45.
154 *Id.* at 41-42.
Minister of Justice. Watt did not see any great need for this although he seems somewhat inconsistent because he criticized two current practices that would have been solved in part by legislation showing leniency to first offenders. Watt’s Society was concerned with the “ease and frequency” with which young minors were sent away to prisons and reformatories on the complaint of their natural guardians who desired “to get quit of the trouble, responsibility and expense of maintenance and education, and to throw their responsibilities on the public.” There is an irony in this because, eighty years later, critics of Ontario’s training schools were complaining that parents (and others) were having teenage girls placed in those institutions on the ground that the females were being “promiscuous”.

Watt complained of the “excessive sentences inflicted under the Vagrant Act on young girls for mere police offences.” He did not explain what these offences were but one can assume that they were somehow connected with prostitution. “Brutal men” were given thirty days while young girls received three to six months and a fine. Watt recommended that the punishment of minors under sixteen who were charged under the Vagrant Act should not exceed a five dollar fine or thirty days imprisonment. (Furthermore, Watt did not seem to be very impressed with the institutions to which the young persons were being sent. He felt that they were reformatories in name only.)

In February 1890, a bill to amend the criminal law of Canada had been introduced. Watt had been upset because his Society had not had an opportunity to make suggestions. A year earlier he had sent a bill, for introduction into the Senate, which would have raised the age of consent for carnal knowledge to sixteen years, while the law relating to the abduction would have been ex-
tended to include poor girls, as well as heiresses. He also sent to Senator Drummond a new bill to cover the "international and intercivic traffic in girls." Its terms would be broad enough to reach "the so-called elopers who bring young girls into the country, live with them a few weeks and then desert them, sometimes in a boarding house but oftener in a brothel."  

His bill also would have changed the law by adding the following provision:

Everyone is guilty of abduction who procures... any girl or woman to leave the Dominion, or to leave her place of abode... with intent that she may... have unlawful carnal knowledge of any person... or become an inmate of disorderly house.

If the female were under twenty-one years, the crime was a felony punishable by five years; if she were over that age, a misdemeanour with a maximum of two years imprisonment. He also wanted to make it a crime for "unfaithful trustees" to have carnal knowledge of females because of the "havoc wrought by policemen, gaol officials and officials in railways and steamboats, teachers, foremen, [and] near-relations..."  

Two months later, in April 1890, Watt was still demanding an increase in the age of consent from sixteen to eighteen years to match Massachusetts law. He would have liked to see the age set at twenty-one, but he supposed that was a little too idealistic. In terms of section 45(a), he made the following comment:

In view of the heavy penalty I suppose you will deem thirteen years old enough. For myself I would greatly prefer to see the penalty lessened to five years and the age increased to sixteen years.

In section 45(b), Watt wanted the protection extended to twenty-one years. Anything less would mean that the reformers could do little to protect immigrant girls. He wanted the same protection for these females as was enjoyed by heiresses.

He also found the proviso to section 45(b) unsatisfactory and he gave an example from Montreal:

A brothel keeper, whose victim was between fourteen and fifteen was informed against by a frequenter who was disgusted at being offered the child. The defendant pleaded that she had reasonable cause to believe that the girl was sixteen, the appearance of the girl justified the belief and the prosecution failed. Small wonder that she looked over age inasmuch as she had been receiving night after night as many men as the keeper required of her.

Watt wanted to delete section 42 and substitute sections 2 and 3 of the

\[\text{References}\]

162 Letter from D.A. Watt to the Min. of Justice (Feb. 9, 1890), Dept. of Justice Archives.
163 R.S.C. 1886, c. 162, s. 44.
164 Supra note 162.
165 Id.
166 R.S.C. 1886, c. 162.
167 Letter from Watt to the Dept. of Justice (Apr. 27, 1890), Dept. of Justice Archives.
168 Supra note 166.
169 R.S.C. 1886, c. 162, supra note 167. [Emphasis in original.]
170 Supra note 166.
British Criminal Law Amendment Act, 1885 (relating to procuration and carnal knowledge by fraud).

Instead of section 40,171 Watt suggested the following:

Anyone who attempts to have carnal knowledge of any girl under 13 years or has or attempts to have unlawful carnal knowledge of any girl being of or above the age of 13 years and under the age of 16 years, is guilty of a misdemeanour and liable to three years imprisonment and to be whipped.172

At this time Watt also sent a copy of his pamphlet Moral Legislation to Robert Sedgewick, the Deputy Minister of Justice, and copies of a similar pamphlet were sent to members of the Senate. The Department of Justice did not take up all of Watt’s suggestions. A memorandum prepared by George Fraser of the Department found many of Watt’s recommendations “quite too vague” — these included sections concerning trusteeship and gross indecency. Fraser wanted to retain “immorality” as the norm and thought that protection should be limited to those under the age of sixteen or possibly eighteen.

In addition, a Society for the Protection of Women and Children pamphlet regretted that the “protection of minor girls without expectations and without guardians . . . against actual defilement ceases at fourteen.”173 The rich girl was protected until twenty-one (section 42), the guarded girl until sixteen (section 44) and, the Society argued, the “poor and friendless girls need greater protection.”174

In May 1891, as the Criminal Code was being prepared for Parliament, Watt wrote on behalf of the Society, complaining about loopholes in the law of procuration of girls for brothels.174 He was still calling for Parliament to raise the age of consent, at least to sixteen years, and he also wanted changes in the law relating to the harbouring of females in brothels so as to protect girls of an older age (preferably twenty-one years) than the federal government was contemplating.175 Another missive, written by G.M. Marshall, Secretary of the Society was sent to Sir John Thompson, Minister of Justice in June 1891. The Society wanted the age changed from sixteen to twenty-one years. The law should be changed to include “fraud, false pretence or false promise” as well

171 Id.

172 Letter from Watt to the Dept. of Justice (May 4, 1890), Dept. of Justice Archives.

In the same letter, Watt suggested, because he was “not without knowledge” that carnal knowledge, including attempts, should attract the following punishments. If the victim were under ten years — a felony; if under thirteen years, a serious misdemeanor although he does not specify the maximum punishment; if the victim were under sixteen years, it would be a simple misdemeanor with a maximum punishment of two years.

173 An untitled leaflet by the Society for the Protection of Women and Children, May 3, 1890 (S. Carsley, President, D.A. Watt, Chairman.) at 2.


175 I trust the Minister now sees his way to give us what I think was half-promised two years ago — making 16 years the age of consent and 21 years the age of both sexes in the matter of incitement to vice and admission to brothels.

We would also urge that law [sic] against procuration be strengthened rather than weakened as seems to be done in the New Code . . . .

Letter from D.A. Watt to the Dept. of Justice (Apr. 4, 1892), Dept. of Justice Archives. Watt also sent along a copy of the Victoria (Aust.) Crimes Act, 1891.
as "force," he argued. With the overall aim of "the better protection of females and the suppression of immorality and vice," the Society's petition asked for tougher laws on "indecent" publications. Adultery by a married person should be a misdemeanour. Finally, it should be an offence of similar severity for "owning or renting or permitting to be used any house, room or premises for illegal carnal intercourse or prostitution."\(^{176}\)

What became the law in Canada in 1892? The Code\(^ {177}\) provisions fall under two categories. Part XIII "Offences Against Morality," which included sodomy, incest, gross indecency, obscenity, as well as the offences in which we are interested — seduction, defilement, and carnal knowledge of "dependent" females such as "idiots," and prostitution of Indian females. Then in Part XXI, "Rape and Procuring Abortion," we find not only those offences mentioned in the title but also infanticide and defilement of children under fourteen. The overall plan of the Code is further explained by the fact that Part XIII falls under Title IV: Offences Against Religion, Morals and Public Convenience while Part XXI falls under Title V: Offences Against the Person and Reputation.

