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SEX CRIMES IN WESTERN CANADA, 1890-1920

by

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FOR MY PARENTS

ABSTRACT

For the majority of Canadian historians, the study of sexual morality, abnormality and deviance in Western Canada during the last decade of the nineteenth and first two decades of the twentieth century is primarily thought of in terms of prostitution. Given that prostitutes and brothels were highly visible commodities in the West during these years, it was and is only natural that contemporaries and historians alike would center their discussions on the impact of prostitution and red light districts on Western Canadian society. However, a study of newspapers, household guides, Mounted Police and Penitentiary reports, the debates of the House of Commons, the Criminal Code of 1892, criminal statistics, published law reports and unpublished court records reveals that Canadians in general, and Western Canadians in particular were greatly concerned with a wide variety of sexual matters. Thus it becomes readily apparent that a visit to a prostitute was not the only sexual activity indulged in by the male population in the West; nor was it the only sexual encounter classified as socially unacceptable and in terms of the written law, criminal in intent.

The definition of a sex crime in the late Victorian and Edwardian era knew no boundaries. For example,

the use, sale and supply of birth control devices, abortion and the solemnization of a marriage were all strictly controlled by specific sections of the Criminal Code of Canada. Concerted efforts were made to prohibit same sex contact between males as homosexual encounters were forbidden by the law of the land. Women were to remain chaste before they married and the law took precautions to ensure that a necessary prerequisite in a conviction for a sex assault against a female was her proven chastity before the assault. All sexual activity was to be confined to the marriage bed, performed in the missionary position and solely for the purpose of procreation. Evidently, this form of traditional sexual morality was to be reinforced through social custom and the written law.

Research into the written and unwritten restraints placed upon sexual activity and an examination as to what constituted a so-called sex crime in Western Canada during the latter part of the nineteenth and early part of the twentieth century are key components of the society's past. Unfortunately however, the study of sexual morality in general and sex crimes in particular, has been neglected by Canadian historians and as a result, a more comprehensive understanding of Canadian history remains incomplete. For just as the public life of a people is important in the historical analysis of a society, so too is their private life. Perhaps the latter is of even

greater importance to the historian.

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CHAPTER I

SEX - THE FORGOTTEN FACT IN CANADIAN HISTORY

Who can deny that the problems of coming to terms with the fact of sex has caused Canadians more concern than the activities of all their politicians?¹

A survey of those works published since Michael Bliss posed this rhetorical question over a decade ago indicates that despite the boom in social and legal history, Canadian historians are seemingly content to ignore "the fact of sex" and produce "sexless history."² In fact, to make mention of sex in Canadian history produces a variety of responses ranging from snickers, to queries about its historical relevance, to gossipy tidbits about some prominent or not-so-prominent person's sex life. And as G. R. Taylor has noted in his book, Sex in History, historians generally assume that sexual matters exist "in a watertight compartment, almost independently of historical trends as a whole, and that it would no more throw light on the general problem of interpreting history to open this compartment than it would to study the development of, say, cooking."³ Such responses are indeed unfortunate because historians are neglecting a subject which has been regarded as "the central problem" and "root of life" -- namely, sex.⁴

The only sexual encounter which seems to warrant

any discussion by Canadian social historians is the highly visible and publicized problem of prostitution in late nineteenth and early twentieth century Canada. Western Canadian studies on this topic have ranged from James Gray's general work, Red Lights on the Prairies (1971), to more localized studies like Judy Bedford's "Prostitution in Calgary, 1905-1914" (1981).⁵ And while the study of prostitution enables the historian to gain some insight into attitudes towards acceptable and unacceptable sexual behaviour during a specific period of time, it does not provide a complete picture.

A few attempts have been made to place Canadian attitudes towards sex, sexual assaults against females and homosexuality within a historical context. In 1970, Michael Bliss used the "Self and Sex" manuals advertised by the Methodist Church publishing house to form the basis for an examination of sexual ideas in Canada prior to Sigmund Freud. Six years later, Ruth Olson surveyed two Kingston newspapers, The British Whig and the Kingston Chronicle, and concluded that the crime of rape was indeed an aspect of life in Upper Canada. Then Robert Burns used an 1838 inquiry into accusations that George Markland, the Inspector General of Upper Canada, had sexual relations with several young men to write an interesting article dealing with nineteenth-century Canadian attitudes towards homosexuality. Angus McLaren's ongoing research into abortion and birth control in Canada has resulted in papers being presented and published

and a book forthcoming. Examining the control of venereal disease and the Canadian Women's Army Corps in World War Two, Ruth Pierson has explored what she termed "The Double Bind of the Double Standard" in a 1976 article. More recently, Peter Ward has examined unwed motherhood in nineteenth-century Canada, while Susann Buckley and Janice Dicken McGinnis have studied venereal disease in relation to public health reform in Canada. And, finally, Constance Backhouse will broaden our knowledge of historical attitudes towards women, sex and sex assaults when her analysis of nineteenth-century rape law in Canada from 1800 to the inception of the Criminal Code in 1892 is published.⁶ However, studies of this nature are few and they tend to concentrate on the social control of sexual activity rather than incorporate any legal discussion in their analyses. Furthermore, there has been nothing in Canadian historiography to compare with Susan Brownmiller's Against Our Will: Men, Women and Rape, or Laurence Stone's massive book, The Family, Sex and Marriage in England, 1500-1800.⁷

If Canadian social historians are prone to silence on sexual matters, so too are Canada's legal historians. Admittedly, they do mention sex crimes, but such offences are usually discussed in terms of their relevance to changes and amendments in the Criminal Code. A case in point is A. K. Gigeroff's book, Sexual Deviations in the Criminal Law: Homosexual, Exhibitionist, and Pedophilic Offences in Canada. Although Gigeroff is not a legal

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historian per se, he does attempt to trace the influence of English legal thought on Canadian sex law, in addition to providing the reader with a selected chronology of certain sex cases in both Great Britain and Canada.⁸ However, his study falls short. The subject matter is not fleshed out with any thoughts or suggestions as to how the fluctuating legal definitions of sex offences over the centuries might have reflected or reinforced societal notions of acceptable and unacceptable sexual behaviour.⁹

In order to come to some understanding of the intricate relationship between law and society and thereby broaden our knowledge of Canada's past, one must be able to transcend the boundaries imposed either consciously or subconsciously by historians when they study their respective areas of research. For example, the categorization of acceptable and unacceptable sexual behaviour does not rest solely with the criminal and the criminal justice system. For just as there are a number of written laws which attempt to dictate social conduct, so too, are there numerous societal customs which pertain to sexual behaviour. The criminal law tends to reflect and reinforce what society has defined as acceptable and unacceptable sexual activity at a certain period of time. Thus sex has been and continues to be a matter for social and legal control.¹⁰

Nowhere is this phenomenon more evident than in late nineteenth and early twentieth-century Canada. G. W. Burbidge's Digest of Criminal Law of Canada published

in 1890 and the Criminal Code of 1892 contained several sections which implicitly defined acceptable and unacceptable sexual behaviour for residents of Canada in the 1890s and early 1900s. The available evidence suggests that sexual intercourse was viewed as a necessary evil, whose sole purpose was the procreation of the human race. And sexual activity which did not have procreation as its end result was deemed to be socially reprehensible and punishable as a crime under the written law.¹¹ By placing such matters as abortion, female chastity, seduction under the promise of marriage, homosexual encounters and even the use of birth control within marriage, under the auspices of the criminal law, the federal government was attempting to establish or reinforce perceived notions of acceptable conduct. Evidently, the state had every right to be in the bedrooms of the nation.

Since it is well beyond the scope of this dissertation to examine every social and legal attempt to control the sexual activity of Canadians throughout the country's past, a number of restrictions have been placed on this study. For practical purposes, the geographical area chosen for analysis has been limited to the three most western provinces - Saskatchewan, Alberta and British Columbia. Thus when reference is made to Western Canada, the reader should remember Manitoba has not been included. It should also be noted that the time frame has been limited to the thirty-year period dating from 1890 to 1920, a period which has been characterized by the

majority of Canadian historians as being crucial to the development of Western Canada.

In addition, the sexual matters chosen to form the basis of this preliminary inquiry into a new area of Western Canadian history have also been limited. For example, general perceptions of womanhood, marriage, chastity and even sex itself have been examined in relation to specific legal definitions of sex offences committed either by and/or against either sex. And an effort has been made to examine specific attempts made during the last decade of the nineteenth and first two decades of the twentieth century to exert some measure of control over the sexual content of books, theatrical performances and motion pictures. The attempts to control what people could and could not see at movie houses has been undertaken as a case study of one particular community - namely, Lethbridge, Alberta.

Those offences involving females which have been chosen for discussion include birth control, abortion, rape, carnal knowledge, incest, seduction and indecent assault. Those involving males deal with varying degrees of homosexual activity ranging from indecent assault on a male and gross indecency to homosexual anal intercourse. Cases involving the protection of public morality from depravity and corruption include an analysis of what constituted obscenity in literature and entertainment. It is hoped that a study of the relevant sections of the federal criminal law and an examination of specific offences within the Western Canadian experience will provide some

insight into the intricate relationship between socially and legally defined notions of acceptable and unacceptable behaviour from 1890 to 1920.

As has been previously mentioned, traditionally there has been a historical denial of sex by the Canadian historical profession. Furthermore, there appear to be very few general research collections dealing specifically with the historical study of attitudes towards sex¹² and sex offences. And as one historian has pointed out, those historians who attempt to study this topic have been forced "to cultivate more ingenuity and persistence in the use of primary source materials than comparable historians in other fields."¹³

However, since the mid-1970s there have emerged two archives devoted to the collection and preservation of gay and lesbian history in Canada. Based in Toronto, Ontario, the Canadian Gay Archives not only collects relevant materials but also publishes a newsletter entitled Gay Archivist, and perhaps more important, distributes the Lesbian/Gay History Researchers Network Newsletter. The other archives, Gay Archives Collective, is in Vancouver, British Columbia, and its purpose is to collect historical information on lesbians and gays in Western Canada and Northwestern United States. In addition to the creation of these archives,¹⁴ the Lesbian and Gay History Group of Toronto and the Gay History Project originating in Saskatoon, Saskatchewan, also have been formed. Although these alternative archives and history

groups provide a much-needed source of information, they do by their very nature focus on the history of specific groups or certain individuals within a group, rather than enhance the knowledge surrounding the general field of sexuality.

Those people who do endeavour to study sex, sexual behaviour and sex offences in Canada's past must rely upon a wide variety of source material which is both social and legal in nature. For example, medical journals like Canada Lancet, Canadian Journal of Public Health and Canadian Medical Association Journal in addition to household guides like the Domestic Cyclopedia and self-help manuals such as Light on Dark Corners: Searchlights on Health: A Complete Sexual Science and A Guide to Purity and Physical Manhood¹⁵ all reveal, to varying degrees, perceptions of womanhood, marriage and acceptable sexual behaviour for both sexes.

Although newspapers are somewhat suspect as a reliable historical source, they can and do provide editorial comment and basic factual information on certain happenings. Thus several western Canadian newspapers ranging from the Saskatoon Phoenix and the Moose Jaw Times to the Edmonton Journal and the Victoria Daily Colonist to name but a few,¹⁶ were examined in order to gain insight into late nineteenth and early twentieth century media coverage and reporting techniques with regards to sex-related matters and offences. For example, was the report of a rape case biased against the woman

or the perpetrator of the alleged assault? What words were used to describe the crime? Was any reference made as to whether the woman displayed any physical signs of attempting to resist her assailant? And perhaps more important, was the moral character of the woman mentioned or alluded to in the report? The answers to questions of this nature can be found in the newspapers of the day. As a result of these findings, some tentative conclusions about social perceptions of sex offences, the victims and the assailant can be drawn from this type of source material.

Although medical journals, self-help manuals, household guides and newspapers provide a social background for discussion, these sources must be incorporated into a legal framework to produce a study of the intricate relationship between law and society. For the years following Confederation, the statutes from 1869, the federal Criminal Code of 1892 and its subsequent amendments, provide a wealth of information for a general study of the criminal law and those laws pertaining to sex offences in particular. Unfortunately, however, the written law is by no means conclusive. For example, although the words and phrases 'buggery,' 'gross indecency,' 'indecent assault,' 'of chaste character,' 'obscene' and 'public morals' appear in the law, they all lack specific definition. Therefore as a consequence, the provinces as the implementors of the federal criminal law had carte blanche to define the term at certain times and places. Thus,

what constituted a sexual offence at one time might not have been at another.

Since statute law and the Criminal Code of Canada were created by men, the thoughts and interpretations of the creators must be examined. Such information can be found in the debates of the House of Commons and the Senate. Although the passage of the 1892 Criminal Code produced relatively little discussion in the Commons, those areas dealing with the morality and chastity of Canadians in the late nineteenth and early twentieth century were debated at great length. In fact, the statements given in the two Houses of Parliament during these years indicate a trend towards the public's acceptance, almost insistence, on the state's right to legislate public morality in general and sexual morality in particular.

In addition to reading the law and analyzing the statements of the legislators, time must be spent in discovering how the written law was actually applied in a courtroom setting. In fact, it is the practical application of the Canadian federal criminal law to specific sex cases in late nineteenth and early twentieth century Western Canada which forms the basis of this dissertation. Unfortunately, historical information of this matter is somewhat difficult to attain. Although the post-Confederation years saw the establishment of federal and provincial Supreme Courts, the number of cases processed through these higher courts was small. The majority of

cases were heard before the local police magistrate or judge presiding at the police, district or provincial court level.¹⁷ In more specific terms, the published law reports such as the B. C. Law Reports, Territorial Reports, Supreme Court Records, Western Weekly Reports, and the Western Law Reporter, to name a few, only present those cases which have established some precedent in law or made some memorable decisions on selected cases which appeared before the various courts of appeal. For example, one volume of R. M. Chitty's Abridgement of the Canadian Criminal Case Law digested those cases which appeared from 1892 to 1925 in Canadian Criminal Cases. However, this series suffered from the same drawbacks as the other sources previously mentioned and thus Chitty's 1925 volume is a 'consolidated' but incomplete digest.

Although there is another way to gain court case information, it is plagued with frustration, complications and inconsistencies. In 1979 one historian suggested that our knowledge of Canadian legal history would never be complete unless researchers had the stamina and energy to spend time going through the thousands of uncatalogued and unindexed court records to be found in the basement of nearly every local courthouse throughout Canada.¹⁸ To date there is nothing to compare with the Alberta Legal History Project whose purpose is to prepare an inventory of all civil and criminal cases heard before the District and Supreme Courts in the province

of Alberta from 1907 to 1972. Eventually, all the case files and the judge's procedure books will be placed on microfilm and stored at the Alberta Provincial Archives in Edmonton.

Although the Alberta Legal History Project is not yet complete, it provided valuable information for this study. In fact, without access to these unpublished court cases this preliminary inquiry into sex crimes in Western Canada would have been an impossibility. Over four hundred sex related offences tried before the Calgary and Wetaskiwin Supreme and District Courts from 1908 until 1924 were read. Unlike the published law reports which contain summary discussions of the purely legal issues in each case, the majority of these unpublished case files contain the depositions of those people involved in the charge, the statement of the accused, the transcripts of the preliminary inquiry and the outcome of the trial. Thus, these unpublished court cases provide the historian with a wealth of information which heretofore has been unattainable from a reading of the published law reports in Canada.

As has been previously mentioned, projects such as the Alberta Legal History Project are nominal and if any worthwhile studies in the field of Canadian legal history are to be produced then more projects of this nature must be undertaken. Unfortunately, this is easier said than done. For example, the majority of the court records for Saskatchewan are housed in the basement of

the old courthouse in Saskatoon. This basement was flooded a few years ago and all the files had to be either hung up to dry on a clothesline, page by page, or freeze-dried and then reboxed. Unfortunately, no one in the Solicitor-General's office, courthouse or archives' staff had the foresight to index the files as they were being returned to storage. Furthermore, there is the possibility that some of the boxes contain files which pertain to adoptions and the Saskatchewan government does not allow the researcher access to such cases. Given that this material is uncatalogued, an archivist must be on hand when every box is opened and every file is examined.