Sections 181 to 184 provided for offences, of varying severity, for seduction of girls over fourteen and under sixteen years, of unmarried females under twenty-one years, under promise of marriage, or of seduction or illicit connection of a ward (of any age subject to the law of wardship) or a woman or girl under the age of twenty-one years who was an employee. In each instance, with the possible exception of a ward, the seduced party had to be of "previously chaste character."\(^ {178}\) All three offences could attract a term of imprisonment of two years.

Mr. Watt had wanted protection for immigrant girls travelling on steamships and trains.\(^ {179}\) The latter form of conveyance was not covered by section 184 that made it an offence only for one employed on a vessel to seduce or have illicit connection with a female passenger (presumably of any age) "under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents." The penalty was a fine of four hundred dollars or a year's imprisonment.

In all these offences, except seduction of a ward, "subsequent intermarriage of the seducer and the seduced" was a valid defence and also reinforced, of course, the proprieties.

The next section, 185, is a complicated one aimed primarily at procurement for purposes of prostitution but is broader than that and lies within the present discussion of the control of sexual activity. For instance, it was an offence punishable by imprisonment for two years with hard labour for anyone who:

(a) procures . . . any girl or woman under twenty-one years of age, not being a

\(^ {176}\) Letter from G.M. Marshall, Secretary of the Society for the Protection of Women and Children, Montreal to Sir John Thompson, Minister of Justice (June 25, 1891), Dept. of Justice Archives.

\(^ {177}\) *Criminal Code, 1892*, S.C. 55 & 56 Vict., c. 29.

\(^ {178}\) *Criminal Code, 1892*, S.C. 55 & 56 Vict., c. 29, s. 183. See earlier legislation: R.S.C. 1886, c. 157, s. 3; S.C. 1890, 53 Vict., c. 37, ss. 3, 4; R.S.C. 1887, c. 48, s. 2.

\(^ {179}\) Compare *An Act respecting Immigration and Immigrants*, R.S.C. 1886, c. 65, s. 37.
common prostitute or of known immoral character, to have unlawful carnal knowledge... with any other person...
(b) inveigles or entices any such woman or girl to a house of ill-fame or assignation for the purpose of illicit intercourse or prostitution
(g) by threats or intimidation procures, or attempts to procure, any woman or girl to have any unlawful carnal connection...
(h) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection...
(i) applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor... with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl.

Mr. Watt and the Children’s Aid Societies, particularly the latter, had been most concerned with the contributions to indecency and unchastity made by parents.225 Of course this was the core of Stead’s Maiden Tribute exposé and it is not at all surprising, six years after the Pall Mall Gazette’s campaign, to find the Canadian Criminal Code making it a very serious offence, punishable with up to fourteen years’ imprisonment, for a parent or guardian to procure a woman or girl to have carnal connection with any man (other than the procurer, who would be committing incest). If the female were over fourteen years of age, the punishment would be limited to a maximum of five years.226

Similar punishments were to be imposed on householders who allowed defilement of girls on their premises. If the girl was under fourteen years, the punishment could be ten years’ imprisonment, but only two years if the girl were between fourteen and sixteen years.227

In Part XXI, Offences Against the Person, section 296 comes immediately after rape in the legislative scheme.228 This section provides that it is an indictable offence punishable by life imprisonment and a whipping for anyone “who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not.” There is no mention of consent or of force. The punishment was the same as that for rape but with an added whipping.229

180 Compare An act to amend the criminal law, 1890, S.C. 53 Vict., c. 37, s. 9 and R.S.C. 1886, c. 157, s. 7.
181 Compare An act to amend the criminal law, id.
182 Criminal Code, 1892, S.C. 55 & 56 Vict., c. 29, s. 186.
183 Criminal Code, 1892, S.C. 55 & 56 Vict., c. 29, s. 187. Compare R.S.C. 1886, c. 157, s. 5 and 1890, S.C. 53 Vict. c. 37, s. 3.
184 Compare An act to amend the criminal law, s. 2, supra note 180.
185 Carnal knowledge was defined in s. 206(3) as “complete upon penetration to any, even the slightest degree, and even without the emission of seed.” Criminal Code, 1892, S.C. 55 & 56 Vict., c. 29. Compare An Act respecting procedure in Criminal Cases, R.S.C. 1886, c. 174, s. 226.
186 In an earlier draft of the Code, the punishment for rape in s. 267 was to have a minimum punishment — “or for any term not less than seven years,” but this was deleted. Similarly, a phrase in s. 269 (defilement of children under 14 years) which would have imposed a minimum punishment of 5 years was also discarded (Bill for a Criminal Code (1892), P.A.C.) A bound copy of the Bill in the P.A.C. has many ink notations, most of which were written by G.B.L. Fraser of the Dept. of Justice at that time.
A memorandum found in the Department of Justice archive files is a lengthy commentary on the Code. To some extent it is a response to the well-known memorandum of Mr. Justice Taschereau. On the Offences Against Morality, the commentator made the following remarks regarding adultery:

As to adultery you left the law as it was . . . . [It was not] of sufficient importance to justify the discussion that would have been created by a proposition to repeal or extend [it] to the whole of Canada. What you did and what you omitted to do was done and omitted advisedly.

On seduction under section 182, the author said:

Probably in section 182 the leading idea is the seduction and the words following are only equivalent; what in section 183 the law is striking at is illicit connection between the persons whose relationships are those defined and intends to punish whether there is seduction or not.

V. THE CANADIAN CRIMINAL CODE

The drafting of the Criminal Code was undertaken in a very thorough manner with careful work done by officers of the Department of Justice under the supervision of Deputy Minister Robert Sedgewick and his predecessor George Burbidge, who was then a Judge of the Exchequer Court. Sir John Thompson, the Minister of Justice also took a direct interest in the project. English legislation, such as the Acts of 1861 and 1885 and the English Draft Code, largely the work of Sir James Fitzjames Stephen, were adopted and adapted for use in Canada. The reports of the English Criminal Law Commission were consulted and used in the drafting.

The completed draft of the Canadian Criminal Code was given wide circulation in 1891 and 1892 and there was a great response from judges, lawyers, clerks of the peace, Members of Parliament, social reform groups and private citizens. In none of these consultations and discussions was the substantive criminal law discussed at any length. The classic crimes of murder and theft, for instance, received very little attention. This is not surprising because few lawyers, whether Members of Parliament or private practitioners, specialised in criminal law. The provisions relating to rape, for instance, received no attention from the Committee of the House of Commons which examined the Code Bill, section by section. This was probably due to the fact that parliamentarians looked upon section 266, the rape provision, as simply a codification of the common law.

Some of the other "morals" offences did receive attention. Mr. Mills M.P. commented during the discussion of the indecent act provisions that:

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188 Document found in the Dept. of Justice archives — undated, but probably 1892. This is an uncollated and unindexed collection of Justice files relating to the early history of the 1892 Code.
189 George Burbidge was the author of A Digest of the Criminal Law of Canada (Crimes and Punishments) (Toronto: Carswell, 1890).
191 Id.
All these offences against morality have crept into the common law from the earlier ecclesiastical law, and they were rather sins than crimes, not being attacks upon property or life, or upon any other members of the community. It is a question whether crimes of this sort should be punished by long terms of service in the penitentiary. I think that flogging and the discharge of the prisoner is preferable, and a far better deterrent than anything else.\textsuperscript{192}

Sir John Thompson did not agree because he felt that it was right to punish those acts which "are offensive to the people, or set a bad example."\textsuperscript{193}

The provision concerning seduction of female passengers on ships was noticed by Mr. Wilfred Laurier who said that section 184 was too wide in including seamen because they could not "exercise authority" although he agreed that an "officer cannot be too severely punished."\textsuperscript{194} Mr. Davies of Prince Edward Island agreed on the criminal liability of seamen but he could not see why this offence should be limited to seduction on board ships and should be extended to similar acts committed ashore because the import of the section was the protection of immigrants. These arguments did not result in amendments to the Bill (and female railway passengers remained easy sexual prey for railway employees).