Although the records in British Columbia have not suffered from the hazards of nature, they remain unindexed like their Saskatchewan counterparts. In addition, the British Columbia records are not centrally located in an easily accessible location. A similar situation exists in Manitoba. The case files for Queen's Bench and County Court for all the judicial districts are scattered throughout the province. At present these records are being indexed and catalogued and brought under retention schedules for their eventual transfer to the Manitoba Provincial Archives. Unfortunately however, the legal history project in Manitoba is still in its initial phase and will not be completed for five years. Because of this fact, and the general problem of finding sufficient information on the topic, a discussion of Manitoba does not appear in this study. And since there is obviously a wide disparity

in the quality and quantity of court cases available even for the three provinces chosen for analysis, it is virtually impossible to undertake a quantitative and comparative analysis of the incidence, prosecution and sentencing of certain sex offences in British Columbia, Alberta and Saskatchewan.

Some information on cases can be obtained from the reports of the North West Mounted Police which have been published as part of the Sessional Papers since the creation of the police force in the mid-1870s. These annual reports can be supplemented by those of the British Columbia, Alberta and Saskatchewan Provincial Police which were created either during or soon after the First World War. Not only do these reports contain a wealth of factual information, but they also reveal some of the attitudes of law enforcers towards sex offences in general and the perpetrator/victim in particular. For example, several accounts refer to cases of rape or attempted rape as being crimes of passion where lust was the sole motivation for the attack.¹⁹ And much like newspaper accounts on sex offences, other reports allude to the woman's moral character and at times specifically mention whether or not she displayed any resistance to the assault.²⁰ Comments such as these and the very fact that members of the law-enforcement agencies at the time would issue such statements serve as yet more examples of the intricate relationship between social values and the justice system.

But perhaps the most difficult aspect of a study of this nature is the fact that many people still believe that one cannot discuss the nature of crime and, more specifically, sex crime without a multitude of statistical information and a computer printout. In fact, Eric Monkennen has gone so far as to assert that our understanding of crime and criminal justice in the past must be based on the counting technique.²¹ However, anyone who studies crime, the law and the criminal justice system quickly learns that the amount of crime reported, recorded and processed through the system is by no means indicative of the actual amount of crime occurring. Such thoughts were vividly expressed by British economist, Sir Joseph Stamp, when he stated:

The government are very keen on amassing statistics. They collect them, raise them to the nth power, take the cube root and prepare wonderful diagrams. But you must never forget that everyone of these figures comes in the first instance from the village watchman, who just puts down what he damn pleases.²²

And bearing in mind that at present only six to thirty percent of all sexual assaults are reported to the authorities,²³ one can only speculate as to the number of assaults which went unreported in the past. Obviously the much discussed 'dark figure' of unreported crime extends deeply into the area of sexuality and sex offences.²⁴

Thus, it is virtually impossible to draw any substantive conclusions as to whether or not there was a preponderance of sexual offences in late nineteenth and early twentieth

century Western Canada.

But what of the recorded incidence of criminal activity in Western Canada's past? Attempting to compile the official statistics according to federal judicial districts, Canada's long-running publication of criminal statistics appeared annually in tabular form in the Sessional Papers. However, as a reliable source, it is somewhat suspect. Whereas compilers of present-day criminal statistics record the number of reported crimes in addition to the number of charges unfounded or reduced to lesser offences, statisticians in the 1890-1920 period concentrated on recording the number charged and acquitted, the degree to which the offender used alcohol, along with his or her religious affiliation, nationality, occupation and literacy. Apparently, the statistics for the earlier time period were more concerned with attempting to prove a correlation between alcohol, religion, education, race and criminality. It must also be noted that the boundaries for the judicial districts in the West did not remain constant during the years of this study.

Furthermore, when one has information indicating that a case involved two offences, it is difficult, in fact impossible, to go to the statistics and find out which offence, if any, a conviction was registered. For example, in a case where a conviction for a rape/murder has occurred, is the conviction statistic to be found in the murder and/or the rape category? Then, at other times, the statistic could be recorded under a joint

category, i.e. 'Abortion and Attempt to Procure Abortion' or 'Sodomy and Bestiality.' In the first instance, the historian does not know whether the statistic listed is for actually performing an abortion, attempting to perform an abortion or merely asking for information on abortions and, in the second instance, was the charge sodomy, bestiality or both? Then, instead of having a joint registration of the statistic, there is always the possibility that such information might be suppressed. There has been at least one attempt to suppress information on sexual attacks. During the First World War, the federal government agreed to be silent on any reports of assaults on women who were going to and from work during their night shifts at the war factories. Thus, it is readily apparent that such problems as compilation, consistency and human intervention leave the historian with a highly suspect statistical sample.

Statistical information available from those sources which deal specifically with the provinces do not relieve any of these difficulties; in fact, they compound them. In British Columbia, for example, the various police charge books, magistrates' books, gaol reports and sentence books breed confusion for the counter. Repeatedly, there is inconsistency in how and what information is reported, the accused or prisoner's name is spelt in a variety of ways and there is no specific factual data given about the case. Even the charge and/or conviction registered against a prisoner could vary in the monthly

records kept on those people residing in the various gaols in British Columbia. For example, the first listing might read that a John Smith was serving three years imprisonment for a rape conviction while the next time it could be listed as John Smith serving three years for attempted rape. If one does not have access to the actual case file then it is impossible to cross reference the listing in order to ascertain which one in the gaol report is correct.

The statistical information for Saskatchewan is not much better and it might well be worse. The Divisional Reports of the Saskatchewan Provincial Police placed their data under joint categories, i.e. rape and attempt rape, carnal knowledge and attempted carnal knowledge, abortion and attempted abortion. Much like the criminal statistics compiled by the federal government, it is difficult to know which offence is represented in the number given. Other sources supply the name of the defendant, his address and the nature of the offence in alphabetical order. Unfortunately, no dates are given and thus the material is virtually useless.²⁶

Even if one could compile a complete statistical sample despite the ambiguous conviction rates, it would be impossible to formulate any sentencing pattern in Western Canada or in the respective provinces of British Columbia, Alberta and Saskatchewan. Although the Criminal Code of 1892 provided maximum penalties for offences, it did not necessarily follow that those penal-

ties were handed out with any degree of consistency by the federal and provincial judges or police magistrates. As individuals in society, judges and jury members are influenced by societal values and have their own ideas on a particular offence. Obviously each case was and still is influenced by preconceived notions of acceptable and unacceptable behaviour, but every case was also judged as an entity unto itself with its own extenuating circumstances. Perhaps more important, the historian must realize that the search for uniformity in sentencing is akin to seeking what has been termed "the Holy Grail of liberalism," that is, "a consistent system of punishment for unequivocally defined crimes."²⁷

But despite these wide and varying problems, there is sufficient evidence to warrant at least a preliminary inquiry into the relationship between social and legal attitudes towards sex, sexual activity and sex offences during the 1890s and early 1900s in Western Canada. Although the literary sources such as medical journals, household guides, magazines and reports from various women's organizations repeatedly promoted marriage, home and motherhood, the debates of the House of Commons, the federal and provincial police reports and the court records themselves reveal a somewhat different world. Married couples practised birth control, unmarried couples had sex before marriage, doctors performed abortions, back-alley abortionists existed and at times women aborted themselves. Serious sexual assaults against females

have often been portrayed as a modern phenomenon, a product of the 1970s and the so-called sexual liberation movement. Yet there are indications that assaults against females occurred with great frequency during the late nineteenth and early twentieth centuries. At a time when living conditions precluded privacy, incest was a fact of life for many families as brothers and sisters slept together as did father and daughter(s). And although same sex encounters between males were thought to be crimes against God, nature, society and the law, homosexual acts by choice or by circumstance did not dissipate. Thus the reality of the situation is far different from the sexless history which is usually presented in historical works dealing with the Canadian, and more specifically, the Western Canadian experience.

Given the current North American fascination with sex as demonstrated by the popularity of Nancy Friday's books, Shere Hite's reports on male and female sexuality, and even the United Church of Canada's study document on human sexuality,²⁸ it is somewhat surprising that historians have left the study of sex in Canada to sociologists and criminologists. The time has certainly come for social and legal historians to take their heads out of the intellectual sand and realize that sex, sexual activity and sex offences warrant historical analysis within a Canadian context. Once sex in history is accepted, or at least tolerated, by the Canadian historical

profession as a viable field of study, then a true and more accurate portrayal of Western Canadian society will be obtained. For just as the peaceful settlement of the West was not so peaceful²⁹ so too is Canadian history not so sexless as has been portrayed.

FOOTNOTES

¹M. Bliss, "Pure Books on Avoided Subjects: Pre-Freudian Sexual Ideas in Canada," Historical Papers (1970), pp. 89-108.

²A. Rasporich, William Lyon Mackenzie (Toronto: Holt, Rhinehart and Winston Ltd., 1972), p. 1.

³G. Taylor, Sex in History (New York: Harper and Row, 1970), p. 4.

⁴G. Seldes (ed.), The Great Quotations (New York: Lyle Stuart, 1960), p. 861.

⁵See as examples J. Gray, Red Lights on the Prairies (Toronto: Macmillan, 1971) and J. Bedford, "Prostitution in Calgary, 1905-1914," Alberta History (Spring, 1981), pp. 1-11.

⁶M. Bliss, "Pure Books on Avoided Subjects: Pre-Freudian Sexual Ideas in Canada," Historical Papers (1970), pp. 89-108; R. Olson, "Rape--An 'Un-Victorian' Aspect of Life in Upper Canada," Ontario History (June 1976), pp. 75-79; A. McLaren, "Birth Control and Abortion in Canada, 1890-1920," Canadian Historical Review, LIX (September 1978), pp. 319-340; R. Pierson, "The Double Bind of the Double Standard: V. D. Control and the CWAC and World War 11," Canadian Historical Review LXII (March 1981), pp. 31-58; R. Burns, "'Queer Doings': Attitudes Toward Homosexuality in Nineteenth Century Canada," Body Politic 29 - Our Image (December 1976/January 1977), pp. 4-7; W. Peter Ward, "Unwed Motherhood in Nineteenth-Century English Canada," Historical Papers (1981), pp. 34-56; J. Dickin McGinnis and Susann Buckley, "Venereal Disease and Public Health Reform in Canada," Canadian Historical Review, LXIII (September 1982), pp. 337-354, and C. Backhouse, "Nineteenth Century Rape Law: 1800-1892," (unpublished paper, draft, October 1981).

⁷S. Brownmiller, Against Our Will: Men, Women and Rape (New York: Bantam Books, 1975) and L. Stone, The Family, Sex and Marriage in England, 1500-1800 (New York: Harper and Row, 1977).

⁸A. G. Gigeroff, Sexual Deviations in the Criminal Law: Homosexual, Exhibitionist, and Pedophilic Offences in Canada (Toronto: University of Toronto Press, 1968).

⁹Gigeroff realizes the limitations of his study when he writes "We are forced to the realization that our existing legislation and case law are a limited resource for study and can at best serve as a springboard for our inquiries." Ibid., p. 111.

¹⁰D. MacNamara and E. Sagarin, Sex, Crime and Law (New York: Free Press, 1977), p. 1.

¹¹D. M. Wyman, Comments on the Criminal Law and Legal Process (Edmonton: Alberta Board of Review, May 1975), p. 45. See also, R. Rodgers, Sex and Law in Canada (Ottawa: Policy Press, 1962), p. 8.

¹²S. Licata and R. Petersen, "Introduction" in S. Licata and R. Petersen (eds.), Historical Perspectives on Homosexuality (New York: Haworth Press, 1981), p. 3.

¹³N. Sahli, "Sexuality in 19th and 20th Century America: The Sources and Their Problems," Radical History Review (Spring/Summer 1979), p. 89.

¹⁴The term archives is misleading. The Canadian Gay Archives has six collective members and houses the papers of nine gay groups and three individuals. The Gay Archives Collective has only three collective members and does research on gay life in British Columbia prior to 1960. It is also concerned with the establishment of a gay library and information center for the Vancouver area. Information obtained from Lesbian/Gay History Researchers Network Letter (Issue 5: December, 1981), p. 7.

¹⁵B. G. Jefferies and J. L. Nichols, The Household Guide or Domestic Cyclopedia (Toronto: J. L. Nichols Co., 1894; reprinted Toronto: Coles Publishing Co., 1972) and by the same authors, Searchlights on Health: Light on Dark Corners, A Complete Sexual Science and A Guide to Purity and Physical Manhood (Toronto: J. L. Nichols Co., 1897).

¹⁶A selection of Western Canadian newspapers consulted includes: Saskatoon Phoenix, Edmonton Journal, Calgary Albertan, Nanaimo Free Press, Victoria Daily Colonist, Victoria Semi-Weekly Tribune, Macleod Gazette,

Moose Jaw Times, Medicine Hat Times, Calgary Herald, Vancouver Sun, Vancouver Province and Lethbridge News.

¹⁷L. A. Knafla, "Bibliography: Crime, Criminal Law and Justice in Canadian History: A Select Bibliography, Origins to 1940," in D. Bercuson and L. A. Knafla (ed.), Law and Society in Historical Perspective, p. 158.

¹⁸Ibid.

¹⁹See Saskatchewan Archives Board (hereafter SAB), Attorney General Papers, Saskatchewan Provincial Police, C Division Reports (1918), File 2. The Regina Division of the Saskatchewan Provincial Police for the year ended December 31, 1918 reported that the motive in a rape/murder case in the district had been lust. p. 10. In the same report, a man was accused of murdering the father of a fifteen year old girl and raping the girl after he had dragged her in the snow. Once again, the report noted that lust was the motive for the offence.

²⁰Ibid. When divisional reports carried an account of a sex-related offence there was usually a comment on the moral character of the female and a statement as to her physical state after the attack.

²¹E. Monkonnen, "The Quantitative Historical Study of Crime and Criminal Justice," in J. Inciardi and C. Faupel (eds.), History and Crime: Implications for Criminal Justice Policy (Beverly Hills: Sage Publications, 1980), p. 53.

²²G. Nettler, Explaining Crime (Toronto: McGraw-Hill, 1974), p. 45.

²³"Women are often reluctant to report assaults to police," The Albertan, 17 September 1976, p. 14.

²⁴D. MacNamara and E. Sagarin, Sex, Crime and Law, p. 7.

²⁵M. Bliss, A Canadian Millionaire: the life and business times of Sir Joseph Flavelle (Toronto: Macmillan of Canada, 1978), p. 306.

²⁶SAB, Attorney General Papers, Saskatchewan Provincial Police (5), Index #3, Name and address of defendant and nature of the crime arranged alphabetically

but no dates given. See also (7), Places and Crimes. Once again, no date is provided so the information cannot be used.

²⁷Wyman, Comments on the Criminal Law and Legal Process, p. 62.

²⁸N. Friday, Men in Love (New York: Bantam Books, 1980); S. Hite, The Hite Report on Male Sexuality (New York: MacMillan Co., 1981) and In God's Image...Male and Female, A Study of Human Sexuality (Toronto: United Church of Canada, 1980).

²⁹T. Thorner, "The Not So Peaceable Kingdom: A Study of Crime in Southern Alberta, 1874-1905." (unpublished M. A. thesis, University of Calgary, 1976).