Mr. Davies was more successful in his submissions regarding section 187 which made it an offence for householders to permit defilement of females under sixteen years. He argued that subsection 187(2) should be struck out. This was done. That provision would have provided a defence if the householder had reasonable cause to believe the girl was over sixteen years. Mr. Davies did not think that, where the law was dealing with serious offences against children, it should "throw around the brothel keeper any such defence."\textsuperscript{195}

Mr. Watt's Society for the Protection of Women and Children made its presence felt; they wanted to re-open the discussion on section 187 and increase the upper age limit to twenty-one years. This was not accepted which is hardly unexpected because the Department of Justice was against such an extension.

The Hon. Mr. Curran M.P. also presented the views of the Society on the proposed section 269 (carnal knowledge of a female under fourteen years), asking for the age to be raised to sixteen.\textsuperscript{196} Mr. Davies thought this was too radical and suggested a compromise of fifteen years. This is a little surprising because in the debate on section 187, one month earlier, he had said that he considered a sixteen year old female to be a "mere child." Perhaps this can be explained by the very severe punishment — a minimum of five years (with a whipping) up to a maximum of life imprisonment. Sir John Thompson gave further explanation:

\begin{quote}
I do not think it is wise to accede to the wish even of gentlemen who are so philanthropic, and who give their best consideration to such work. This is an offence for which a drastic punishment is provided, not only imprisonment for life but also
\end{quote}

\textsuperscript{192} Can. H. of C. Deb. May 25, 1892, at 2968.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 2972.
\textsuperscript{195} Id.
\textsuperscript{196} Can. H. of C. Deb. June 24, 1892, at 4225.
flogging, and the intention of the Act is to extend this punishment to those who commit outrages on children. If you extend the age it will be impossible to say whether a man knew that the woman was sixteen years of age or not; but he must be responsible if it is the case of a child. We had a remarkable case under consideration from Winnipeg a short time ago, in which a man was sentenced to a long term of imprisonment and to be whipped when it was proved that the girl was under fourteen, but was a notorious prostitute. If we extend the age to sixteen, we shall be punishing offences against young women while this clause is really intended to punish those who commit offences against children.\(^1\)

Mr. Curran suggested that the age could be raised to sixteen years if the words “not being a prostitute” were added. Only one other comment was reported — the Hon. Mr. Masson M.P. stated, “At that age you cannot prove it” — before the amendment was defeated.\(^2\)

And so the debate on the offences controlling sexual activity ended. Sir John Thompson’s speech on section 269 made a very arbitrary distinction — at the age of fourteen years — between a “child” and a “woman”. His speech did not mention Part XIII — Offences Against Morality — and the offences relating to the seduction of females under sixteen or even twenty-one years of age. These were, presumably, offences of a different quality because they were not, in effect, statutory rapes but were sexual acts with females of “previously chaste character.” In other words, the double standard — distinguishing “good” from possibly “bad” girls — was in evidence again.

VI. THE OPERATION OF THE LAW UNDER THE CANADIAN CODE

The provisions of the Code covered a very wide range of sexual behaviour but most of them were not used very extensively.

The sections about brothels which had so exercised Watt were not very useful if we can judge by the case law. (Criminal statistics for the first forty years of the Criminal Code are elusive and unhelpful.) Watt was very hopeful in thinking he could succeed in suppressing brothels where so many other reformers had failed. In any event, the traffic in young girls did decline but this may have borne little relationship to the reform of the law. A rising school-leaving age, the increased prosperity of the community, a reduction in the rough frontier-like quality of Canadian life and, most important, the introduction of elaborate child welfare legislation made the criminal law’s interest in child prostitution less crucial. Girls who were “bad” and under age were subjected to the Juvenile Delinquents Act\(^3\) for “sexual immorality or similar forms of vice.” The double standard was at work again. Committal of a girl to training school because she was considered “promiscuous” by her parents or other persons in authority was a common occurrence and a cruel quasi-penal measure which continued until the nineteen-seventies. Young males who indulged in similar behaviour were either ignored or treated more leniently by the law.

Without consulting the files of the Crown prosecutors, criminal and juvenile courts and the children’s welfare organisations, it is impossible to say how frequently the new Code sections were used to impose moral standards or

\(^{197}\) Id.
\(^{198}\) Id.
control "deviant" sexual behaviour. A much wider study would be needed to establish the actual sexual behaviour of Canadians in the three or four decades following the passage of the Criminal Code. The reported cases may give a very stilted picture. The upper and middle classes probably avoided the law even (or particularly) when their "good" daughters were deflowered, preferring "injustice" to social disgrace.

The charges laid under Parts XIII and XXI (at least as found in the law reports) show that the males who were brought to justice were the notorious cases that had outraged public opinion in some way. They exhibited social problems much more complicated than the simplistic campaign of the reformers to keep all nice, respectable girls pure and chaste. Instead, the girl was often pregnant as a result of the seduction for which reason the parents or Society had used the criminal justice system against the accused.

A. Defilement

In 1890, the Canadian legislature adopted the 1885 British legislation concerning the crime of householders permitting defilement of girls on their premises, incorporating it as section 187 of the 1892 Code. The age of females to be protected was raised from thirteen to fourteen, but the maximum punishment for commission of the crime was dropped from penal servitude for life to fourteen years in prison. The upper age was raised to eighteen years in 1900. In the 1927 Code, the section was changed in two important respects: first, the increased punishment for defilement of females under fourteen was dropped; and second, the maximum punishment was reduced to five years.

All three reported cases (under what is now section 167) in the first twenty years of the operation of the Code involved Chinese men, which suggests some discrimination against Orientals. In Karn, two girls between fourteen and eighteen years of age were brought by the defendant to his shop in Toronto. Karn had sexual intercourse, on two occasions, with one girl and his clerk had sexual relations with the other. T.C. Robinette, who appeared for Karn, argued that "unlawfully and carnally knowing" meant that the accused's sexual acts with the female had to be contrary to the common or statutory law and not merely against the moral law. The Ontario Court of Appeal had no difficulty in convicting. Osler J.A. could not understand why the case was reserved. He reviewed all the sections of the Code that were designed to protect under-age females, and could see no difference between "unlawful carnal knowledge" and "illicit connection" (the latter term found in other sections). Both meant "not sanctioned or permitted by law and as distinguished from acts of sexual intercourse which are not regarded as immoral." Maclaren J.A. used the analogy of gaming houses — the act was not in itself unlawful but the use of the house for performing the act was the offence. A similarly suspect argument was made when he commented that as any issue

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200 1890, S.C. c. 37, s. 9(1).
201 An Act further to amend the Criminal Code, 1892, 1900, S.C. 63 & 64 Vict., c. 46.
202 (1909), 20 O.L.R. 91, 15 C.C.C. 301 (Ont. C.A.)
203 Id. at 94-95 (O.L.R.), 304-305 (C.C.C.). In part, Osler J.A. relied on the analogy of an illegal contract based on prostitution discussed by Bramwell B. in Cowan v. Milbourn (1867), L.R. 2 Ex. 230 at 236, 16 L.T. 290 at 293, 15 W.R. 750 at 751.
of such intercourse would undoubtedly be "unlawful", it "would not appear to be improper to apply the word to the act itself." The judgment of Meredith J.A. also seemed somewhat confused:

Fornication, under any circumstances, is unlawful, in the one sense, but, in the circumstances of this case, it was not criminally unlawful, though under other circumstances it is also criminally unlawful, as expressed in several sections of the Criminal Code.

The problem was that the section under which Karn was charged referred to females of a greater age than the other sections that protected immature girls. Meredith J.A.'s answer was that the purpose of the present section 167 was "the protection of all girls under eighteen years from the opportunities for prostitution."

The judge used the analogy of an unlawful contract, which does not seem very helpful. He argued that all forms of informal sexual behaviour were unlawful. Carnal knowledge would be unlawful unless it happened between a lawful man and wife.

The facts in Sam Sing were similar to those in Karn. The accused's first contention — that the provision was meant to apply only to sexual intercourse with a person other than the householder — was summarily dismissed. The defendant was also unsuccessful in claiming that he should be acquitted because he did not know the female was under eighteen years of age.

In all of these cases we are not so concerned with intricate questions of criminal law theory as we are interested in the policy considerations underlying the Criminal Code of 1892. The Ontario Court of Appeal, per Garrow J.A. did not consider that section 167 was aimed at the mere act of illicit intercourse if the girl was "induced or knowingly permitted to be upon the premises for the unlawful purpose." In other words, the householder would be guilty if he allowed his premises to be used as a house of assignation. The Judge looked at the whole scheme of the Code and satisfied himself that only one section (now 151) prohibited sexual intercourse without any special circumstances. Consequently, he decided that section 167 was never intended to apply to the facts in Sam Sing. Meredith J.A. agreed. The language was too uncertain for criminal liability and the facts of the case would at the most be appropriate for a civil action.

The dissenters, Maclaren and Magee J.J.A. took a diametrically opposite view: Part XIII was intended for the protection of young girls and women and should not receive a narrow construction. The dissenting judgment reviewed the history of this provision from 1885 in England to its varied form in the 1892 Criminal Code of Canada. The judgment continued:

Now it would ... be an unusual thing in criminal experience that a person would entice a girl under twelve years into his or her premises for the purpose of someone else having intercourse with her, and yet the severest punishment under section 4 of the Act of 1886 was imposed for offences against girls of that age. Actual intercourse or attempts at actual intercourse were prohibited under other sections; but

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204 Karn, supra note 202, at 95 (O.L.R.), 305 (C.C.C.).
205 Id. at 96 (O.L.R.), 307 (C.C.C.).
206 Id. at 99 (O.L.R.), 307 (C.C.C.).
207 (1910), 22 O.L.R. 613, 17 C.C.C. 361 (Ont. C.A.)
208 Id. at 615 (O.L.R.), 363 (C.C.C.).
in this section enticement to the premises for the like purpose, where the acts did not yet amount to an attempt, and would not otherwise be punishable, are made so. Take the case of a man intending to make a young girl his mistress and enticing her to a room or house owned by him and where he intended to keep her, would not such a case come within the mischiefs intended to be covered by this section?209

Under section 167, a decisive influence, at least in Karn, was the English case of Webster210 where a mother was convicted under a similar defilement provision involving her daughter, aged fourteen, despite the fact that the premises were those in which the mother and daughter lived.

B. Contributing to Immorality and Delinquency

The situation in Webster was more fully covered in Canada by the contributing to delinquency provision which did not always point to the sexual activity of the young female but more to the "immoral" behaviour of the parent which shows the criminal or family welfare laws being used in a preventive way to uphold moral standards. The contributing law was also based on even more doubtful delinquency causation bases.

One of the first cases, Davis211 arose during the First World War and the underlying social and moral policies are obvious. The accused had had sexual intercourse with a woman whose husband was serving overseas in the armed forces. There was a child of the marriage — a girl of three years. The woman became pregnant as the result of her affair with the accused who was charged under The Children’s Protection Act of Ontario.212 The Crown did not allege that the child was poorly cared for; only that the mother was indulging in immoral conduct. The accused was often in the child’s home when the child was awake, and had often heard her mother call the accused by his first name.

Davis appealed from his conviction by a Commissioner of the Juvenile Court and Middleton J. quashed it, but with some reluctance. He said:

There are very few who do not regret the absence from the Criminal Code of any provision for the punishment of adultery, and none can have any sympathy for the accused, whose abominable conduct merits far more drastic punishment than that awarded by the Commissioner. . . .

Unfortunately, abhorrence of misconduct could not justify imprisonment unless there was statutory foundation for it. Meredith J.A. followed an

209 Id. at 619 (O.L.R.), 368 (C.C.C.). Sam Jon, (1914), 20 B.C.R. 549, 24 C.C.C. 334 (B.C.C.A.) decided to follow Sam Sing, supra note 207, but mostly for the sake of uniformity. They did so reluctantly because, although not a crime, the accused’s behaviour was an example of “deplorable immorality.”

210 (1885), 16 Q.B.D. 134, 15 Cox C.C. 775, 34 W.R. 324.

211 (1917), 40 O.L.R. 352 (Chambers, Ont. H.C.).

212 R.S.O. 1914, c. 231, s. 18(d).

213 Davis, supra note 211, at 353. Adultery was not totally ignored in the Code. The Dept. of Justice has resisted the suggestions of some of its correspondents that adultery should be a crime in itself. See text accompanying notes 206, 207, supra. Section 188 of the 1892 code made it an indictable offence punishable with two years’ imprisonment for every one who “conspires with any other person by false pretences, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.” This provision is still in the Code as s. 423(1)(c). The original purpose was probably to discourage false hotel registrations as “Mr. and Mrs. Smith”.

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unreported judgment of Clute J. in Owens, deciding that an adulterer could not be convicted unless there was proof of actual injury to the child. The child’s tender years meant that she did not understand the moral quality of her mother’s conduct. Meredith J.A. also considered that the Ontario legislation was probably unconstitutional.

This acquittal was soon remedied by 1918 Code amendments. The Canadian Parliament adopted an Ontario provision from that province’s Juvenile Delinquency Act which was similar to the law under which Davis was charged.

Middleton J. was right in thinking the situation in Davis was not covered in the Criminal Code. The Department of Justice has received several letters during the Code’s drafting stage (and in subsequent years) expressing indignation that persons were living openly in adultery and demanding that such behaviour should be criminally punished. A few of the correspondents had pointed out that these persons admittedly were Americans, implying that Canadians did not indulge in such acts. The original Code had only one provision relating to adultery and it only provided an oblique attack on this social problem. Section 188 made it an indictable offence, punishable with two years’ imprisonment, for persons to conspire, by fraudulent means to induce any woman to commit adultery or fornication. The section was not widely used and one’s imagination is sorely taxed to envisage circumstances in which it would apply.

The 1918 Code amendments imported the Ontario law to make it an offence for a person, in the home of a child (originally defined as under sixteen but raised in 1954 to eighteen years), to indulge in “sexual immorality... or any other form of vice” that would cause a child “to be in danger of becoming immoral, dissolute or criminal, or the morals of such child to be injuriously affected” or its home rendered unfit. Adultery was not specifically mentioned but was added in 1933.

Subsection 215(4) solved the Davis problem by denying any valid defence on the basis that the child was “of too tender years to understand or appreciate” the home conditions or the acts committed there.

This addition to the Code was passed at a time when the child-savers were in full spate. Admittedly, subsection 215(6) provided that prosecution could be instituted only at the instance of “some recognized society for the protection of children” or an officer of a juvenile court and with the authorization of the provincial Attorney-General.

The zeal of the child-savers can be seen in the Ducker case when the authorities executed a search of a house. There were five children in the house


216 Supra note 211.


220 (1919), 45 O.L.R. 466, 31 C.C.C. 357 (Ont. H.C.).
although it is not clear who were their parents. Ducker was convicted by the juvenile court and this was confirmed without difficulty by the Ontario High Court.

A more liberal tendency started with Okrainetz\textsuperscript{221} although the peculiar facts of this case robbed it of much precedental value. Two young persons were of roughly the same age although the male was the female's uncle. They were the parents of a six month old child and were charged under subsection 215(2) with endangering its morals. Ross D.C.J. acquitted them because immoral sexual behaviour was not sufficient \textit{actus reus} for the purpose of the section. The judge seemed to ignore subsection 215(4) in observing that there was no evidence of the six month old baby becoming immoral or even being in danger of it, and that the child may never know the truth of its parentage or at least not until it had reached such an age as to be outside the contemplation of the Code.