CHAPTER II

WOMEN, SEX AND MARRIAGE:

MIDDLE CLASS PERCEPTIONS AND REALITIES

In 1867 the British North America Act provided not only for the confederation of Canada East (Quebec), Canada West (Ontario), New Brunswick and Nova Scotia, but also for the admission of Rupert's Land, which was under the administrative control of the Hudson's Bay Company, to the union. After a series of negotiations between the British government and the Hudson's Bay Company, Rupert's Land was transferred to Canada on July 15, 1870. The West had now become part of Canada.¹ And although the actual enforcement of law and order in the ceded area ceased to be under the jurisdiction of the Hudson's Bay Company, all the laws which were in effect in Rupert's Land and the Northwest Territories at the time of admission into the union, were to remain in force until changed by the Canadian government.² Then with the creation of the province of Manitoba in 1870, it became subject to the law of England as it existed on July 15, 1870 in both federal and provincial matters.³

The massive area known as the Northwest Territories, which still remained after the creation of the 'postage stamp' province as Manitoba was so named, had its administration of justice, organization of the courts and the

appointment of stipendiary magistrates and justices of the peace directed by an appointed Lieutenant Governor and a Council as stated in the Northwest Territories Acts of 1873, 1875 and 1877.⁴ In addition, Canadian criminal law was extended to the area in 1873. During the same year, there was the creation of a Mounted Police force for the Territories, complete with a Commissioner and Superintendents who were ex officio justices of the peace.⁵ A year later in 1874, an amendment to the Mounted Police Act gave the Commissioner of the force the powers of a stipendiary magistrate.⁶ Then over a decade later in 1886, the Supreme Court of the Northwest Territories was created, the number of coroners and sheriffs was increased and lastly, the area (like Manitoba earlier) became subject to the law of England as it existed in 1870.⁷ But despite this "general overhaul of the legal machinery," at least one historian has noted that the Mounted Police remained the dominant system of justice on the Prairies, hearing criminal cases and disseminating judgements swiftly until the early twentieth century.⁸

Although minor changes were made in the intricacies of the administration of justice in the Northwest Territories during the 1890s, for the purpose of this general overview of the legal framework in the West, the next major concern is the creation of the provinces of Alberta and Saskatchewan out of the Territories in 1905. Both the Alberta and Saskatchewan Acts, which created these two new provinces, reiterated the common trend of

continuing the laws, the courts and the officers as they existed prior to either, the admission of a territory into the union or the creation of a new province. More specifically, the Alberta and Saskatchewan Acts continued the laws which were in effect at the time of their establishment.⁹

But irrespective of whether the accused was charged with an indictable offence (rape, murder, treason, etc.) or a summary offence (break and entering, common assault), his progress through the court system was a long, drawn out, step by step procedure. In order to have some understanding of this process, let us create a hypothetical case which is pertinent to this study of sex crimes in Western Canada from 1890 to 1920 and trace it through the judicial system step by step. The name of the accused is John Brown. On December 1, 1910 what is known as an 'information and complaint' is laid against the accused by Charles Doe alleging that Brown raped Doe's eighteen year old daughter on or about October 1, 1910. An 'information and complaint' is merely a written allegation taken before a Justice of the Peace that a crime has in fact taken place. Once the 'information and complaint' has been made, inquiries are made by the police and then if there appears to be sufficient evidence, the person named in the written allegation can be arrested. In this instance, Brown was arrested and charged with raping Charles Doe's daughter, Emily, on or about October 1, 1910. Brown is then ordered to appear before a Justice

of the Peace where the charge is read and he is remanded to a later date for a preliminary inquiry into the charge. Held before either a magistrate or a Justice of the Peace, the preliminary inquiry is designed to decide if there is sufficient evidence for committal to trial. After hearing brief statements from the witnesses, the magistrate does decide to send Brown to trial. Since he has been charged with an indictable offence, Brown has the option to choose whether to be tried by a judge with or without a jury. In this instance, the accused chooses trial by judge. Once again, Brown is remanded and placed in custody to await trial.

Since he chose trial by judge alone, Brown now appears before a Chief Justice of the Supreme Court of Alberta. During the trial, the prosecuting attorney or the Crown attempts to establish Brown's guilt while the defence attempts to prove his innocence or insufficient evidence to prove the charge. More specifically, the evidence and witnesses of the Crown are presented first, then the defence has the opportunity to cross-examine after each witness. After the cross-examination is all finished, the defence presents its witnesses and evidence with the Crown being allowed to cross-examine in a similar fashion. And finally, closing remarks are made by the Crown first and the defence second. The judge will weigh the evidence presented by both sides and deliver a verdict. For our purposes, Brown is found guilty of rape and ordered to appear before the judge in a week for sentencing. Al-

though Brown is liable to a life sentence for his conviction, he is sentenced to five years imprisonment with hard labour at Prince Albert Penitentiary.

But arguing that he is in possession of a new and pertinent evidence which has a direct bearing on the outcome of the case, Brown's lawyer decides to appeal the judge's decision within the thirty day time limit. Instead of being transferred to Prince Albert, Brown is kept in custody at the provincial jail. The appeal is heard by the Appellate Division of the Supreme Court of Alberta and the Chief Justices agree with Brown's lawyer. Consequently, the conviction is quashed and Brown is freed.¹⁰ The process has been completed. And while this procedure from the committing of the offence, through arrest, preliminary inquiry, trial, conviction, sentencing and appeal appears to be somewhat simple and straightforward, it is important to note that these various steps in the system did not occur over a period of a few short days but over a matter of several months.

But who did the laws and the courts in Rupert's Land, the Northwest Territories and later, the newly created provinces of Alberta and Saskatchewan serve? Originally when Rupert's Land was transferred to Canada in 1870 and British Columbia was admitted into Confederation as a province in 1871, Prime Minister John A. Macdonald hoped that his vision of a country stretching from sea to sea had finally become a reality. However, possession of the land was one thing; the actual populating of the immense

area was quite another matter! And the anticipated movement of people to the newly acquired land never really materialized in the early years.¹¹ In fact, Macdonald even went to the extent of making the settlement of the West one of the important cornerstones of his famous three pronged National Policy of 1878. Although the other two elements of the policy, namely the completion of a trans-continental railway and the establishment of a high protective tariff became faite complet during the Macdonald era, large scale settlement of the West remained elusive. Indeed, it was not until the Laurier years, and specifically the years from 1896 until 1911, that the populating of Western Canada on the scale envisaged by Macdonald took place.

There can be little doubt that Laurier's immigration policy was a phenomenal success. The population of Saskatchewan increased from 91,279 in 1901 to 492,432 in 1911. In a similar fashion, the population of Alberta increased from 73,022 to 374,663 during the same time period. And lastly, the population of British Columbia increased to 392,480 in 1911 from the 1901 figure of 178,657. It must be noted that these increases in population statistics cannot be solely attributed to natural increases within the provinces, or to a movement of Canadians from one province to another, or to British immigration. For example, the population of Saskatchewan in 1911 was composed of 20.7 percent born within the province, 29.8 percent born in another province, 16.5

British-born and 33.0 percent foreign-born. In the same year the population of Alberta was comprised of 19.7 percent born within the province, 23.6 percent born in another province, 18.6 percent British-born and 38.1 percent foreign-born. And in British Columbia in 1911 that province's population consisted of 21.5 percent born in the province, 21.6 percent born in another province, 30.1 percent British-born and 26.8 percent foreign-born.¹²

Despite the fact that the settlement of the West was a phenomenal success during the Laurier years, this increased immigration was fraught with problems. According to prominent Social Gospeller, J. S. Woodsworth, the new immigrants which were arriving in Canada at the turn of the twentieth century were swelling the ranks of the unskilled labourers and were settling in the already overcrowded immigrant areas in the newly emerging urban centers.¹³ In addition, these immigrants from primarily the Southern European countries and the Orient, were perceived as being physically inferior and morally decadent in comparison to the physically superior and morally upright British-born immigrants and, of course, the Canadians themselves.¹⁴ And as immigration to the West continued, the physical and perhaps, more important, the moral character of the new arrivals was subject to close scrutiny by the self-appointed guardians of morality in Western Canadian society.

As the West became settled, many Canadians of primarily white, Anglo-Saxon and Protestant persuasion

saw the existence of alcohol, prostitution and drugs as serious threats to the three cornerstones of society, namely, motherhood, home and family. Yet the very nature of the Western Canadian frontier experience was not conducive to moderation in alcohol and drug consumption or sexual activity. Those Westerners who would not or could not tolerate the existence of such practices, which threatened the very basis of their society, attempted to use moral behaviour as a criterion for drawing a line between a reputable and disreputable individual in society.¹⁵ Nowhere is this phenomenon more prevalent than in middle-class perceptions of women, sex and marriage. And as will become evident through this chapter, such perceptions were reinforced through the written criminal law and legal system at the time.

Although women in Western Canada worked side by side with their husbands and fathers on farms and were the first women in Canada to receive the vote,¹⁶ they did not examine their sexuality or seriously question their lack of sexual autonomy. For the purpose of this study, the term sexual autonomy refers to freedom of choice for females in matters dealing with their sexual activities within and outside the marriage contract. However, in the last ten years of the nineteenth and the first twenty years of the twentieth century, a woman's place in society, her relative worth as a female and even her sexuality were defined by and for men. Male-oriented perceptions of womanhood were then reinforced and vocalized by various

middle class women's organizations whose membership came to believe in the ideals. As a result, socially and legally defined notions of acceptable and unacceptable sexual behaviour were directly related to perceptions of a woman's 'proper sphere',¹⁷ within society.

The supposed epitome of happiness for a woman was to marry, have children and maintain the home. If a woman entered the labour force, her stay there was thought to be temporary as eventually she would get married, propagate and work in the home atmosphere. For the most part, economic independence for females was virtually unknown in this era. Usually women were supported by their fathers until they married, and then their husbands assumed the financial responsibility.¹⁸ Consequently, for the majority of Canadian women, the words marriage and career were synonymous.

Men were advised to find a suitable mate, marry and then produce as many children as possible without causing injury to the woman.¹⁹ The Canadian Household Guide of 1894 told its readers that married life with children led to marital bliss, a happy home, contentment and a sense of worth about life. The Guide also warned that the pleasure gained from illicit love was artificial, while domestic love brought true happiness.²⁰ Several newspapers in the West expressed the view that married life without children would lead to misery and ultimately divorce.²¹ The author of the Canadian edition of What a Young Man Ought to Know (1897) was horrified that many

women married without intending to have children. He felt that those women were really leading "a life of legalized prostitution."²² If a woman did not want children then she should not marry because she was denying her strong maternal instinct.²³ Nellie McClung, one of Western Canada's leading women's suffragists at the time, believed that nearly every woman was blessed with the love of children and the home.²⁴

Throughout the late nineteenth and early twentieth century, women were taught by men and other women to be docile, submissive Christian wives, mothers and hostesses.²⁵ For example, in 1886 the Fort Macleod Gazette advised wives not to "bother their husbands while they were reading the newspaper by asking stupid questions. The women were to be patient and when their husband found something which they thought their wives could understand then he would speak."²⁶ In 1892, the National Council of Women of Canada spoke of organizing women into a movement not for their economic, social and sexual advancement but for the preservation of the family unit.²⁷ The first annual convention of the Alberta Women's Institutes held in February 1915 discussed women's traditional place in society. The programme included such topics for discussion as household efficiency and furnishing the home.²⁸ In 1915, Violet McNaughton, the President of the Women's Grain Growers' Association wanted women in the organization to extend their home service ethic to society and use it to create "a bright, clean, prosperous Western

Canada."²⁹ And in 1891 when the average weekly wage for a man was nearly twice that of a woman, the leading female occupations outside of a marriage were still associated with household work. The majority of women worked as domestic servants, housekeepers, dressmakers and teachers.³⁰ It was only during World War One that women entered, in increasing numbers, positions previously held by men. And, it was hoped that this state of affairs would be temporary.

Even as middle class women came to demand the vote, they did so in terms of extending their home service ethic to society. Arguing that women guarded the human race, Nellie McClung felt that Christian women would use the vote to protect the weaker, less fortunate members of society and make the world a safer place for children.³¹

She went so far as to state that if women had been in the German Reichstag then World War One might have been averted.³² Men who supported the right to vote movement for women also hoped that women would bring to politics and society many of the attributes which women displayed in running a happy home. In an article carried in the May 26, 1915 issue of the Grain Growers' Guide, the author F. J. Dixon hoped that women would turn their attention to allaying some of the ills of capitalism after they had eradicated the social evils of gambling and alcohol.³³

A year later Dixon noted that women possessed the spirit of Edith Cavell who had no bitterness or hatred in her heart; and he firmly believed that it was "the mission of women to bring that spirit into politics."³⁴ T. A.

Crerar, the leader of the Progressive Party felt that women would "give an elevation of tone to our public discussions that will exercise a profound power in establishing and maintaining a sound moral viewpoint in government and the administration of our public affairs."³⁵

Despite the numerous organizations and meetings supporting the vote for women, moral reform and social purity, few questions were raised about sexuality and sexual autonomy. Admittedly, some of the women at the annual meeting of the Alberta Women's Institute held in March 1916 suggested that women standardize their dress,³⁶ and Nellie McClung spoke of educating women not to wear immodest clothing which allegedly excited the ever lurking passions of men.³⁷ But such suggestions were designed to maintain and consolidate the traditional place and role of women in society. The very fact that the institution of marriage was placed upon the pedestal alongside motherhood and the home diminished any thoughts of sexual autonomy for women. Thus, women were viewed as "valuable sexual property for the exclusive ownership of those men who could afford to acquire and maintain it."³⁸ The institution of marriage furnished a means for this exclusivity.

Traditional middle class Victorian morality guaranteed that men could purchase the sexual exclusivity and reproductive function of a female through a marriage license. And since sex and womanhood were chained by a marriage contract³⁹ it was a foregone conclusion that

there was to be no sex without the benefit of marriage. The 1897 edition of Searchlights on Health: Light on Dark Corners, A Complete Sexual Science and Guide to Purity and Physical Manhood, written by the same authors as Canada's Household Guide, warned that a woman had lost her most prized possession if she lost her virtue.⁴⁰ Women in the West were portrayed as living in a world of constant sexual danger where a woman's chastity was to be guarded at all times.⁴¹

One pioneer woman remembered that when she was going to school in the late nineteenth century, she and her friends were met at the train station by a school representative who drove them the five miles to class. He never let the girls out of his sight until he delivered them to the Mother Superior. She also noted that it was virtually impossible to carry on unchaperoned correspondence as the Sisters opened their mail.⁴² And in mid-May 1904, the Saskatoon Phoenix carried a warning from the local Council of Women not to answer job advertisements for the St. Louis Exhibition for fear that it might lead to prostitution.⁴³ The Searchlights on Health manual warned women about men who tried to excite their animal passions. Those women who allowed themselves to be taken advantage of by a man in hopes of getting a marriage proposal were considered to be "lost and heartless in the last degree, and utterly destitute of moral principle as well as virtue."⁴⁴ John Charlton, who was instrumental in Parliament's attempts to legislate morality, told the April 21,

1897 sitting of the House of Commons that once an unmarried woman had succumbed to a man she became a social outcast.⁴⁵

It would appear that chastity was to be valued even above life itself. Western Canadian newspapers placed sexual assaults against females under the general rubric of women defending their honour against man's brutality.⁴⁶ This is most aptly illustrated by the Nanaimo Free Press coverage of the murder of a twenty-two year old British Columbia woman at South Wellington in July 1906. In its sensationalized front page coverage of the event, the paper called it "the crime that has appalled the province" and alluded to the "dastardly nature of a crime that has robbed an old man of the sunshine of his life." The paper characterized the attacker as having "the instincts of a heart black with inky sin" because he had tried to "rob a fair woman of her honour" which was "treasured above life itself."⁴⁷ Since he had been unsuccessful in his rape attempt, he had killed the girl. Speaking of the girl's valiant struggle, the Free Press noted that she "had died defending all that is dearest and best to womanhood - her honor."⁴⁸ The Calgary Morning Albertan of July 25, 1906 reported the case in a similar fashion. Under the caption "NANAIMO YOUNG LADY FOULLY MURDERED" the paper observed "that the girl had died defending her honor. On her wrists were the cruel marks of violence, and other signs denoted, all too clearly, the tragic tale -- man's brutality and a woman's brave resistance."⁴⁹ A similar account can be found in the July

28, 1906 issue of the Edmonton Journal under the heading, "Is Murdered in Defence of Honor."⁵⁰

Given that middle class morality was mostly concerned with upholding the institution of marriage and a man's support of his wife and family,⁵¹ those women who indulged in sex before and without marriage were viewed with a jaundiced eye by the dominant segments of society. Women were divided into two categories - good and bad; reputable and disreputable. While a good woman remained chaste until she married, a bad woman had sex without marriage. Quite clearly then, Victorian and Edwardian Canada did not believe that chastity was "the most unnatural of the sexual perversions."⁵²

Once married, sex was to be endured, not enjoyed. Supposedly enjoyment would come from the pleasures of motherhood. Taught at an early age that every able bodied man wanted to seduce them,⁵³ women came to view sex as the seamier side of their wifely duties. Church sermons extolled "the virtues of certain women in the community," and helped to establish definite ideas about what was not "proper, Christian and virtuous in women."⁵⁴ The available evidence seems to suggest that the enjoyment of sex was neither proper, Christian nor virtuous. It was generally assumed that the lust of the male was responsible for sexual encounters, and decent, Christian women acted as passive or unwilling participants. A woman would only participate if she was married, seduced under the promise of marriage or raped.⁵⁵ In fact, "The

choice for women became motherhood or prostitution, as the sexual standards became so rigid that all sexual activity outside of motherhood became identified with . . . prostitution."⁵⁶