\textit{Strom}\textsuperscript{222} also showed the clear dangers of mixed bathing. Unfortunately the recital of the facts is a trifle cryptic but the judge had the benefit of photographs when he heard an appeal from a contributing conviction under the \textit{Juvenile Delinquents Act}\textsuperscript{223} Acts that were only suggestive of immoral relations between the mother of the children and the accused were not sufficient for a conviction. The Manitoba King’s Bench offered these intriguing and morally uplifting comments:

Bathers undoubtedly indulge in frolicsome conduct in the water that they would not think of under other conditions. . . . [Referring to photographs, Exhibits 2 and 3.] There is evidence of immodesty and indifference to outward appearances, but is it conduct inducing juvenile delinquency?\textsuperscript{224}

Macdonald C.J.K.B. believed that the behaviour complained of might create a suspicion but the “door is open to differences of moral opinion.”\textsuperscript{225} Furthermore, the Judge did not believe that the conduct of the adults was wilful or would create immoral tendencies in the children. He added that the proscribed behaviour must \textit{actually} cause the children to become juvenile delinquents before there could be a conviction. That last opinion did not receive approval from later courts, who held that likelihood of delinquency was sufficient.\textsuperscript{226}

Two other cases led to further legislative changes. R.B. Bennett explained to the House of Commons that an amendment was sought by the Social Service Council because the Ontario Court of Appeal had made it almost impossible to secure a conviction.\textsuperscript{227} In \textit{Vahey},\textsuperscript{228} the appellant had been convicted under subsection 215(2). When the police entered the house, they found a woman in bed with a four-year old boy; Vahey, the father of the child, had apparently just gotten out of the bed. Both the woman and Vahey were convicted

\textsuperscript{221}[1930] 1 W.W.R. 826, (1929), 53 C.C.C. 340 (Sask. Dist. Ct.).
\textsuperscript{223}R.S.C. 1970, c. J-3, s. 33.
\textsuperscript{224}Re Strom, supra note 222, at 878 (W.W.R.), 225 (C.C.C.).
\textsuperscript{225}Id. at 880 (W.W.R.), 227 (C.C.C.).
\textsuperscript{227}Can. H. of C. Deb. May 26, 1933, at 5489.
presumably because she was separated from her husband and had lived "in sin" with Vahey for five years.

In quashing the conviction, Orde J.S. showed some impatience in saying that there was "not a tittle of evidence" to support the charge found proved by the Juvenile Court Judge who, in Orde J.A.'s words:

presumably takes the view that the father and mother of an illegitimate child must not be allowed to continue to live together and to maintain and bring up the child and that the home is to be broken up by sending both the father and mother to gaol. What is to happen when they come out of gaol? They cannot resume their former mode of living for fear that the law will pounce upon them again.229

The appellate judge did not believe this was the proper purpose of subsection 215(2). The accused were not indulging in vicious morals-endangering habits. Merely living in adultery did not constitute sexual immorality. That statement explains one of the changes in the law so that subsection 215(2) included adultery as well as other sexual immorality.

A year later the same court again examined the scope of subsection 215(2) in Eastman.230 The accused was the mother of three children aged twenty, seventeen and ten who lived in the same house as Eastman and a man called Potter. In the bedroom shared by Eastman and Potter, the police found a two year old girl, the offspring of a marriage between Mrs. Eastman’s twenty year old son and Potter’s daughter. The police made the search just after midnight.

The Police Magistrate discussed Orde J.A.'s judgment in Vahey and interpreted that decision to lead to an acquittal unless the behaviour of the accused was “so gross or flagrant or carried on so out of the normal as to amount to vicious indulgence endangering the child’s morals.”231 His Honour commented that living in adultery was “undoubtedly a serious violation of the code of public morals” and created “a degraded moral atmosphere.”232 Even if Orde J.A. were correct, a Children's Aid Society could still solve the problem by making an application for wardship under the neglect provisions of The Children’s Protection Act.233 The magistrate clearly felt, however, that Orde J.A. had made a basic mistake in thinking that adultery was a “mere moral offence.” The trial judge in Eastman limited the scope of the Vahey decision by interpreting Orde J.A. as saying that subsection 215(2) would only fail to apply if the mother were living in a well-established although unorthodox union. If the mother committed “sporadic acts of adultery” merely for the purpose of “gratifying her sexual desires,”234 that might well be viewed by the law as “vicious” living.

The magistrate also attacked the Vahey decision because Orde J.A. had overlooked section 310(b) of the 1927 Criminal Code,235 which made it an indictable offence, punishable with five years imprisonment and a fine, for everyone:

who lives, cohabits or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another or with a person who lives or cohabits with another or others in any kind of conjugal union.

229 Id. at 96 (D.L.R.), 212 (O.R.), 380 (C.C.C.).
231 Id. at 413 (O.R.), 223 (C.C.C.).
232 Id. at 414 (O.R.), 224 (C.C.C.).
233 R.S.O. 1927, c. 279, s. (g).
235 Originally s. 278(a)(iv) of the Criminal Code, 1892 S.C. 55 & 56 Vict., c. 29.
This was part of the polygamy section of the Code (now repealed), but the magistrate thought that it could apply to parties who lived in "open continuous adultery and expressly and quite probably impliedly represent themselves to be man and wife."236 A further justification for finding criminal guilt in the Eastman case seemed to be the magistrate's finding that the parties in these "common law" or "companionate" marriages sometimes imposed severe financial burdens on the public treasury — they were "almost entirely immune from the civil obligations and criminal responsibility"237 attaching to regular unions and the mothers often became public charges.

Sedgewick J. quashed the conviction and decided that the language of the section was equivocal and that "in the absence of controlling context" the words should be given the "less severe meaning."238 "Indulgence", found in subsection 215(2), meant "giving free course" to sexual immorality, and that had not been proved. In addition, a further ingredient, "something in the act complained of akin to publicity as towards the child," was not present. The Judge's meaning is not at all clear but he was probably suggesting that acts committed while the child was asleep would fall outside the scope of the section.239

A year after Eastman, political pressure from the child-savers resulted in the addition of subsection 215(3), which created an irrebuttable presumption that a child was in moral danger or that a home was unfit if adultery or sexual immorality was proved. Two years later, the stringency of subsection 215(3) was alleviated with a proviso that the presumption would not apply to a cohabiting couple reputed to be man and wife and if the child were their offspring.

In Limoges,240 the accused were acquitted under the Juvenile Delinquents Act of contributing to delinquency. The facts are not of concern but the case is noteworthy for Stuart J.'s attitudes toward women and their sexual activities. He disagreed with the trial judge who had described one of the victims as a "prostitute". Stuart J. admitted that the girl "may have fallen and probably did fall, but there is not evidence from which it could be reasonably inferred that it was not the first time she had done so."241

In Linda,242 the accused, a minor charged with contributing, argued that he could not be convicted of contributing for having sexual relations with the girl because she was already a delinquent. Walsh J. dismissed the appeal while acknowledging that the girl was "sadly depraved" and "a wanton,"243 because she had admitted having sexual acts with two other men.244 In Miller,245 a very similar situation produced the comment:

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236 Eastman, supra note 230, at 415 (O.R.), 225 (C.C.C.).
237 Id. at 416 (O.R.), 226 (C.C.C.).
238 Id. at 417 (O.R.), 228 (C.C.C.).
241 Id. at 297 (W.W.R.), 204 (C.C.C.).
243 Id. at 838-39 (W.W.R.), 113 (C.C.C.).
244 The judge allowed the appeal against sentence, cancelling the sentence of hard labour and substituting a one year recognizance with a five hundred dollar surety along with probation and a fine of fifty dollars.
I cannot conceive that it was ever intended that because a girl made two or three mistakes in her life, that she should thereafter be beyond redemption, and at the mercy of anyone who might wish to take advantage of her.\footnote{Id. at 804 (D.L.R.), 416 (W.W.R.), 111 (C.C.C.).}

The judge allowed the Crown appeal against acquittal and imposed a “tax” on immorality consisting of a fine of twenty-five dollars and costs amounting to $101.23.