Given that a woman's raison d'être was to have children and that the purpose of marriage was the production of children,⁵⁷ there evolved the concept that sexual intercourse was solely for the purposes of propagation. Sexuality and reproduction were not to be separated because sex without fear of pregnancy took the risk out of promiscuity.⁵⁸ Women were taught that sex was something to be endured in order to propagate the race and men were taught to control their ever lurking sexual passions. Young boys could be fitted with a device invented in 1887 whereby an erection would ring an electric bell in the parents' room.⁵⁹ Guide to living manuals at the time tried to exert some form of social control over sexual activity by advising the number of times that sexual intercourse should occur within marriage. For example, the previously mentioned Searchlights on Health advised:

The best writers lay down the rule for the government of the marriage-bed, that sexual indulgence should occur about once in a week or ten days, and this of course applies only to those who enjoy a fair degree of health. But it is a hygienic and physiological fact that those who indulge only once a month receive a far greater degree of the intensity of enjoyment than those who indulge their passions more frequently.⁶⁰

Although some people noted that "too much sex never wore

out anyone, except a weakling who is out of training,"⁶¹ the majority of the source material warned that frequent intercourse would lead to sexual decline and premature aging.⁶²

Even though societal notions of acceptable sexual behaviour seemed to be well-defined, the federal government took precautions to ensure traditional sexual morality through the law. On April 29, 1880 the federal government asked the authorities in the Northwest Territories to forward a count of the number of seduction cases heard in their courts during the years 1874-1879.⁶³ Reacting to petitions circulating in the 1880s,⁶⁴ the government moved to protect the purity and chastity of women. Prior to 1886, seduction was a civil action whereby a father could sue the plaintiff for the loss of services if his daughter became pregnant as a result of the encounter.⁶⁵ Perhaps the father was not so much concerned with immediate loss of income but with the future marriage marketability of his daughter. In any event, seduction of a girl of previously chaste character between the ages of twelve and sixteen and the seduction of a previously chaste female under the age of eighteen became criminal offences in 1886. A conviction for either offence carried a maximum of two years imprisonment.⁶⁶ The following year, the age of a female in a case for seduction under the promise of marriage was raised to twenty-one as long as the age of the seducer was over twenty-one. This offence also carried the possibility of a two year prison

term if the accused was found guilty.⁶⁷ The 1887 stipulation became section 182 of the 1892 Criminal Code and it remained unchanged for over seventy-five years.

There were also suggestions that chastity could be protected through the legal age of consent. Throughout the 1880s and 1900s, Canadians petitioned the federal government to raise the age of consent from fourteen to sixteen to eighteen years of age.⁶⁸ Although the 1892 Criminal Code raised the age of consent in certain cases, it did not come close to the suggestions of some people that the age should be set at thirty or even higher.⁶⁹ Legally then attempts were made to protect the chastity of women for longer periods of time rather than leaving the matter to individual choice.

By classifying premarital sexual encounters as 'seduction under promise of marriage,' 'seduction of a female between the age of 14 and 16,' 'unlawfully defiling women,' and even holding any householder liable to criminal action if he or she allowed the defilement on their premises as Offences against Morality under the criminal law,⁷⁰ the federal government was imposing legal restraints on its citizen's sexual activities. Rationalizing his attempts to get the age of consent raised from sixteen to eighteen, John Charlton, the Member of Parliament for Norfolk North, told the April 10, 1899 sitting of the House of Commons:

No vice will more speedily sap the foundations of public morality and of national

strength than licentiousness, and any legislation adopted by the legislature that is calculated to give to society a better tone and a greater degree of purity, is a class of legislation most desirable in the public interest.⁷¹

Interestingly, most of the listings in the Offences Against Morality section made a point of mentioning that the female had to be "of previously chaste character."⁷² This was really based upon societal notions of chastity rather than any legal definition of the term.⁷³ Quite obviously then, the phrase 'offence against morality' in actual fact meant offence against chastity.

There are a number of cases which indicate that a woman's chastity and moral character were very important in all charges of seduction whether there was a promise of marriage or not. For example in an early 1891 case in the Northwest Territories a French ^{Metis} half-breed by the name of LeCree was charged with seducing his sister-in-law, a girl under fourteen years of age. At the preliminary hearing the accused pleaded guilty to the charge, but subsequently it was noted that this plea could be withdrawn and witnesses produced to show the girl was immoral. In fact, the girl could not swear that LeCree was the father of the child she bore and which had later died. Furthermore there was evidence to suggest that the girl was a prostitute. Eventually the girl's father told the court that he really did not want to see LeCree punished as he knew his daughter was immoral and that other men on the Reserve were just as guilty as LeCree. Thus he

felt that if LeCree was to be punished then all of the males involved should be.⁷⁴

Another interesting case occurred in 1914 and involved the conviction of a male for seducing a girl under sixteen years of age. The case was referred to the Supreme Court of Alberta. The basic question was whether or not the evidence indicated that the girl was of previous chaste character. The facts revealed that the girl had left home and had met a woman who had attempted to introduce her to prostitution. After this woman had arranged a meeting for the accused and the girl, the two got a room in a boarding house, registered as husband and wife and spent the night there. Evidence was also given that the girl had been caught in the back of a store having intercourse with a male and with her consent. However, the trial judge ruled she was of previously chaste character until the day of the offence.

The Supreme Court judges who heard the appeal upheld the conviction of the accused. They argued that going to the boarding house, signing the register fictitiously, accepting money and possessing knowledge of sexual matters did not prove that the girl was of unchaste character. Furthermore, there was the possibility that the girl had been bribed or her sexual passions had been excited well beyond her control. And the court contended that the onus of proof was not upon the girl to prove her chaste character but upon the accused to prove she was unchaste.⁷⁵ However, such a ruling in cases of seduction

and indeed in cases involving more serious sexual assaults against females, appears to have been an exception rather than the rule in Canadian case law.

In 1903, the Supreme Court of the Northwest Territories quashed the conviction of a man found guilty of seduction under the promise of marriage. The facts of the case reveal that their first sexual encounter occurred in June 1901 under a marriage promise. They continued to have intercourse once a week from June 1901 to September 1902, each time with a renewed promise of marriage. In September 1902, the girl became pregnant and charges were laid against the accused. The Supreme Court ruled that the girl was not of chaste character from June 1901 to September 1902 as she did not try to reform or attempt "self-rehabilitation in chastity." Furthermore, the girl should have been suspicious about his promise of marriage long before she became pregnant.⁷⁶ A similar set of conditions arose in a case heard before a Saskatchewan Supreme Court in 1915. Once again the question of the girl's character was brought up by the court. The girl admitted having sex with the accused every week for over a year. Thus the court concluded that she was not of chaste character at the time of the alleged seduction.⁷⁷

What constituted a promise of marriage? In 1893, the Supreme Court of the Northwest Territories ordered a new trial for a man named Walker on this very question. Supposedly the accused had promised the girl marriage in June 1892. Then with a renewed promise of marriage in

early November of the same year he seduced the girl who was under twenty-one years of age. Walker was convicted of seduction but the case was referred to the Court of Appeal with the question as to what was a marriage promise. The appeal court ruled that the trial judge should have instructed the jury as to whether the seduction was obtained by means of a promise of marriage or if his promise influenced her to yield.⁷⁸ And in 1914, a British Columbia Court of Appeal overturned a lower Court's conviction for seduction because it felt the statement of the accused did not constitute a marriage promise. Although Spray, the accused admitted to having intercourse with the girl, he denied that he had promised to marry her. The court ruled that Spray's question "Do you love me enough to live with me?" and the girl's answer of yes was not a promise of marriage. Evidently the promise had to be made more direct.⁷⁹

If chastity was protected and promoted by the law, so too was the reproductive function of women. Given that conception was to be the end result of the sexual act, the use of natural and artificial means of birth control was viewed as an attempt to undermine this philosophy, and was, by definition, wrong.⁸⁰ And although the July 28, 1919 issue of the Victoria Semi-Weekly Tribune carried a favourable account of the Bishop of Birmingham's statement in support of birth control,⁸¹ the paper quickly qualified its stand. In the very same issue it carried a statement that it would be unanimously accepted "that

it was wrong in every way to use preventive means after there was even a suspicion that conception might have taken place."

The written law was very definite in its attitude towards birth control and abortion. Contained under the general heading 'Offences Against the Person and Reputation,' section 179c of the 1892 Criminal Code effectively limited birth control by making everyone liable to a two year sentence who,

Without lawful excuse or justification, offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.⁸³

If anyone was found guilty of supplying the means to procure an abortion, he or she was subject to two years imprisonment.⁸⁴ The actual use of the means to procure an abortion, for example, the administration of and/or the use of an instrument, was also an indictable offence. If convicted, the culprit was liable to life imprisonment.⁸⁵ And perhaps more importantly, any woman who attempted to procure an abortion on herself was guilty of an indictable offence and liable to seven years in prison.⁸⁶

However, despite the continual idealized portrayals of the institution of marriage complete with children and the social and legal restraints placed upon sexual activity, the reality of the situation in Western Canada was somewhat different from middle class ideals. Newspapers carried several articles which led to the conclusion that

there were a number of unhappily married couples.⁸⁷ A 1911 article delving into Canada's crusade against the white slave trade told the story of a married man from Vancouver, British Columbia who continually visited a house of ill-fame, without a second thought of his wife and family. The account went on to lament the fact that there were "thousands of married men who, like this one, soon forget their pledges at the marriage altar."⁸⁸ Prostitution flourished and was tolerated in nearly every Western town from Winnipeg, Manitoba to Victoria, British Columbia.⁸⁹ Quite obviously, a child-filled marriage did not ensure marital bliss.*

* There were also instances of wife beating. In November 1906, for example a woman in Calgary was locked in a room and tied to a bed for two days by her jealous husband. He battered her to such an extent that there was a possibility that she might lose her left eye. The husband was charged with assault causing bodily harm.⁹⁰ E. Perdue was sentenced on August 26, 1908 to three months with hard labour at the Victoria Provincial Gaol for assaulting his wife.⁹¹ Then in January 1913, William Pollock was sentenced to six months with hard labour in the Victoria Gaol for wife beating.⁹² And on September 1, 1917 at Sundre, Alberta, Ole Matheson received a two year suspended sentence for wife beating contrary to section 292 sub-section (a) of the Criminal Code.⁹³ During the year 1918, the Swift Current divisional report of the Saskatchewan Provincial Police reported that a man had

beaten his wife to such an extent that the assault was termed attempted murder. The attack stemmed from a drunken domestic dispute over the husband allegedly keeping the company of other women. After he was committed to trial, the wife went to great lengths to get her husband out of jail and then stated that she would not testify against him.⁹⁴ Although these cases serve as but a few examples of wife beating, one can only wonder about the number of batterings which were classified under the general category of assault causing bodily harm or went unreported and undetected. At this stage one can only speculate as to whether such happenings were common occurrences or merely isolated cases.

Bigamy (being married to two or more different people at the same time) posed a serious threat to the institution of marriage. Considered as an 'offence against conjugal rights,' a conviction for bigamy could possibly bring a term of seven years imprisonment.⁹⁵ And the courts were not adverse to pressing charges. For example, on December 2, 1895 Walter Gray was charged by the Yale Magistrates' Court in British Columbia with "living in a state of conjugal union with a woman named C. Alvarez who is legally married to one Alvarez, and which marriage has not been dissolved for the space of one year last past." Although the case was dismissed due to lack of evidence, both parties were ordered to pay their own court costs.⁹⁶ At the end of April 1909, Adam Dickson was sentenced to eighteen months with hard

labour at the Victoria Gaol for a bigamy conviction.⁹⁷ Then on March 19, 1915 at New Westminster, William Harris was convicted of bigamy and sentenced to three years with hard labour.⁹⁸

In the West, the Mormon practice of polygamy posed a more serious threat to the institution of marriage than bigamy. Speaking about the Mormons, the September 1887 issue of the Fort Macleod Gazette editorialized that "Canada wants all the settlers she can get: . . . as long as they are law-abiding."⁹⁹ In the summer of 1888, the federal government ordered its officers to report all cases of polygamy.¹⁰⁰ The previously mentioned Gazette argued that polygamy was a serious social evil and a menace to the country. Consequently, the paper took a firm stand against the Mormons on February 6, 1890.¹⁰¹ One month later, the Calgary Herald stated that the Mormons were not welcome in Alberta because they were "advocates and practitioners of a promiscuous concubinage" and were "deliberately defying the laws of the country."¹⁰² And in his book, Strangers Within Our Gates (1909), dealing with the problems of immigration, James S. Woodsworth, one of Western Canada's most prominent Social Gospellers, wrote that "the practice of polygamy will subvert our most cherished institutions."¹⁰³ Considered as an offence against conjugal rights, polygamy carried a maximum penalty of five years imprisonment plus a fine of \$500.00.¹⁰⁴

Despite claims that women were pure, passionless and sexless, and that "the vilest of all criminals [is]

the one who robs a female of her virtue,"¹⁰⁵ there was an occasional expression of the opinion that women were not as innocent as the projected image. When the federal government discussed the protection of female employees from the sexual advances of their employers, Mr. Mitchell, the skeptical Member of Parliament for Northumberland, told the April 10, 1890 sitting of the House: "I have never heard of an instance of advantage being taken of a woman who was not pretty willing to accede, and I do not think we should place men in charge of factories at the mercy of the female sex."¹⁰⁶ Arguing in a similar fashion, Mr. Davin, the Member of Parliament for Assiniboia, stated that people seem to view seduction "as only an offence against women; but any man who knows anything of the history of mankind, or who is acquainted with the world, knows that seduction is just as often effected by the woman as by the man." He further noted that women might find it more advantageous to fall than to maintain their chastity.¹⁰⁷

Women lost credibility in seduction cases because in a few instances the girl and the seducer were subsequently married and the charges were dropped. In 1916 for example, a Swift Current case of seduction under the promise of marriage was withdrawn when the accused married the girl.¹⁰⁸ There was even an instance where a man was charged with the more serious offence of rape and the charge was withdrawn when he and the girl were married. This occurred during July 1915 in Glen Bush, Saskatchewan.¹⁰⁹

In another peculiar case heard by the Supreme Court of the Northwest Territories in 1895, the judge found the accused guilty of seduction because he had admitted to a friend during the trial that if he could get the girl to marry him he would escape punishment.¹¹⁰ Four years later a man in the Macleod district of the Northwest Territories was able to elude a warrant for his arrest on a charge of seduction by leaving the country before the warrant could be served.¹¹¹

However, since the sexual standards were so rigid, women were made to feel guilty for their sexual indulgence and one of their, or more directly, their fathers' few recourses was to press charges for seduction. It was commonly feared that a seduction charge was a woman's way of entrapping a man into marriage. Such thoughts are clearly reflected by the accused in a seduction case heard by the Supreme Court at Calgary on June 4, 1912. The sixteen year old girl testified that she went to a doctor and was told that she was pregnant. When he refused to give her something to induce an abortion, the doctor advised her to inform the man responsible for her condition. So she wrote the accused a letter on October 13, 1911. In his reply dated October 27, he stated that he was somewhat surprised and accused the girl of plotting to get him to marry her. He also contended that he was not responsible for her condition and directed her to find the real father and marry him.¹¹²

But perhaps the greatest challenge posed to mar-

riage and motherhood was the attempt by women to control and restrict their reproductive function. Although they were told to 'go forth and multiply,' many women were fearful of the repercussions of intercourse. In the late nineteenth and early twentieth century, sexual intercourse could be physically dangerous as pregnancy and childbirth were often painful and risky experiences. In all probability, women feigned illness to escape the sexual advances of their husbands and thereby ensure their health and well-being.¹¹³ At a time when the safe period for the natural method of birth control was thought to be mid-month,¹¹⁴ it is quite evident that the only assured means of birth control was total abstinence.