C. Seduction Under Promise of Marriage

These last few cases give some inkling of judicial thoughts about female virtue, but the most instructive are those where conviction could only result where the “victim” was of “previously chaste character.” The most common were cases of seduction under promise of marriage. This provision has remained almost unchanged since its original passage a few years before the 1892 Code.\footnote{Section 182 of the \textit{Criminal Code}, 1892, S.C. 55 & 56 Vict., c. 29: “Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age.” Compare 1887, S.C. 50 & 51 Vict., c. 48, s. 2.}

The words “or has illicit connection with” have been struck out, probably because of a senator’s comment in 1920 that, “you seduce a virtuous girl; you can have illicit intercourse with a prostitute.”\footnote{Senator L.G. Power of Nova Scotia in \textit{Can. Senate Deb.} June 23, 1920, at 700.}

The section is now a dead letter but there were several cases in the first twenty-five years of the Code’s existence. Only a year after the Code became law, a five judge appeal court heard a stated case\footnote{Walker (1893), 1 Terr. L.R. 482, 5 C.C.C. 465 (N.W.T.S.C.).} of a man who had previously become engaged to a female and had renewed the promise of marriage at the time of the seduction. The judges refused to convict because they believed that the phrase “under the promise of marriage” qualified the word “seduces” and indicated the means by which the seduction was effected.

A decade later, the same court considered the situation of a young couple who had “kept company” for a month or two before “illicit connection” occurred under promise of marriage. Intercourse took place on a weekly basis for eighteen months until pregnancy was diagnosed. The Court\footnote{Lougheed (1903), 8 C.C.C. 184 (N.W.T.S.C.).} quashed the conviction but had some difficulty defining “previously chaste character.” All of the decisions show a strange mixture of pontifications on morality and slightly veiled discussions of contract law.\footnote{See also \textit{Spray} (1914), 20 B.C.R. 147, 24 C.C.C. 152 (B.C.C.A.).}

Prendergast J. read the object of the Code section as the protection of the chastity and morality of female minors. This did not help him with the phrase “previously chaste character” which seemed to be unique to Canadian jurisprudence. It did not mean previous chaste reputation but pointed to “those acts and that disposition of mind which constitute an unmarried woman’s virtue or morals.”\footnote{Lougheed, supra note 250, at 186 (C.C.C.).} Although the Judge did not consider the com-
plainant to qualify as a female of previously chaste character, this did not mean that a female could not be seduced twice (but obviously fifty or more times was rather stretching a point). A female who had "once surrendered herself" should not automatically be deprived of the protection of the statute, but the judge should be convinced that, in the interval between the two acts of seduction, the female's behaviour should "imply reform and self-rehabilitation in chastity. . . ."

In commenting on the complainant's predicament, the Judge said:

[T]his young woman's faith in the accused should have been shaken long before the occurrence in question, and it is rather difficult to believe that this particular promise of September, 1902, repeated for the sixtieth or seventieth time under the very same circumstances, was really and truly the inducement to which she allowed herself to yield on that day.254

This decision was a liberal one compared with those that followed. A Nova Scotia court255 found it "almost inconceivable" that the magistrate could acquit the accused because the seduction was independent of the promise of marriage. Townshend C.J. decided that the offence was proved and that there was a "continuing promise."256 (The accused had proposed to the girl but had later told her that if she got into trouble, "I will marry you before anyone knows about it."257 Townshend C.J. had written a very broadly based judgment as a deterrent, not only to the seducers, but also to inferior court judges who adopted a too liberal attitude. Only Longley J. showed any inclination to limit the scope of the offence; he was prepared to convict if the facts showed that "the promise of marriage was the super-inducing means of the accused" in seducing the female, but did add, however, that if the girl had "herself sought and desired the act of intercourse,"258 then conviction would not be proper.

One small inconsistency in these cases (and in most of the criminal cases discussed including carnal knowledge of young girls) is that, while the courts are very solicitous of the virtue of the females involved, almost all of the reported cases name the complainants, thus advertising their unchaste character. This practice continued until a decade or so ago.

The courts continued to search for a definition; one court commented that if Parliament had meant virgo intacta to be the criterion, it would have said so. Instead, the test must be one of reputation (which was the current thought in the United States) and reputations could be rehabilitated.259

253 Id. at 187 (C.C.C.).
254 Id.
255 Romans (1908), 4 E.L.R. 426, 13 C.C.C. 68 (N.S.S.C.). See also Daun (1906), 12 O.L.R. 227, 11 C.C.C. 244 (Ont. C.A.).
257 Romans, supra 255, at 427 (E.L.R.), 69 (C.C.C.).
258 Romans, supra note 255, at 79 (C.C.C.). (The judgment of Longley J. was not reported in (1908), 4 E.L.R. 426.).
259 Comeau (1912), 5 D.L.R. 250, 46 N.S.R. 450, 19 C.C.C. 350 (N.S.C.A.). See also Lougheed, supra note 269, at 184 (C.C.C.); and Hauberg (1915), 8 W.W.R. 1130, 8 Sask. L.R. 239, 24 C.C.C. 297 (Sask. Full S. Ct.).
The most litigated case in the field was *Magdall.* The Alberta Appellate Division was evenly split and offered very little illumination although Stuart J. did suggest, perhaps with a glint in his eye, that if a female could be rehabilitated, there might also be a possibility of a "similar change in a male with the strengthening of his virtue and moral purpose."

Davies C.J. of the Supreme Court of Canada did not treat the matter so lightly in upholding the conviction:

I am not able to accept the argument that such a single fall from grace of a woman, engaged to a man to whose solicitations she yields, either because of a weaker will than his or that combined with affection and a hope of their prospective marriage under his promise, necessarily stamps that woman as one of an unchaste character for all future time. That surely cannot be so. There must come a time when repentance and pureness of living can rehabilitate her as a chaste character within the meaning of the statute.

Duff and Brodeur JJ. dissented, the former appearing to write a little more realistically than his Chief Justice:

Evidence of previous conduct could only be admissible as tending to show a reciprocal state of feeling between the two persons concerned making it not only probable that the prisoner would desire to have intercourse with the prosecutrix but a disposition on her part also to yield to him.

To allow the prosecution to rely upon such evidence as a basis for guilt would, in Duff J.'s opinion, "be playing fast and loose with justice."

This problem was solved by an amendment to the Code in 1934, which became subsection 301(4): "Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character." This addition of course appeared to be a concession to female feelings but there is evidence of the familiar double standard here. As long as the accused, and he alone, had deflowered the virgin, then it could still be seduction. The male was not to be convicted for "seducing" supposedly used or damaged goods.

D. Carnal Knowledge Under Fourteen Years

Cases of carnal knowledge of females under twelve or fourteen years of age have generated very little case law. This crime is closely related to rape because the law presumes that consent cannot be given by a female of that age. Subsection 146(1) expressly provided that the accused's belief that the girl is over fourteen is irrelevant. This safeguard was necessary because the nineteenth century cases show that some courts had treated the question of consent as the same whether the charge was assault or carnal knowledge.