Limited accessibility to information on birth control and anti-conception devices led to many unwanted pregnancies both within and outside of marriage. And despite the medical risks and legal restraints placed upon abortion, many women and/or couples took action to end the pregnancies. Some confided in their doctors. Although procuring and supplying the means for procuring an abortion were criminal acts under the law, some doctors challenged constituted authority by prescribing drugs and performing abortions. As a result they suffered the consequences. On May 30, 1908, for example, a thirty-five year old Methodist doctor at Nanaimo, British Columbia was found guilty of "unlawfully using certain instruments upon Kate McIntosh with intent to procure a miscarriage." He was sentenced to two years and six months imprison-

ment.¹¹⁵ In another case, this time in Calgary, Dr. D. J. Bechtel was faced on May 21, 1912 with three charges of attempting to procure abortions through the prescription of drugs and the use of instruments on three different women who came to him for help.¹¹⁶ In an abortion case heard before a March 1919 sitting of the Alberta Supreme Court at Calgary, a man told the Court that an abortion of a ten week old baby cost \$50.00.¹¹⁷ For the most part, however, "respectable physicians would not countenance the use of 'mechanical' contraceptives," but according to Angus McLaren they did on occasion recommend the rhythm method or intercourse without ejaculation.¹¹⁸

Women also took several strange potions and used a variety of potentially dangerous devices in an attempt to prevent conception and/or induce abortion. McLaren found a recipe for a homemade pessary in the papers of Violet McNaughton. This particular recipe contained a mixture of cocoa butter, boric acid and tannic acid.¹¹⁹ In 1900, the Sears, Roebuck and Company catalogue advertised Dr. Warden's Female Pills for All Female Diseases ranging from aches and pains and memory loss to menstrual problems and "excesses and indiscretions of living."¹²⁰ Also sold in the catalogue was Brown's Vegetable Cure for Female Weakness. Touted as a wonder drug and a blessing to pregnant women, Brown's remedy was said to save the user from suffering and would "cure quickly, pleasantly and permanently."¹²¹ One is left wondering if between the lines, these two cure-alls for female dis-

orders were, in reality, medicines to induce abortion.

Speaking in more specific terms, in May 1910, Bessie Wells of Claresholm, Alberta took her lover's advice and inserted certain pills in her vagina to end her two month pregnancy.¹²² Other women drank carbolic acid,¹²³ took two teaspoonsful of a turpentine with sugar mixture four times a day,¹²⁴ or soaked in Epsom's salts.¹²⁵ In 1915, a Calgary woman who thought she was pregnant took the advice of a fortune teller who told her to take a teaspoonful of 'ERGOT' every four hours.¹²⁶ Supposedly, the ergot would cause a contraction of the uterus. However, in March 1918 a woman in Banff, Alberta stopped taking doses of ergot after it failed to end her two month pregnancy by a man other than her husband.¹²⁷ A year later, a man was charged with supplying a catheter to a sixteen year old girl who was three months pregnant in the hopes that it would induce an abortion.¹²⁸ On June 16, 1919 a complaint was laid against a male who had allegedly supplied a bottle of creolin to a woman who had become pregnant by him and he even offered to pay the expenses for an abortion if the drug did not work.¹²⁹ If mixtures such as these did not work, women took more drastic measures. They attempted to abort themselves with syringes, pieces of elm wood bark or even a pair of scissors.¹³⁰

Ostensibly, much of the anti-abortion legislation could be seen as a way of protecting the mother from unskilled abortionists.¹³¹ However, if mixtures such as the ones mentioned did not work and doctors were not to

be consulted or trusted, women took other action. Abortions were attempted by people not connected with the medical profession. A person named Lovingheart ran a very successful back alley abortion service in Calgary until he was brought to trial in 1893.¹³² On January 24, 1898 a thirty-nine year old blacksmith from Nanaimo, British Columbia was sentenced to ten months imprisonment with hard labour after he was found guilty of attempting to procure a miscarriage.¹³³ After William Riddock performed an abortion on Rose Knight in Calgary on March 28, 1913 she claimed that he proceeded to have intercourse with her.¹³⁴ And in November 1908, a Regina woman named Sarah Hunt paid the ultimate penalty for her sexual indiscretion. She died in Winnipeg, Manitoba as the result of a botched abortion performed by an illegal practitioner.¹³⁵

If the unwanted child was born, concealment of birth and infanticide were not unheard of in Western Canada. Section 140 of the Criminal Code stipulated that everyone was

guilty of an indictable offence, and liable to two years imprisonment who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during or after birth.¹³⁶

The April 17, 1896 sitting of the Assizes Court at Nanaimo, British Columbia sentenced a forty-four year old Finnish woman to a twenty-four hour stay in jail for the concealment of a birth.¹³⁷ A similar sentence was meted out by Judge Richardson at Moose Jaw in the Northwest Territories

on June 21, 1897. However, the one day imprisonment was accompanied by a fine of \$200.00.¹³⁸ In July 1906, the Edmonton Journal reported that a sixteen year old Galician servant girl had concealed the birth of a stillborn baby at Vegreville.¹³⁹ The 1920 annual report for the Saskatoon division of the Saskatchewan Provincial Police told the story of Mary Rasmuson who had given birth to an illegitimate child and then burned it in the stove.¹⁴⁰ During the same year, a woman living in Gravelbourg District, Saskatchewan aborted herself with a pair of scissors and she too burned the remains.¹⁴¹

In a rather odd case heard before the Wetaskiwin district court in February 1918, a woman by the name of Mrs. W. E. Dewitt was charged with concealment of birth. Several witnesses testified they had noticed that the accused was pregnant in the early summer of 1917 despite the fact that her husband was away. However, the woman apparently spent a lot of time with a Mr. Erickson at his farm around Alliance, Alberta. In fact, there were speculations that they were living together. The next time witnesses saw the accused, which was sometime during the fall of 1917, she no longer appeared to be pregnant yet no mention was ever made about a birth taking place. After several people had voiced their suspicions to James Scott of the Alberta Provincial Police, he proceeded to lay charges against Mrs. Dewitt.¹⁴²

In a few instances people claimed that they did not know they had to register the birth of a child with

the authorities. Although Edward and Mary Hose of Red Deer, Alberta were found not guilty, it was rumoured that they had murdered their infant child in April 1914 and placed the remains down the outhouse. The doctor noted that the Hoses had asked him not to report the birth which a Police Constable testified that the father had stated that "he did not know you had to register one that lived only a few hours."¹⁴³ A similar statement was given in a 1917 case involving the disposal of a dead child heard before the Alberta Supreme Court sittings at Wetaskiwin. The accused who was the pregnant girl's father had not been present when the baby was born so he did not know if the baby was stillborn, died soon afterwards or was murdered. He told the court that he had merely buried the baby's body. The girl herself stated she did not know that a birth and death had to be officially registered. Her mother acknowledged that she had denied the illegitimate birth as she wanted to uphold the good reputation of the other family members. Despite such statements, the case was dismissed due to insufficient evidence.¹⁴⁴

Some women were exerting and asserting, subconsciously at least, some measure of control over their bodies. Indeed, it was revolutionary for women to have sex without marriage, children out of wedlock, and to consciously attempt to control their reproductive function through the use of rudimentary methods of birth control. Such actions undermined the most cherished institutions of Canadian society in general and Western Canadian so-

ciety in particular -- namely, marriage, motherhood, home and family life. Although the evidence suggests that women did not directly question their lack of sexual autonomy, they were unconsciously asserting some measure of sexual independence at a time when social convention and the criminal law had combined in an attempt to control sexual activity.

By the 1920s women throughout Canada had entered the labour force in greater numbers, received the vote and increased their educational possibilities. Yet home, motherhood and family were still considered to be a woman's 'proper sphere' and her true vocation. In a society preoccupied with sex and its suppression, Christian teaching promoted virginity and abstinence as moral indices¹⁴⁵ and designated any sexual activity which deviated from the accepted norm as not only a social offence against sexual custom but a crime under the law. Traditional sexual morality was being challenged by socially and legally defined notions of unacceptable sexual behaviour and women asserted their biological independence by searching for some effective way to control their reproductive function.

Despite the concerted social and legal efforts to control sexual behaviour in the late nineteenth and early twentieth century a few Canadian women took the first step on the long road to sexual independence by attempting to control their reproductive function. In January 1913, a sixteen year old girl told a preliminary inquiry at Hardisty, Alberta, into a rape charge that the accused had

trespassed on her private property when he had intercourse with her without her consent.¹⁴⁶ However, such statements were in a distinct minority. It would be years before women would seriously question their sex roles within a family based traditional society, let alone envision sexual equality and autonomy for themselves.

FOOTNOTES

¹"An Act for the Temporary Government of Rupert's Land and the Northwestern Territory when united with Canada: Statutes of Canada, 1869, Chapter 3," in D. Owram (ed.), The Formation of Alberta: A Documentary History (Calgary: Historical Society of Alberta, 1979), pp. 24-26.

²Ibid., p. 25.

³"The Manitoba Act, Statutes of Canada, 1870, Chapter 3," in D. Owram (ed.), The Formation of Alberta: A Documentary History (Calgary: Historical Society of Alberta, 1979), pp. 26-27.

⁴L. D. Hyndman, "The Legal Profession in Alberta" unpublished paper (October 1981), p. 1.

⁵"An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories, 1873," in L. G. Thomas (ed.), The Prairie West to 1905: A Canadian Sourcebook (Toronto: Oxford University Press, 1975), pp. 150-157.

⁶"An Act to amend 'An Act respecting the administration of Justice and for the establishment of a Police Force in the North West Territories, 1874,'" in L. G. Thomas (ed.), The Prairie West to 1905: A Canadian Sourcebook, pp. 157-159.

⁷R. C. Macleod, "The Problem of Law and Order in the Canadian West, 1870-1905," in L. G. Thomas (ed.), The Prairie West to 1905: A Canadian Sourcebook, p. 137.

⁸Ibid., pp. 138-139.

⁹"An Act to establish and provide for the Government of the Province of Alberta, 1905," in D. Owram (ed.), The Formation of Alberta: A Documentary History, pp. 341-347 and "An Act to establish and provide for the Government of the Province of Saskatchewan, 1905," in M. Ollivier (ed.), British North America Acts and Selected Statutes (Ottawa: Queen's Printer, 1963), pp. 230-243.

¹⁰See for example, M. Zuker, A Guide to Law for Canadians (Toronto: Pittman Publishing, 1967), pp. 86-91.

¹¹According to J. L. Granatstein et al, "few people from anywhere seemed eager to go west - . . . There was still good land available to settlers in the United States either free or at low prices, and European immigrants were convinced that the streets of America, not Canada, were paved with gold. Immigration to the United States boomed, as even British settlers chose the States over Canada in vast numbers." J. L. Granatstein et al. Twentieth Century Canada (Toronto: McGraw-Hill Ryerson Limited, 1983), p. 8.

¹²Ibid., p. 34.

¹³J. S. Woodsworth, Strangers Within Our Gates (Toronto: University of Toronto Press reprint, original edition, 1909).

¹⁴J. Gusfield, Symbolic Crusade (Chicago: University of Illinois Press, 1963), p. 5.

¹⁵For a more detailed discussion of this material see T. L. Chapman, "'The Drug Problem' in Western Canada, 1900-1920" Calgary, University of Calgary, unpublished M. A. thesis, 1976.

¹⁶Women in Saskatchewan and Alberta received the vote in the months of March and April, 1916, respectively. Women received the vote in British Columbia in April, 1917.

¹⁷R. Cook and W. Mitchinson, "The Proper Sphere": Woman's Place in Canadian History (Toronto: University of Toronto Press, 1976).

¹⁸L. Gordon, Woman's Body, Woman's Right (Middlesex: Penguin Books, 1977), p. 110.

¹⁹The Ideal (1924) in A. Forel, The Sexual Question: A Scientific, Psychological, Hygienic and Sociological Study (New York: Physicians & Surgeons Book, 1924), p. 542.

²⁰B. G. Jefferies and J. L. Nichols, The Household Guide: A Domestic Cyclopedia (Toronto: J. L. Nichols Co., 1894, reprinted Toronto: Coles Publishing Co., 1972), pp. 22 and 24.

²¹"How to be Happy Although Married," Nanaimo Free

Press, 23 July 1906; "The Marriage Question," Medicine Hat Weekly News, 2 December 1899, p. 7.

²²A. McLaren, "Birth Control and Abortion in Canada, 1890-1920," Canadian Historical Review, Vol. LIX (September 1978), p. 319.

²³A. Lefroy, "Should Canadian Women Get the Parliamentary Vote?," Queen's Quarterly, Vol. 21 (1913-1914, July 1913), p. 93.

²⁴N. McClung, In Times Like These (Toronto: University of Toronto Press, reprint 1975, original edition 1916), p. 86.

²⁵I. Bassett, The Parlour Rebellion (Toronto: McClelland and Stewart, 1975), p. 16.

²⁶"Advice to Wives," Macleod Gazette, 16 March 1886, p. 1.

²⁷The Council stated: "We, Women of Canada, sincerely believing that the best good of our homes and nation will be advanced by our greater unity of thought, sympathy and purpose, and that an organized movement of women will best conserve the highest good of the Family and the State, do hereby band ourselves together to further the application of the Golden Rule to society, custom and law." Lefroy, "Should Canadian Women Get the Parliamentary Vote?," p. 92.

²⁸"Alberta Women's Institute," Grain Growers' Guide (3 March 1915), p. 9.

²⁹"Women's Organization Reports," Grain Growers' Guide (17 February 1915), p. 9.

³⁰M. MacLellan, "History of Women's Rights in Canada," in Studies of the Royal Commission on the Status of Women (Ottawa: Information Canada, 1971), p. 25.

³¹N. McClung, In Times Like These, pp. 22 and 77.

³²"I could not help think that if there had been women in the German Reichstag, women with authority behind them, when the Kaiser began to lay his plans for the war, the results might have been very different." Ibid., p. 89.

33 F. Dixon, "Let the Women Vote," Grain Growers' Guide (26 May 1915), p. 19.

34 F. Dixon, "Women in Politics," Grain Growers' Guide (13 September 1916), p. 26.

35 T. A. Crerar, Grain Growers' Guide (1919/1921), p. 21.

36 "Alberta Women's Institute," Grain Growers' Guide (8 March 1916), n. p.

37 "If women could be made to think, they would not wear immodest clothes, which suggest evil thoughts and awaken unlawful desires." N. McClung, In Times Like These, p. 34.

38 L. Clark's thesis summarized in J. Hagan, The Disreputable Pleasures. (Toronto: McGraw-Hill, 1977), p. 133 and L. Clark and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto: Women's Educational Press, 1977).

39 R. Walters (ed.), Primers for Prudery: Sexual Advice to Victorian America (New Jersey: Prentice-Hall, Inc., 1974), p. 79.

40 B. Jefferies and J. Nichols, Searchlights on Health: Light on Dark Corners, A Complete Sexual Science and a Guide to Purity and Physical Manhood (Toronto: J. L. Nichols Co., 1897) in J. Colombo (ed.), Colombo's Canadian Quotations (Edmonton: Hurtig, 1974), p. 285.

41 Bassett, The Parlour Rebellion, p. 16.

42 Ibid.

43 "WARNING TO WOMEN," Saskatoon Phoenix, 13 May 1904, p. 2.

44 Jefferies and Nichols, Searchlights on Health, p. 285.

45 Canada, Debates of the House of Commons, 21 April 1897, p. 1060.

46 In September 1897, the Victoria Daily Colonist felt that a Mrs. Thomas Rabbit would be acquitted for the

murder of her assailant. The facts of the case seemed to indicate that the woman was defending herself against a sexual assault. "Shot her Assailant - James Hamilton of State Creek Killed by Mrs. Thomas Rabbitt - In Self-Defence the Woman Discharges a Rifle with Deadly Effect," Victoria Daily Colonist, 28 September 1879, p. 5.

47 "Further Details of South Wellington Murder," Nanaimo Free Press, 23 July 1906, p. 1.

48 "Foul Murder at South Wellington," Nanaimo Free Press, 23 July 1906, p. 2.

49 "NANAIMO YOUNG LADY FOULLY MURDERED," Calgary Morning Albertan, 25 July 1906, n. p.

50 "Is Murdered in Defence of Honor," Edmonton Journal, 28 July 1906, n. p.

51 T. Honoré, Sex Law (London: Duckworth and Co., 1978), p. 3. The same author argued that "marriage is the institution which traditional sexual morality is mainly concerned to uphold," p. 6.

52 Remy de Gourmont in L. Peter, Peter's Quotations: Ideas for Our Time (New York: Bantam Books, 1977), p. 464. See also Anatole France, "Of all sexual aberrations, chastity is the strangest." Ibid.

53 Bassett, The Parlour Rebellion, p. 16.

54 Ibid.

55 Dr. M. Wyman, Comments on the Criminal Law and Legal Process (Edmonton: Alberta Board of Review, 1975), p. 45.

56 L. Gordon, Woman's Body, Woman's Right, p. 22.

57 "The Bishop of Birmingham Says 'Birth Control is Justified,' Victoria Semi-Weekly Tribune, 28 July 1919, p. 3.

58 L. Gordon, Woman's Body, Woman's Right, p. 176.

59 G. Taylor, Sex in History (New York: Harper and Row, 1950), p. 223.

⁶⁰Jefferies and Nichols, Searchlights on Health, p. 585.

⁶¹A. Comfort, Sex in Society (Secaucus: The Citadel Press, 1975), p. 17.

⁶²Ibid.

⁶³Saskatchewan Archives Board (hereafter SAB), Attorney General Papers, "G" Papers, 702 (29 April 1880 - 28 February 1881), Secretary of State Requesting Return of number of actions in seduction for the last six years.

⁶⁴"Petitions to the government praying that seduction may be made a criminal offence, 1886," Canada, Index to the Journals of the House of Commons of the Dominion of Canada, 1877-1890 (Ottawa: Queen's Printer, 1891).

⁶⁵See for example, McLeod v. McLeod (1842), 9 Upper Canada Queen's Bench Reports (hereafter UCQB), p. 331; L'Esperance v. Duchene (1850), 9 UCQB, p. 146; Whitfield v. Topp (1850), 1 UCQB, p. 223; Biggs v. Burham (1858), 1 Queen's Bench and Police Court Reports, p. 106.

⁶⁶Statutes of Canada, "An Act to Punish seduction and like offences, and to make further provision for the Protection of Women and Girls" (1886), 49 Victoria, c. 52, s. 1, 2 and 8.

⁶⁷Ibid., 50 and 51 Victoria, c. 48, s. 2.

⁶⁸See Canada, Debates of the House of Commons, 31 March 1898, p. 2909.

⁶⁹Ibid., 5 June 1895, pp. 2145-2153 and 4 May 1900, p. 4717.

⁷⁰See for example Canada, Criminal Code of Canada (1892), Section 181, "Seduction of girls under sixteen"; Section 182, "Seduction under promise of marriage"; and Section 183, "Seduction of a ward, servant & c."

⁷¹Canada, Debates of the House of Commons, 20 April 1899, p. 1899.

⁷²Canada, Criminal Code (1892), Sections 181, 182 and 183.

⁷³Wyman, Comments on the Criminal Law and Legal Process, p. 51.

⁷⁴SAB, Attorney General Papers, "G" Papers, 473L (24 April - 16 May 1891), Re: Case of Chas. LeCree, Regina Gaol, charged with the seduction of his sister-in-law; request for counsel to be assigned to the accused.

⁷⁵R. v. Rioux, 22 Canadian Criminal Cases (1914), p. 323.

⁷⁶R. v. Lougheed, 8 Canadian Criminal Cases (1903), p. 184.

⁷⁷R. v. Haugberg, 24 Canadian Criminal Cases (1915), p. 297.

⁷⁸R. v. Walker, 5 Canadian Criminal Cases (1893), p. 465.

⁷⁹R. v. Spray, 24 Canadian Criminal Cases (1914), p. 147, and 20 British Columbia Law Reports, p. 147.

⁸⁰"The Bishop of Birmingham Says 'Birth Control is Justified,'" Victoria Semi-Weekly Tribune, 28 July 1919, p. 3.

⁸¹Ibid., 28 July 1919, p. 2. As Chairman of the National Birth-Rate Commission, the Anglican bishop stated: "Morally as well as eugenically it was right for people in certain circumstances to use harmless means to control the birth rate."

⁸²Ibid., p. 3.

⁸³Canada, Criminal Code of Canada (1892), s. 179.

⁸⁴55-56 Victoria, c. 29, s. 274, Canada, Criminal Code of Canada (1892); see also Section 305 of 1906 Revised Criminal Code, Canada, Selected Chapters of the Revised Statutes of Canada Relating to the Criminal Code (1906), p. 331.

⁸⁵55-56 Victoria, c. 29, s. 272, Section 303 of 1906 Revised Code, Ibid., p. 330.

⁸⁶55-56 Victoria, c. 29, s. 273; also Section 304 of the 1906 Revised Code, Ibid., p. 331.

⁸⁷"DIVORCE CONDEMNED," Medicine Hat Weekly News, 28 September 1899, p. 6. See also "DESERTED BY HIS WIFE," Macleod Gazette, 4 April 1889; and "Chief Justices on Divorce," Macleod Gazette, 10 October 1889, p. 1.

⁸⁸Rev. J. Shearer, "The Canadian Crusade" (1911) in E. Bell (ed.), War on the White Slave Trade (original publication date unknown, reprinted Toronto: Coles Publishing Co., 1980), p. 356.

⁸⁹J. Gray, Red Lights on the Prairies (Toronto: Macmillan, 1971), p. 32. "The White Slave Trade finds some of its victims on the prairie when they are taken to Winnipeg to British Columbia, or to American cities where prostitution is 'tolerated' in 'segregated' areas." Rev. J. Shearer, "The Canadian Crusade," p. 342.

⁹⁰"BRUTAL TREATMENT OF A GIRL WIFE," Saskatoon Phoenix, 25 November 1906, p. 7.

⁹¹Provincial Archives of British Columbia (hereafter PABC), Attorney General Papers, List of Prisoners under sentence in Victoria Gaol, Vol. 16 (January 1902 - October 1910), n. p.

⁹²Ibid., Vol. 17 (November 1910-1914), p. 119.

⁹³District Court Records (hereafter DCR), Criminal (Calgary), File #288, Case: R. v. Matheson (1917) wife beating.

⁹⁴SAB, Attorney General Papers, 4, Saskatchewan Provincial Police, File #2, C Divisional Reports, Swift Current report for the year ending 31 December 1918.

⁹⁵Canada, Revised Statutes of Canada (1906), chapter 146, Section 307.

⁹⁶PABC, Attorney General Papers (Yale), Vol. 3, Magistrates' Court, Charge and Sentence Book (23 August 1890 - 17 August 1909), p. 76.

⁹⁷PABC, Attorney General Papers, Inspector of Gaols, Victoria Gaol, List of Prisoners under sentence in Victoria Gaol, Vol. 16 (January 1902 - October 1910), n. p.

⁹⁸PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 7 (June 1914 - October 1917), p. 41.

⁹⁹Macleod Gazette, 27 September 1887, n. p.

¹⁰⁰"Government Officials told to report polygamy incidents," Macleod Gazette, 24 July 1888, p. 1.

¹⁰¹"The Mormon Question," Macleod Gazette, 6 February 1890.

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¹⁰³J. S. Woodsworth, Strangers Within Our Gates, p. 71.

¹⁰⁴Canada, Revised Statutes of Canada (1906), chapter 146, Section 310.

¹⁰⁵Canada, Debates of the House of Commons, 5 June 1895, p. 2147.

¹⁰⁶Ibid., 10 April 1890, p. 3165.

¹⁰⁷Ibid., p. 3166-67.

¹⁰⁸SAB, Attorney General Papers, Saskatchewan Provincial Police, M. Constable's Reports Upon Conclusion of Cases, R. v. J. Haughian, seduction under promise of marriage (1916).

¹⁰⁹Ibid., Conviction Register (1912-1916), Arthur Trudgeon, Farmer from Glen Bush, rape (11 July 1915), case withdrawn as the parties were going to get married.

¹¹⁰R. v. Wyse, 1 Canadian Criminal Cases (1895), p. 6.

¹¹¹"Annual Report of Superintendent R. B. Deane Commanding Macleod District," report dated 30 November 1899 contained in "Annual Report of Northwest Mounted Police for the year ended December 1899," Canada, Sessional Papers, XXXIV (1900), Paper 15, n. p.

¹¹²Supreme Court Records (hereafter SCR) Criminal (Calgary), File #121, Case: R. v. Wakelyn (1912), seduction contrary to Section 211.

113 Bassett, The Parlour Rebellion, Chapter one and two and L. Gordon, Woman's Body, Woman's Right, p. 106.

114 McLaren, "Birth Control and Abortion in Canada," p. 324.

115 PABC, Attorney General Papers, Inspector of Gaols, Victoria Gaol, Record and description list of all prisoners received in Victoria Gaol, Vol. 12 (November 1890 - February 1910), p. 112.

116 SCR, Criminal (Calgary), File #94, Case: R. v. Dr. D. Bechtel (1912), intent to procure a miscarriage.

117 Ibid., File #828, Case: R. v. A. Prosser (1919), procuring an abortion.

118 McLaren, "Birth Control and Abortion in Canada," pp. 324-25.

119 Ibid., p. 326.

120 Sears, Roebuck and Co., Consumers Guide (Northfield: Digest Books, Inc., 1900), p. 16.

121 Ibid.

122 SCR, Criminal (Calgary), File #10, Case: R. v. Tucker (1910), attempt to procure a miscarriage.

123 "THE GEORGIA BUREN CASE IS CLEARING UP," Saskatoon Phoenix, 18 July 1906, p. 5. The account told the story of a woman in Winnipeg, Manitoba who drank carbolic acid in an attempt to end her three-month pregnancy.

124 SCR, Criminal (Calgary), File #313, Case: R. v. Evans (1909), attempt to procure abortion by supplying a drug. The accused allegedly gave the woman two teaspoonsful of turpentine mixed with sugar three to four times a day hoping to induce a miscarriage.

125 Ibid., File #94, Case: R. v. Dr. D. Bechtel (1912), intent to procure a miscarriage.

126 Ibid., File #506, Case: R. v. Mary Buck (1915), intent to procure an abortion. The woman was told she was pregnant but it turned out that she was not. See also File

#824, Case: R. v. Prosser (1918), administering a drug with intent to cause a miscarriage. Prosser allegedly had given the woman, Helen Williams, ERGOT in hopes that it would terminate her pregnancy.

¹²⁷Ibid., File #824, Case: R. v. Prosser (1918), administering a drug with intent to cause a miscarriage.

¹²⁸Ibid., File #918, Case: R. v. Lowe (1920), supplying a drug with intent to procure an abortion. The accused was fined \$50.00 by Justice McCarthy.

¹²⁹Ibid., File #856, Case: R. v. Lowther (1919), intent to procure an abortion. The accused told the court that if they could prove the child was his he would consent to marry the girl.

¹³⁰Ibid., File #545, Case: R. v. Luke Sturn (1915), supplying an instrument to procure an abortion. The accused has supposedly supplied his wife with a syringe about one foot long and one-half inch in circumference for an abortion. In the same file is the case of R. v. Annie Sturn (1915). She was charged with attempting to use an instrument for abortion, the instrument being a piece of slippery elm bark and not the syringe supplied by her husband.

¹³¹V. and B. Bullough, Sin, Sickness and Sanity (New York: New American Library, 1977), p. 111.

¹³²P. Hanna, "The Days of Instant Justice," Calgary Centennial Souvenir Book (Calgary: Provost Promotions and Publications Ltd., 1974), p. 82.

¹³³PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 50.

¹³⁴SCR, Criminal (Calgary), File #191, Case, R. v. Wm. Riddock (1913), intent to procure an abortion with an instrument. See also, "Man Charged with Attempt to Procure Abortion," Saskatoon Phoenix, 14 November 1908, p. 1.

¹³⁵"ON A SERIOUS CHARGE," Saskatoon Phoenix, 19 November 1908, p. 1.

¹³⁶Canada, Criminal Code of Canada (1892). 55-56 Victoria, c. 29, s. 240.

¹³⁷PABC, Attorney General Papers, Inspector of

Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 34.

138 "Cases tried in Northwest Territories," contained in "Annual Report of the Commissioner of the North West Mounted Police for year ended 1897," Canada, Sessional Papers, Vol. XXXII (1898) Paper 15, n. p.

139 "An Unhappy Incident," Edmonton Journal, 7 July 1906, p. 8.

140 SAB, Attorney General Papers, Saskatchewan Provincial Police, C Divisional Reports, File #4 (1920), "Report for Saskatoon Division year ended 31 December 1920," p. 13.

141 Ibid., B Annual Reports, File #3 (1920), "Annual Report of the Saskatchewan Provincial Police for year ending 31 December 1920," R. v. Jalbert.

142 DCR, Criminal (Wetaskiwin), File #1002, Case: R. v. Dewitt (1917), concealment of birth.

143 SCR, Criminal (Calgary), File #323, Case: R. v. Edward and Mary Hose (1914), concealment of birth.

144 SCR, Criminal (Wetaskiwin), File #608, Case: R. v. Wm Spruham (1917), disposing of a dead child. The mother testified "that I denied that Agnes had given birth to a child which was simply to retain the good reputation of the other members of the family."

145 A. Comfort, Sex in Society, p. 64.

146 SCR, Criminal (Wetaskiwin), File #558b, Case: R. v. F. Hoppe (1913), rape. The question was posed to the girl: "Where was he in reference to you when he had this sexual intercourse?" and she replied, "Why, he was on private property." When asked to clarify this statement she stated that the accused was on her private property which was her body.

CHAPTER III

SERIOUS SEXUAL ASSAULTS AGAINST FEMALES:

RAPE, CARNAL KNOWLEDGE AND INCEST*

The problem of sexual assaults against women and young girls in Western Canada is not a new phenomenon. In 1905 for example, the presiding judge in a sex assault case heard in Regina, Saskatchewan told the court that in his opinion there seemed to be a predominance of this type of offence throughout the country.¹ The following year, young girls in Edmonton were being sexually harassed by certain individuals in the city and the police promised to combat the problem.² Some reports which appeared in 1906 mentioned the apparent frequency of sexual assaults against females,³ while other reports noted that rape was part of the "carnival of crime" which was so prevalent in Western Canada.⁴ One Western Canadian newspaper, the Saskatoon Phoenix went so far as to carry a 1906 report from Chicago which recommended the death penalty for any person found guilty of sexually assaulting a female.⁵ By 1920, the general and district reports of the

*Given the present state of the Criminal court records in Western Canada, this chapter is based primarily on the Supreme Court and District court records for the province of Alberta. However, when there is information available on the other provinces, it has been included to reinforce the arguments presented.

Mounted Police and Provincial Police repeatedly referred to cases of rape and carnal knowledge committed against females.⁶ In their haste to criticize the present day federal criminal justice system, studies have tended to ignore the historical background of their subject. However, there can be little doubt that sexual assaults have a history as do the written law and the social attitudes which produce the law.

In the late nineteenth and early twentieth century the handling of serious sexual assault cases such as rape, carnal knowledge of a female under fourteen and incest by the justice system in Western Canada, was influenced and reinforced by societal notions of acceptable sexual behaviour for females. The public's perception of the offence was also subject to the same rigid social attitudes. A study of these three types of sexual assaults against females and the functioning of the law in the West reveals much about social, sexual and legal attitudes towards women in the Victorian and Edwardian era. It also indicated that many of the complaints levied about Canada's present day sex laws have strong historical antecedents heretofore ignored by the critics.

* Both in terms of the written criminal law and public pronouncements, the crime of rape in Canada was considered to be a serious, perhaps the most serious crime perpetrated against women. The 1892 Criminal Code of Canada defined rape as

The act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or

fear of bodily harm or obtained by personating the woman's husband or, by false and fraudulent representation as to the nature and quality of the act.⁷

Included in Canada's rape laws at the time was the 1841 provision which stipulated that there was no need for proof of emission of seed or total penetration in order to constitute the act of carnal knowledge. The maximum penalty for the crime of rape was life imprisonment or death while a conviction for attempted rape could bring a maximum of seven years imprisonment. And since the provision for a minimum penalty for both offences was removed in 1892, the sentence of a convicted man was totally in the hands of the presiding judge.⁸

Public pronouncements seemed to echo the law's contention that rape was a crime worthy of the death sentence. Western Canadian newspapers of the day used such adjectives as 'horrible,' 'revolting,' 'heinous' and 'brutal' to describe rape attacks, while the accused in such a case was characterized as a brute of the most vile nature.⁹ Similar expressions can be found in the annual reports of the North West Mounted Police, the divisional reports of the Provincial Police and the debates of the House of Commons.¹⁰ But despite the fact that the law promised and the public seemingly condoned severe penalties against the convicted sex offender, the reality of the situation was somewhat different.