The policy of the law is well reflected in the scheme of the 1892 Code. Sexual activity with females under fourteen years was called "defilement" and

261 *Magdall*, id. at 257 (W.W.R.), 320 (Alta. L.R.), 393 (C.C.C.).
263 *Id.* at 94-95 (S.C.R.), 627 (D.L.R.), 250 (C.C.C.).
264 *Id.* at 95 (S.C.R.), 628 (D.L.R.), 250 (C.C.C.).
265 S.C. 1934, c. 47, s. 9.
266 *E.g.*, *Connolly* (1867), 26 U.C.Q.B. 317.
267 1892, S.C. 55 & 56 Vict., c. 29, s. 269.
found with the rape provisions (and carried a maximum penalty of life imprisonment and a whipping). Sexual acts with females between fourteen and sixteen years was called seduction and illicit connection and was only an offence if the female was of previously chaste character. The maximum penalty was only two years' imprisonment.\textsuperscript{268}

This arrangement ended with the 1927 Code revision when all sexual activity (including rape) became grouped under the same Part. The term applied to sexual activity with females under fourteen years and fourteen to sixteen years became "carnal knowledge". In 1954, the term became "sexual intercourse".\textsuperscript{269}

In this essay, we are most interested in judicial and social attitudes toward the control of sexual activity. The sexual acts proscribed under subsection 146(1) are of little interest because no one, not even the most avant-garde reformers, doubts that females under fourteen years of age should be protected from sexual predators.

Most of the case law is concerned with corroboration, which is not within our present discussion. The punishments inflicted are often omitted but the sentences imposed are far from the potential punishment of life imprisonment. The usual sentence was two years although a whipping was often added.\textsuperscript{269}

E. Fourteen to Sixteen Years

The defilement offence can still be committed even if the accused thought that the female was over the age of sixteen years. It seems somewhat inconsistent that, despite the provision negating a defence of mistake of fact, the Canadian Parliament should add an amendment in 1920\textsuperscript{270} that provided:

[T]he trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of the said offence, they may find a verdict of acquittal.

Although the apportionment of blame is described slightly differently, the words "as between the accused and the female person" are still in the Code.\textsuperscript{271}

The first reported case\textsuperscript{272} under this section resulted in an acquittal because the Court held that there was insufficient corroboration. One has the impression that the parents were also on trial because they had kept insufficient surveillance over their daughter. The father testified that he had tried to keep himself informed of his daughter's movements and although he knew she had been in the company of young men, he did not know of any young man "having an opportunity to have improper knowledge of her, and that he could not account for her condition [pregnancy] unless her story was true."\textsuperscript{273} The mother gave rather explicit evidence as to her daughter's "courses" (that is, menstruation) or rather lack thereof.

Most of these cases do not show the courts writing highly moralistic ser-

\textsuperscript{268} 1892, S.C. 55 & 56 Vict., c. 29, s. 181.
\textsuperscript{269} See Childs, [1939] 1 D.L.R. 188, [1939] O.R. 9, (1938), 71 C.C.C. 70 (Ont. C.A.). The accused was sentenced to 7 years imprisonment and to be whipped twice, 10 strokes each time.
\textsuperscript{270} S.C. 1920, c. 43, s. 17.
\textsuperscript{271} R.S.C. 1970, c. C-34, ss. 146(3).
\textsuperscript{272} Vahey (1899), 2 C.C.C. 258 (Ont. C.A.).
\textsuperscript{273} Id.
mons about the purity of womanhood and the need to protect the morals of Canada's future wives and mothers. Criminal statistics are sadly lacking here, but there is a suspicion that the law was not taken very seriously except by the parents of pregnant fourteen to sixteen year old daughters. Very few cases of men being charged with the simple deflowering of virgins have been reported which suggests that, even in the nineteen-twenties, Watt's age of consent had been set too high for practical purposes. Most cases found the accused claiming that the complainant was not previously chaste and the courts making it clear that the burden of such proof was on the prosecution. Such a case was Schemmer where seduction was defined, inter alia, as "the act of a man in enticing a woman to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes or other means, without the employment of force." And in Gasselle, Mackenzie J.A. said that illicit connection and seduction were not synonymous. On the other hand, a firmer stand was taken in Stinson where Martin J.A. decided that consent and submission were not the same. Stephen J. in R. v. Clarence added that "a young child [she was fourteen] who submits to an indecent act no more consents to it than a sleeping or unconscious woman." Stinson's case was made even more difficult after 1934 because the then subsection 301(2) of the Code (now subsection 146(2)) was modified with the proviso (already found in subsection 211(2)) that the girl could be still of chaste character if she had only had previous sexual acts with the accused.

F. Sexual Activity of Females Between 16 and 18

The criminal law has not been vigorously applied in prosecuting men for offences under section 211 (now section 151). Most of the decisions are concerned with corroboration but one or two judgments contain some purple prose. Langelier J. in Fiola consulted his Larousse and resolved to keep the double standard bravely flying:

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274 There is hardly any mention of the evidential burden as to previous chaste character. Under R.S.C. 1927, c. 36, s. 210 and R.S.C. 1970, c. C-34, s. 139(3), the burden of proof on that issue is placed on the accused.

275 (1927), 3 W.W.R. 417 (Sask. Dist. Ct.).

276 Id. at 419.


280 Section 301(4) of the 1927 Code provided that "proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character. Also see R.S.C. 1970, c. C-34, s. 139(4).

281 See, Canadian Bar Association Resolution 11 Can. B. Rev. 481 at 483-84. Also see R.S.C. 1886, c. 157, s. 3.

282 1886, S.C. 49 Vict., c. 52, s. 1(1) made it an offence to seduce or have illicit connection with a female between 12 and 16 years. The 1892 Criminal Code by section 181 had protected females of previously chaste character between the ages of 14 and 16 years. (Lack of consent, actual or constructive, was dealt with elsewhere). Both of these provisions applied to "any" person. There were important changes by S.C. 1920, c. 43. The accused in future had to be over 18 years. Words "or has illicit connection with" were eliminated. The age range was changed by substituting 16 to 18 for 14 to 16 years. The "proof of previous intercourse" provision was inserted (see note 299). And finally, section 17 of S.C. 1920, c. 43 provided that the judge might instruct the jury that if the accused was wholly or chiefly to blame, they might acquit.
Chastity is a virtue which makes one abstain from prohibited carnal pleasures and repel even the thought of it.

Purity is the most perfect chastity. As far as the words *honour, wisdom, virtue* are applicable to a woman, *honour* supposes the determination to remain estimable to the eyes of the world; *wisdom* brings the idea of prudence with which a woman avoids the dangerous occasions; *virtue* suggests the courage with which a woman shall resist the seducer’s attacks.\(^{284}\)

The judge did not necessarily think that “chaste” was limited to physical chastity, since if that were the case, “a woman of lewd conversation and manners, guilty of lascivious acts, and of indecent familiarity with men is an object of [the statutes’] protection equally with one who is pure in mind and manners. . . .”\(^{285}\) The Code did not mean “constructive chastity” but it meant chastity in fact “according to the practical sense of that word.”\(^{286}\) The result is unclear because the judge also seemed to approve of cases such as *Comeau*\(^{287}\) which had stated that Parliament would have said *virgo intacta* had it intended that. He did not actually have to decide the question because he found that the complainant had confessed to two detectives to acts of “gross immorality” with another man which showed a “lewd and lascivious disposition” close to prostitution. Therefore, she could not be put on the same footing as the “pure woman” for whom section 211 was designed.

Section 151 is a frank attempt to control sexual behaviour between males over eighteen and previously chaste females between sixteen and eighteen years. Langelier J. saw the obvious purpose as the protection of pure young women. How would the learned judge view a female who was not quite so virtuous? The full bench of the Supreme Court of Alberta considered this problem in *Rioux*.\(^{288}\) The female concerned had decided to leave home and “fell in with” a woman in a shooting gallery. The woman asked the complainant if she “ever did business” and advised her to enter the “sporting life” and gave her information about “how she could avoid trouble as a result of carnal intercourse with men.”\(^{289}\) The younger female took this advice and spent the night with a man who paid her ten dollars. There were other inferences that she had engaged in indecent behaviour with another man who “had possibly gone so far as to have got his private parts in juxtaposition with hers with her consent. . . .”\(^{290}\)

The Alberta Court affirmed the conviction of the accused. The rationale seemed to be the question of the female’s chastity although the Court said that it had expressly refrained from a definition of “previously chaste character” because it was not necessary for the decision. The rationale seems to be that the complainant was *virgo intacta* until her sexual escapade. The Court viewed her ten dollar affair as no proof of her unchaste character; instead, the Judge said that the accused had appealed to “her avarice and need rather than her passions.”\(^{291}\) In further explanation, the Court said:

\(^{283}\) (1918), 41 D.L.R. 73, 29 C.C.C. 125 (Que. City Sess. of Peace).