Although the Criminal Code of 1892 and its subsequent revisions broadened the existing legal definition of rape in Canada to include such things as personating a hus-

band and taking advantage of the mentally handicapped, the police, the courts, the public and the media adhered to the eighteenth century common law definition of the crime. According to Sir Matthew Hale and Sir William Blackstone, two of England's foremost legal thinkers for that century, rape was the act of a man having unlawful carnal knowledge of a woman by force and against her will.¹¹ This definition also appeared in a number of works throughout the nineteenth century including S. R. Clarke's A Treatise on Criminal Law as Applicable to the Dominion of Canada published in 1872.¹²

But implicit in this seemingly straightforward definition of a rape were the social and legal problems of measuring force, resistance and lack of consent as well as the corroboration of a woman's complaint. Such issues became directly related to the traditional sexual morality of the time and social perceptions of the moral character of women.


Historically, middle class Canadians generally assumed or hoped that marriage, sex and procreation formed a holy triumvirate and no decent woman would have sex unless she was married, seduced under the promise of marriage or raped. As a result, the Canadian criminal justice system and the public came to expect some measure of resistance to sexual attack on the part of the woman. Indeed, the more physical the display of resistance, the more likely the police, the courts and the public were to believe the woman's allegations. As early as November 12, 1845, the Kingston Chronicle reported that in one particular rape case heard in the Home District, the jury could not nor would not is-

(Substantive Evidence)

sue a guilty verdict because of an apparent lack of violent resistance which was required by law,¹³ Twenty-one years later, Chief Justice William Richards warned the jury in the 1866 case Regina versus Fick that it "had the right to expect some resistance on the part of the woman, to show that she really was not a consenting party." In upholding the conviction upon an appeal, Justice Adam Wilson once again referred to the notion of force and resistance.¹⁴

★ Although the 1892 Criminal Code stipulated that it constituted rape if consent was extorted through threats or fear of bodily harm, the trend towards the requirement of physical resistance to sexual assault continued. This is clearly reflected in a number of instances in late nineteenth and early twentieth century Western Canada where attitudes similar to those expressed in the 1845 and 1866 Upper Canadian cases can be found. For example, in September 1897, the Victoria Daily Colonist felt that a Mrs. Thomas Rabbitt would be acquitted for the murder of her assailant. The facts of the case seemed to indicate that she was defending herself from a sexual attack. Therefore, the paper felt it was justifiable homicide.¹⁵ In his annual report for the year 1901, Inspector Wilson of the North West Mounted Police division at Regina reported that a girl had been sexually assaulted within two miles of Qu'Appelle. Apparently, the girl had been riding her bicycle in broad daylight when Whalen, the accused, attacked her. Wilson noted that the girl had "strongly repulsed" Whalen until help arrived, otherwise "more serious results would have followed."¹⁶ And on June

6, 1906, the Saskatoon Daily Phoenix carried the story of a 'plucky' eighteen year old Macleod girl who had fought off the hired hand until her father came to the rescue.¹⁷

However, serious doubts were raised when there was  no evidence or insufficient evidence of physical resistance.

On January 9, 1913 a woman told a preliminary hearing at Brooks, Alberta that she had consented to sexual intercourse with the accused as he had threatened to kill both her and her husband. Although this case was sent to trial the accused was found not guilty.¹⁸ Later in the same year, a man charged with raping a fourteen year old girl at Ferintosh, Alberta was acquitted by Judge D. L. Scott as there was no evidence of a struggle. Although the girl alleged that she screamed and tried to get away, much was made of the fact that her clothes were not torn.¹⁹ And in a preliminary hearing held on May 3, 1915 at Strathmore on a rape charge, counsel for the defence repeatedly questioned an eighteen year old female as to why she had not bitten or scratched her assailant. When she replied that she did not have the opportunity, the lawyer told the court that this was obviously a case of the girl trying to save her self-respect. He stated that it was better for her to tell her father that she had been raped rather than to admit that she had indulged in pre-marital sex. The accused was found not guilty of the charge on June 8, 1915.²⁰ In yet another rape case this time near Crossfield on November 10, 1918, Jessie Isabella Thompson testified that she was not strong enough to fight off the advances of Gus Neetnay and thus he had intercourse with her.

She also told the court that she screamed and hollered but it was pointless since the nearest neighbours were at least a quarter of a mile away.²¹

In a July 16, 1919 preliminary hearing on a rape charge heard by a Police Magistrate at Camrose, Alberta, a sixteen year old girl apparently did not even know what consent was. When asked whether or not she consented to have intercourse with McMahan the accused, the girl told the court she did not understand the question. The Magistrate then rephrased the question to the following, "Did you permit him to do it of your own free will?" to which her response was no. Upon cross-examination, the girl admitted that she did not cry when the accused kissed her or when he asked her to kiss him. There were no signs of struggle, her clothes were not torn and it was only after a wagon went by when the alleged rape was happening that she screamed for help. Counsel for the defence seriously questioned the girl's story in light of the fact that she went home, went to sleep and the next morning told her mother she had been raped.²²

The issue of consent was also of importance in a case where the woman was insane. As early as 1867 the Court of Queen's Bench in Upper Canada ruled that there had to be some evidence of nonconsent on the part of the woman. Indeed if the woman consented from what the court termed "animal passion" then it could not possibly be rape.²³ The courts in Western Canada appeared to follow the precedent set in an aforementioned case. In a 1913 Saskatchewan case the accused, Walebek stated that although the woman was an imbecile,

she had agreed to have intercourse with him as he had promised her twenty-five cents.²⁴ And When Michael Kowell was charged on March 6, 1916 with carnally knowing a thirty-four year old mentally handicapped female at Halley, Alberta, the issue of consent was raised once again. Despite the fact that the woman was six months pregnant, the accused was acquitted of the charge as she admitted that she knew her long-term sexual relationship with Kowell was wrong. In this instance, the woman's imbecility was not severe enough to affect her decision making process as to what constituted acceptable and unacceptable sexual behaviour.²⁵

The greatest display of physical resistance on the part of a female was the loss of her life. Indeed, this seemed to be the only sure way to quell any conscious or subconscious doubts about lack of consent which might have arisen. On September 17, 1889 for example, the Regina Leader reported that a woman who had been raped earlier in the month had died as a result of her struggle to defend herself.²⁶ Newspaper accounts of an alleged rape-murder of a twenty-two year old British Columbia woman at South Wellington in July 1906 reinforced such contentions. The Nanaimo Free Press, the Calgary Morning Albertan and the Edmonton Journal relied heavily on the girl's valiant struggle to defend her chastity which was valued above life itself in their reports of the case.²⁷

In the eyes of the adjudicators and the public the issue of consent was inseparable from the reputation and character of the woman. At times the newspapers referred

to the respectability of the females assaulted and their parentage.²⁸ On August 28, 1890, the Macleod Gazette carried a lengthy report on three men who had been convicted of sexually assaulting a female Salvation Army officer at Guelph, Ontario. The judge had sentenced the men to two years imprisonment with hard labour and three floggings of ten lashes each. But the paper went on to note that since the convictions had been made there were indications that the woman's character was not as impeccable as originally believed. If this had been known at the time then the convicts might have received a more lenient sentence.²⁹ And when Judge Richardson handed out a three year prison term to a man convicted of the first recorded attempted rape on a half breed woman in the Northwest Territories, (1890) he expressed a similar opinion. Referring to the attack as the "meanest of offences" Richardson told the six man jury that "So long as a woman - be she white or black . . . conducted herself properly; she was entitled to protection as the highest lady of the land."³⁰

The defence in a September 1917 Alberta case of attempted rape tried to create the impression that the woman had not 'conducted herself properly.' She told the court that the accused, Roy Lane had come to the house while her father was away and attempted to assault her. When her father returned she told him about the attack and he laid a complaint against Lane on the same day. Upon cross-examination the woman stated that she had been married but had left her husband as he did not support her. Her credibility was

★
 women
 who conducted
 herself properly
 believed

further destroyed when she admitted that she had a sexual relationship with a man prior to her marriage. Obviously her conduct was not what was expected of a woman with a high moral character. Three months later on December 19, 1917, the Crown entered a Stay of Proceedings.³¹

In 1916, Chief Justice Scott of the Alberta Supreme Court noted that in a case of rape the previous chastity of the woman was not an element of the offence. Thus he argued that evidence of unchastity should not be admissible in a court of law.³² However, this was not the overriding principle in cases heard in the late nineteenth and early twentieth century. In fact once a woman entered the court room, she had to withstand a barrage of attacks on her moral character from the defence. This trial within a trial was so severe that at times the woman became the defendant and the accused, the prosecutor. For example when the girl in a rape case heard at Hardisty, Alberta on January 24, 1913 was hesitant to explain the details of the attack, counsel for the defence insinuated that she might have dreamt it. The presiding magistrate told the court that she was "apparently a chaste girl" and thus he considered her modesty in the matter quite alright. Then the defence lawyer tried to destroy the sixteen year old girl's credibility by implying that she had intercourse with a man she had gone dancing with.³³ Interestingly, the prosecution did not object to this line of defence.

* At a time when no woman was to have sex without the benefit of marriage, a woman's character seems to have been

directly related to her virginity. Indeed, if she succumbed once then in the eyes of the court she was no longer of chaste character. However, this term was never legally defined and was based on social connotations of the term. In his deposition of an alleged rape committed against his fourteen year old daughter on June 13, 1913, the father made a point of stating that as far as he knew she had been a good girl. Obviously this meant that the girl was a virgin.³⁴ Even the prosecution expected chastity on the girl's part. For example, at a preliminary hearing heard at Hardisty, Alberta on January 7, 1918, the prosecution asked the woman whether this was the first time that she had sexual relations.³⁵ It is evident that both the prosecution and the defence expected the woman in a rape case to be of high moral character.

* Married women who claimed that they had been raped were subjected to the same kind of questioning as unmarried women. There were certain societal notions of acceptable behaviour for married women and the courts reflected such ideas. The defence counsel at a preliminary enquiry into a rape which had allegedly occurred on April 20, 1918 at Crossfield, asked Mrs. Jessie Isabella Thompson whether she had ever encouraged or shown affection towards the accused.³⁶ In another case heard during the same year, counsel for the defence insinuated that the complainant had intercourse with a number of men, including her brother-in-law.³⁷

* If the issue of consent, the physical display of resistance and a woman's moral character were of importance

in a rape case so too was the length of time which elapsed between the attack and the complaint. In fact, the justice system in Western Canada seemed to be following the guidelines established in the thirteenth century by Henry de Bracton. He wrote that the wronged woman "must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships and there show the injury done to her to men of good repute."³⁸ It was generally assumed that if a woman had been raped and was of chaste character then she would lay the complaint immediately. Otherwise, the charge of rape was false and her character was suspect. Sergeant Hynes of the North West Mounted Police stationed at Estevan, N. W. T., told of such a situation in an interesting rape charge made in his district during 1897. According to a woman who had gone to a circus appearing in Oxbow, one of the showmen had dragged her under a tent and raped her. Although there had been four police officers, including an Inspector on duty at the fair grounds, she did not make a complaint nor did she complain until it was obvious she was pregnant. Hynes stated in his report that even if the showman was guilty it would be impossible to apprehend him due to the time delay. Furthermore, he felt the girl's story was a cover-up to "cloak her real seducer."³⁹

A similar set of circumstances can be found in a case mentioned in the February 16, 1899 issue of the Regina Leader. Supposedly the rape had occurred in 1897 but no complaint was made until 1898 when the woman, the accused's half niece, gave birth to a child. Her story lost credibility

because she had first claimed that she had been raped by a stranger who had pulled her from her horse while she was riding to Regina.⁴⁰ More similarities can be seen in the George Sinki rape case of May 1915 heard at Wetaskiwin.

The defence objected to the woman's information being admitted as evidence of a complaint as it was not given as such until several months after the alleged offence. Much like the case noted by Sergeant Hynes, the girl mentioned the attack only after her pregnancy became noticeable. Then she stated that the accused had raped her at her grandmother's house. However, her grandmother testified that the girl never told her about it.⁴¹ And in another instance during 1915 this time at Didsbury, the girl's father alleged that the accused had raped his eighteen year old daughter on or about February 19, 1915. The complaint however was not filed until June 29 of the same year. A doctor found the girl to be four and a half months pregnant. Since the complaint had not been given at the first opportunity the court found the accused not guilty.⁴²

Given that women were not to indulge in premarital sex, a father in the late nineteenth and early twentieth century had two legal options if his daughter became pregnant as a result of a sexual indiscretion. He could charge the accused with seduction under the promise of marriage or he could lay a more serious charge of rape. Thus the crime of rape had another connotation in addition to the traditional idea of it being a violent attack which occurred only once or several times on a particular day or night. Since

the sexual standards were so rigid, a father or even the daughter herself could claim that she had been repeatedly raped over a long period of time.

Not only did the courts in the West expect the complaint to be made at the first reasonable opportunity, but it was to come voluntarily without leading questions from a third party. This is clearly reflected in the October 26, 1906 Jimmy Spuzzum rape case heard at the fall sitting of the Court of Assizes at New Westminster, British Columbia. The Crown had as one of its witnesses the girl's grandmother who, after hearing various reports, had gone to the girl's house the day after the alleged rape. Supposedly, the accused, Jimmy Spuzzum, had broken into the house of the complainant a night her father was away and raped her. The next morning she had gone to her aunt's house and told her nine year old cousin that the house had been burglarized but she failed to mention the rape. Upon receiving this information, the aunt went to see the sixteen year old girl and asked the following question: "What was the trouble?" Arguing that the girl's answer was mere conversation, W. Myers Gray, counsel for the accused, objected to it being admitted as evidence of a complaint. However, the trial judge, J. Irving, used his discretionary powers and the evidence was admitted. Subsequently, the convicted man became one of the few individuals sentenced to life imprisonment for rape during the late nineteenth and early part of the twentieth century.⁴³

In another case with somewhat similar circumstances to the Spuzzum episode, the Supreme Court of Saskatchewan

ruled in favour of the accused, Jim Dunning, on March 31, 1908, and ordered that a new trial be held. The evidence indicates that the woman, Jennie Cole, made her first complaint about the rape after a friend asked her directly whether the accused had "been getting too free with her." After hearing the story, the friend went to get Jennie's husband who testified that he had "met her outside the shack and threw my arms around her neck and kissed her and then took her to the shack. I asked her if Dunning had hurt her." Jennie's answer to her husband was considered to be the second complaint. However, the appeal court ruled that the trial judge should not have admitted as evidence of a complaint the information obtained from the questions of the friend and the woman's husband. Their questions were leading ones and suggested the guilt of Dunning.⁴⁴ Thus what was at issue in this case was not whether a rape had occurred but whether the woman had given her complaint voluntarily and at the first reasonable opportunity.

A woman's testimony in a rape case was viewed with such a jaundiced eye by the justice system in the late nineteenth and early twentieth century that Supportive corroborative evidence was needed to reinforce the woman's claim that she had in fact been raped. In his annual report for 1901, Superintendent Joseph Howe of the North West Mounted Police stationed at Macleod, noted that two rapes in his district had been tried and dismissed due to lack of corroboration.⁴⁵ Five years later on August 28, 1906 at Yale, British Columbia, an Indian railway labourer was charged with raping a

woman named Ellen Castle. The next day, the Crown decided not to proceed with the case at that time as the girl's father and other witnesses were absent. Obviously, it was felt that the woman's statement would not suffice in a court of law and consequently the hearing was adjourned until September 4.⁴⁶

✓ All these problems with the issue of consent, the display of resistance and the need for corroborative evidence were not confined to cases of rape against adult females. At times the criminal justice system and the public used the same criteria to judge a case of defiling a female under the age of fourteen. And there were other problems encountered by the courts in cases of carnal knowledge or attempted carnal knowledge against children which varied according to their age. For example, if the girl was very young there was the dilemma of whether she was telling the truth while a girl closer to the age of fourteen was dealt with as an adult.