\(^{284}\) Id. at 74 (D.L.R.), 125-26 (C.C.C.).

\(^{285}\) Id. at 75 (D.L.R.), 127 (C.C.C.).

\(^{286}\) Id. at 76 (D.L.R.), 127 (C.C.C.).

\(^{287}\) Supra note 259.

\(^{288}\) (1914), 17 D.L.R. 691, 28 W.L.R. 69, 22 C.C.C. 323 (Alta. S.C.).

\(^{289}\) Id. at 692 (D.L.R.), 71 (W.L.R.), 324 (C.C.C.).

\(^{290}\) Id.

\(^{291}\) Id. at 693 (D.L.R.), 72 (W.L.R.), 325 (C.C.C.).
Knowledge of these things comes to all women and... long before they have any practical familiarity with them. To impute an unchaste character to this girl because of her understanding of the other woman’s talk would be an exceedingly unsafe thing to do, for it would follow that every woman, no matter how pure of mind, who understood the meaning of catch phrases descriptive of impurity, must be similarly branded.\(^2\)

These remarks are rather simplistic. No one would suggest that, even fifty years ago, a woman should be branded as unchaste because she had some knowledge of sexual matters or even if she had a foul mouth. On the other hand, it does not seem to make much sense to penalize the accused. If the criminal law, as opposed to child welfare legislation, should be invoked, it would seem to make more sense to charge the shooting gallery woman with contributing.

These laws designed to control sexual activity did not work because they did not protect females (presuming for a moment, that that was a salutary aim) and they did not prevent such activity. The court in \textit{Rioux} was punishing the female’s first customer and was leaving her to the mercy of the sexual market for all future occasions. The law, penal and otherwise, and society did not offer her good guidance to replace the influence of the woman in the shooting gallery and offered no solution to the girl’s economic needs.

\section*{VII. CONCLUSION}

Most of the case law discussed has been pre-1939. A conscious decision was made to concentrate on the first fifty years of the Canadian \textit{Criminal Code} because the cases decided during that time best reflect the values espoused by Butler, Stead and Watt. The crime of carnal knowledge of a female under fourteen years has continued to be committed with great frequency, but the cases coming before the courts have not been offences involving constructive consent committed by sixteen year old males with factually willing thirteen year old girls. Instead, they have been crimes involving exploitive older men having sexual intercourse with impressionable or dependent females, or they have been offences where the facts could almost have supported a rape conviction. A number of times they have been crimes involving elements of pedophilia.

Carnal knowledge of older females has not been as frequently subject to criminal prosecution in recent years. If detected, such acts have been dealt with informally or outside the scope of the criminal law by marriage of the participants, by paternity suits and, most frequently, by the use of the contributing to delinquency offence which is heard in juvenile court.

The females who indulged in sexual activity in the past thirty years have also been subjected to quasi-criminal prosecutions under Ontario’s \textit{Training Schools Act}. This is not a new development because “vicious” girls have always been stigmatized by society, but in the name of salvation or protection and always “for their own good.” The Victorians concentrated on elevating the moral status of the lower classes. This classification was not consciously a socio-economic choice although the dangerous, vicious and perishing classes happened to be also the poorest.

\(^{292}\) \textit{Id.} at 693 (D.L.R.), 71 (W.L.R.), 325 (C.C.C.).
At that time, the middle and artisan classes, who were pre-eminently respectable, guarded, chaperoned and cosseted their female offspring so that the girls had little opportunity to become knowledgeable, let alone promiscuous.

Female suffrage, two World Wars, wider employment opportunities, greater availability of and more candour about sex and sexuality, Freudian psychology and economic prosperity have caused the Victorian and Edwardian female stereotype to disappear. Or perhaps only to mutate. Unfortunately, the Double Standard is still often the cause of promiscuous girls being classed as delinquent and uncontro
trollable. This is reflected not only in the Training Schools Act, which could result in the drastic solution of committal to training school but also in the "sexual immorality" provisions of the Juvenile Delinquents Act.

Now that the Federal Parliament has passed the Young Offenders Act behaviour that does not fall within the Criminal Code but is nevertheless looked upon as vicious, naughty, delinquent or deviant will become matters to be dealt with as social welfare problems requiring non-punitive (and provincial) resolutions.

Present day reformers are trying to lower the age of consent because they claim that the present laws are unrealistic, unenforced or unenforceable. There seems little chance of success. The book-burners are in the high schools again. Can Mrs. Grundy be far behind?

In his book, Sex in History, Gordon Rattray Taylor puts forward the hypotheses that societal attitudes toward sex — permissive or restrictive — are linked to broader political factors. In the society where there are permissive attitudes towards sex, are also found more freedom and higher status for women, welfare is more valued than chastity, sex differences (including dress) are minimised. If the trend is toward restrictive attitudes, then these factors are found in a negative form. In broader terms, Taylor said:

If this is true, it follows that we are not free to change our sexual laws and customs except in proportion as we are willing to change the character of our whole society. The converse is also true: we cannot change society without changing sexual attitudes . . . it would be truer to say, that we cannot change our society unless we have already started to change our personalities.

Taylor’s analysis may be too simplistically Freudian but he made a good point when he said that the Victorians were well aware of "the importance of the authoritarian family as a device for training children to accept a hierarchial society."

The degradation of the new industrial nation had its greatest impact in mid-century. From 1800 to 1850, in Taylor’s view, we see the worst manifestations of prostitution when puritanism was at its height. By the time the
reformers made their presence felt, the worst was over. To the Victorians, the question of morality usually meant sexual morality.

The Victorian pre-occupation with sex may well have resulted in more immorality in the nineteenth than in the eighteenth century. Taylor commented, "By making normal sexual activity more difficult, they increased the amount of autoerotic, perverted and fantasied sexual behaviour." The Victorians forced vice out of sight, leading some to greater piety while others were motivated to go to the opposite extreme. The Victorians seemed quite capable of rationalising these attitudes. Members of Parliament impeded factory legislation that would eventually prevent incredible hardships to women and children. The rationalisation was that British industry could not compete in international markets if higher wages and better working conditions were provided. Yet, these same persons were avid supporters of the abolition of slavery. The Victorians, for a time, were more concerned with cruelty to animals than with the inhumane treatment of children.

The question of Victorian hypocrisy is a very complex one. The rulers of the period had no qualms about the efficacy of so-called hypocrisy. Perhaps it can be explained on the basis of a rigid class system and by the principle of less eligibility. An 1827 newspaper account expressed it well: "Our men of rank may occasionally assume a virtue which they have not, they may sometimes be greater hypocrites than their forefathers were, but hypocrisy is, at all events, a homage offered to public opinion, and supposes the existence of a fear of the people." Or, the same sentiment was well stated in the same year by Scott when he said "modern vice pays a tax to appearances, and is contented to wear a mask of decorum."

Taylor had a psychological explanation when he looked upon hypocrisy as a retreat from reality:

If it makes one feel better that prostitution is out of sight, it must be because this enables one to pretend that it doesn't exist. When a moralist actually sees a prostitute, painful emotions are aroused, and he feels an obligation to take action. In short, the early Victorian attempt to thrust the unpleasant side of life out of sight represents another facet of the retreat into fantasy. The attempt to deny the sexuality of the normal woman shows this process in its most extreme form.

\[\text{297 Id. at 83.} \]
\[\text{298 Id. at 277.} \]
\[\text{299 Id. at 277 n. 46.} \]
\[\text{300 Id. at 278-79.} \]