Sexual Intercourse

According to section 269 of the 1892 Criminal Code, a person was

guilty of an indictable offence and liable to imprisonment for life, and to be whipped, 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.

A conviction for attempted carnal knowledge of a girl under fourteen carried the possibility of two years imprisonment and flogging.⁴⁷ Interestingly, the legal definition of the offence does not mention the issue of consent or nonconsent

as being a prerequisite to the charge. However, in a few instances, counsel for the accused attempted to use the consent issue in their defence. In an Alberta case against Paul Chartier heard on June 7, 1913 the ten year old girl admitted that she did not scream or try to get away. She further stated that the accused had offered her \$5.00 if she would not tell anyone. As a result of this information the charge was withdrawn from the jury.⁴⁸ And in another case of carnal knowledge the girl told a May 19, 1915 preliminary hearing that she had consented to have intercourse with the accused Charles Spencer nearly every second day between April 1914 and January 1915. The wife of the accused knew about the relationship and gave the girl tincture of iron in hopes of inducing her periods. Eventually, however, the girl became pregnant and her father laid the complaint against the accused when he became aware of his daughter's condition. For his part, Spencer admitted that the child to be born was his and that he was willing to pay the expenses.⁴⁹

In cases where the children were young, there was always the question of whether the girl was to be believed or whether she really understood what had happened. For example, Henry Chapman was arrested in Medicine Hat for attempted carnal knowledge of a six year old girl in the fall of 1897. Calling it a "heinous crime," the Regina Leader reported that he narrowly escaped being shot by the girl's father.⁵⁰ However, when he was brought to trial on November 4, the child's statement was not admitted due to a tech-

nicality and Chapman was acquitted.⁵¹ The judge in a June 7, 1913 inquiry into a charge of carnal knowledge did not allow the ten year old girl to be sworn in because of her age.⁵² And on May 6, 1914, F. Eaton, the defence lawyer for James McLees, told a Police Court sitting at Calgary that the four year old girl who had allegedly been assaulted did not have sufficient intelligence to understand what happened or the nature of the oath. The girl stated that the accused had "put himself inside her" while McLees contended that he had spanked her for misbehaviour. A doctor told the court that he had found the girl's hymen ruptured, severe swelling and blood in her urine. He concluded that she had been sexually violated by the "male sexual organ." However, despite the doctor's testimony, Chief Justice Horace Harvey found the accused not guilty on May 19, 1914.⁵³

Repeatedly, the courts tried to impress upon the children involved in the case the importance of telling the truth and the ramifications of their allegations. In a number of instances, the child was asked if they attended Sunday school, knew what would happen if they lied and even ordered to kiss the Bible as a display of their sincerity.⁵⁴ Consequently, there was an even greater need for corroboration in cases of carnal knowledge involving young girls than was necessary in rape cases against women. For example, in 1901 Judge Rouleau dismissed a case of rape committed on an eight year old girl in Lethbridge. Although he firmly believed that the man was guilty, Rouleau thought there was insufficient corroborative evidence to warrant a trial.⁵⁵

Similarly, in an April 1919 case of attempted carnal knowledge against a ten year old and a nine year old girl, the Department of the Alberta Attorney General wrote the trial judge saying that there was no point in proceeding with the case. The letter contained the following statement:

while there seems very little doubt that the girl's story is true, in the absence of any corroboration, I do not see how anything is to be gained by committal, as the dismissal would surely follow in the higher courts.⁵⁶

The corroborative evidence could be supplied by the girl's parents, usually the mother and/or more importantly a medical doctor. In a December 11, 1911 hearing on a charge of carnal knowledge against a four year old girl, Dr. Frederick Hazard testified that he found the child's vulva red and scratch marks on her abdomen. The pathologist reported that he found semen stains on the front of the girl's undergarments and thus he concluded that there might have been an attempt at intercourse. On February 22, 1912 a jury at Calgary found the accused, Christian Torguson, guilty of attempted carnal knowledge. The judge sentenced him to eighteen months with hard labour at the Lethbridge Gaol in addition to twenty lashes.⁵⁷

At times the medical evidence and the doctors themselves did not support the girl's claim that carnal knowledge or an attempt at carnal knowledge had occurred. In June 1913 a thirteen year old Alberta girl told a preliminary hearing that she had known the accused William McNary intimately for over a year but had not told anyone. The

doctor stated that although the girl's vagina was somewhat larger than it should be and the hymen ruptured, he could not state positively whether the condition was caused by sexual intercourse. Subsequently, the accused was found not guilty on October 13, 1913.⁵⁸ Three years later, James Dora appeared before the Calgary division of the Supreme Court of Alberta on a charge of having carnal knowledge of Annie Bernard, a nine year old girl. After the Police Magistrate had impressed upon the girl the importance of telling the truth, she stated that the accused had penetrated her on at least two occasions. The doctor who examined Annie told the court that she was bruised and there had been an attempt to penetrate the child with some kind of blunt instrument. He further testified; "There was no laceration of the internal parts. There had been no complete penetration. The outer parts were partially penetrated, that was all."⁵⁹ Perhaps if the girls in these cases had been pregnant then the courts would have been more inclined to believe that penetration had taken place.

In another case, the mother of a seven year old girl told a December 24, 1918 court that when she found her daughter chafed between the legs she washed the area with carbolic lotion, covered it with cold cream and then sent for the doctor. The girl stated that she had taken some milk over to the accused James Eccles at Bassano and he had asked her in to the house to get warm. Once she was inside, Eccles laid her on the lounge and in her own words rubbed "his old thing on me between my legs." Although Dr. Scott admitted that

the girl was chafed he noted that this was a common occurrence and even more so in female children suffering from a vaginal discharge. Furthermore, Scott was of the opinion that it was impossible for a penis to bruise flesh.⁶⁰ Two months later, a doctor who testified in a carnal knowledge case stated that upon examining an eleven year old girl he found the hymen intact, no outward signs of swelling and no attempt at penetration. According to his understanding of the female anatomy, the hymen could be broken with an inch of penetration.⁶¹ But it must be remembered that carnal knowledge was legally defined as penetration to the slightest degree. Thus on several occasions the courts required a greater amount of evidence than was legally necessary.

Despite the fact that there was somewhat different medical evidence given by experts in a carnal knowledge case heard at Drumheller on July 22, 1920 the accused, Sidney Williams, was eventually convicted. The first doctor found the girl's sexual organs red and the vulva slightly stretched. However, there was no evidence of tearing and no bleeding. Obviously this evidence did not indicate conclusively that carnal knowledge had occurred. A second doctor concurred with the findings of his colleague but added that he discovered a milky discharge which he thought might be gonorrhoea. When Williams was examined, he was found to be suffering from that very disease. Although Williams pleaded not guilty to the charge on September 27, 1920, he was found guilty by a jury and was sentenced to life imprisonment at Prince Albert Penitentiary.⁶² The October 7, 1920

issue of the Calgary Herald called Williams an "inhuman brute" and his crime a particularly revolting one against a five year old girl.⁶³ One wonders if the harsh sentence was meted out not so much for assaulting the girl but because the accused had apparently infected a child of tender years with a venereal disease.

In cases of carnal knowledge and attempted carnal knowledge of a female under fourteen, the girl was not expected to raise a 'hue and cry' as was the case in adult rapes. Apparently it was not necessary to tell someone at the first reasonable opportunity. In 1901, an Abernathy, Saskatchewan girl "finally plucked up courage" to tell her father that a man had carnal knowledge with her on several occasions. She had not told her father immediately as the man had threatened her and thus she was afraid to tell her parents.⁶⁴ On June 14, 1913, a girl contended that she had indulged in sexual intercourse with the accused at Ensign, Alberta for well over a year but had not told anyone.⁶⁵

In a rather peculiar case before the Alberta courts, the girl's father waited over three years to lay a complaint of carnal knowledge. He had not said anything earlier as he hoped that once his daughter and the boy involved were older they would marry. However, since a marriage did not seem to be forthcoming, he decided to press charges. The facts of the case were as follows. On March 25, 1917, three boys, one of them being the accused Oswald Ternes, came to the girl's house while her parents were away. Two of the boys had intercourse with the girl at that time but the accused

said he did not. However, he did have connection with her in December of the same year. The girl went away to a convent to have a baby which was born in September 1918. Two years later on September 20, 1920, her father laid a complaint against Ternes. But when he heard that two other boys had connection with his daughter, he laid a complaint against them for carnal knowledge on March 25, 1917. All three pleaded not guilty and elected to be tried by a jury. On January 17, 1921 they were found not guilty.⁶⁶ Some three years later, the child still did not have a father or the girl a husband.

By placing carnal knowledge and attempted carnal knowledge of a female under fourteen within the criminal law, the system was genuinely trying to protect young girls from sexual assaults. Indeed, there was an abhorrence towards sex crimes committed against girls of a tender age. But those girls who were closer to the age of fourteen were for all intents and purposes young adults who often experienced sexual relationships without the benefit of sex education or birth control. If she became pregnant, one of the few recourses for the girl's parents was to charge the male with carnal knowledge. And even if pregnancy did not occur, the girl's father could gain some measure of retribution against the person who had led his daughter down the road to ruin, destroying her chastity and jeopardizing her marriage marketability.

X Unlike rape and carnal knowledge of a female under fourteen which were classified as 'Offences Against the Per-

son and Reputation,' incest was considered an 'Offence against Morality' in the Criminal Code. According to section 176:

Every parent and child, every brother and sister, and every grandparent and grandchild who cohabit or have sexual intercourse with each other, shall each of them, if aware of the consanguinity, be deemed to have committed incest.

A conviction for incest, an indictable offence, earned a maximum penalty of fourteen years imprisonment with the male offender liable to be whipped. If the judge or court felt that the female consented to intercourse because of "restraint, fear or duress of the other party," then the judge did not have to impose any punishment upon the female.⁶⁷

On April 15, 1890 John Thompson, the Conservative Minister of Justice, argued in the House of Commons that both the male and female should be punished in incest cases. He cited the example of a father and daughter who were living together and had several children, to prove his point. Despite threats and remonstrances from the authorities, the two continued to cohabit. Thus he felt they both should suffer punishment.⁶⁸ As leader of the Liberal opposition, Wilfrid Laurier told the House that he felt females should not be prosecuted in cases of incest. In response to Thompson's example, Laurier stated that obviously the

girl must have been debauched and demoralized at an early age. It is impossible to suppose this offence was committed except on one of tender years, who was unable to resist, or unaware of the gravity of the offence.

Laurier further argued that a female would not be inclined

to report the case to the authorities if she knew she was liable to punishment.⁶⁹ Thus, the stipulation about the issue of consent in incest cases would appear to be a compromise between the Thompson and Laurier position.

The first problem in a charge of incest was proof of blood relationship. On February 25, 1908, the accused was acquitted by the County Court Judge's Criminal Court at Revelstoke, British Columbia because the only real evidence of the parent/child relationship was the girl's statement. Under oath, the girl and other witnesses swore that the accused was her father. However, the trial judge ruled that this was insufficient proof of their blood relationship. An appeal of the acquittal was heard on April 10, 1908 at Vancouver. At that time, the evidence of the girl as to proof of blood relationship was considered to be inconclusive. The acquittal was affirmed.⁷⁰

Some of the reasons given for offences having occurred were bizarre. A prime example is the case of Christian Mairz of Mayton who was charged with having intercourse with his sister causing her to become pregnant. In February 1909, she gave birth to a child which subsequently did not survive infancy. The girl was twenty-one years old and the complaint was laid by her husband. She told the court that her brother was the only male who had intercourse with her prior to her marriage. When questioned, she stated that she did not know it was a criminal offence to have sex with her brother. For his part, Christian denied everything and suggested that the husband had intercourse with her before they were married.

The accused pleaded not guilty and was acquitted on April 30, 1909.⁷¹

Another example is provided by the Jean Beaudry case of Chestermere Lake who was charged by his wife with cohabiting with his daughter from August 4 to December 23, 1914. Beaudry's wife told him that she was not strong enough to have intercourse with him so she suggested, in the presence of their nineteen year old daughter, that he have intercourse with her. Despite the daughter's protests, the mother convinced her to indulge her father while he agreed only if his wife said it was alright. Intercourse occurred about once a week. To avoid pregnancy, the girl used a syringe filled with warm water and her father used a condom. Eventually, the jealous wife of Beaudry decided to press charges against her husband when he refused to stop his sexual relationship with their daughter.⁷²

Similarly, George Worsley told a May 1918 sitting of the Wetaskiwin District Court that he had intercourse with his eleven year old daughter because his wife refused to sleep with him. He wanted his daughter to know what would be expected of her when she got married, as when he married his wife she was totally ignorant of such matters. Originally, the accused pleaded not guilty to the charge and then changed his plea to guilty. He was sentenced to three years imprisonment.⁷³ A month later, another eleven year old girl said that her father had intercourse with her after her mother had left them.⁷⁴ On October 2, 1918 a woman laid a complaint against her husband for having intercourse with their

twelve year old daughter. The wife stated that when she returned home in July she found that her husband had been sleeping with the girl. In fact, it was revealed that the accused fathered a child by a step-daughter in another country. She further stated that she did not want to sleep with her husband as there were sores all over his body and she did not know what they were. Thus the accused had turned his attention to their daughter.⁷⁵ And on September 12, 1919, the accused told a Calgary preliminary hearing into a charge of incest that he and his fifteen year old daughter had slept in the same bed since she was a baby.⁷⁶

Conversely a man told a 1918 preliminary inquiry into charges of incest that his two step-daughters had lied. They stated that he had intercourse with them three years ago. However, the accused stated that he never touched the girls and if he had, he wondered why they had waited so long to report the cases to the authorities.⁷⁷ When Louis Budde was charged with committing incest with his sixteen year old sister in September 1920 at Provost, he claimed that although he had placed his penis between the girl's legs, he had never completed intercourse. The charge in this case was laid after their eldest sister had found a box of french safes, took them to the Alberta Provincial Police and told them she suspected incest.⁷⁸

In the late nineteenth and early twentieth century reports of incest were usually given by the wife of the accused. Complaints of rape and attempted carnal knowledge of a female under fourteen were laid by the girl's parents,

usually the father or the husband. Very few women laid charges independently. Once the charge was laid the woman's character immediately became suspect and liable to close scrutiny. It was her prior moral and sexual behaviour that was at issue and not the behaviour of the accused at the time of the assault. Furthermore, in the majority of the rape and carnal knowledge cases reported, the girl knew the accused either through her parents, domestic service, church groups or as hired hands on the farm. This prior acquaintance of the accused by the girl led to insinuations that the girl had led him on. And at times, cases of incest were seen as the inevitable consequence of there being only one bed in the house.

Although the law stipulated that a conviction for rape or carnal knowledge carried a maximum penalty of life imprisonment or the death sentence and fourteen years for incest, few convicted men received the maximum provision. In fact, it is impossible to see any sentencing pattern emerging in Western Canada from 1890 to 1920. For example, in British Columbia, sentences for rape convictions ranged from a few months, to two, four, ten and fifteen years or the occasional life term.⁷⁹ The amount of physical force used to perpetrate the crime does not seem to have been important in the final sentence. The prerogative of mercy was exercised in a few cases where prisoners were conditionally or unconditionally pardoned. Similarly, sentences levied for attempted rape convictions ranged from a fine to a few months, to the maximum seven years imprisonment.⁸⁰ Persons convicted

of carnal knowledge or attempted carnal knowledge of a girl under fourteen were also subject to a wide variety of punishment. For example, a man found guilty of carnally knowing a six year old girl in August 1910 was fined \$25.00 plus court costs by a British Columbia court.⁸¹ A few years earlier a Vancouver Police Court judge had sentenced a man to twenty-three months in jail and one hundred and sixty lashes for the same offence.⁸² And sentences for incest included a year, three, five and seven years imprisonment with a stiff dose of the lash.⁸³ In one particular case, a forty-one year old man was sentenced to seven years imprisonment and seventy-five lashes by the King's Bench at Winnipeg on April 8, 1904 for a conviction of incest. But once again, the system exercised its prerogative of mercy as the prisoner had some of his lashes remitted on March 27, 1908.⁸⁴

The available information indicates that women and young girls were not immune to sexual assaults from strangers, acquaintances, friends, fathers and brothers. In the late nineteenth and early twentieth century, the written law as implemented by the criminal justice system in Western Canada did not fulfill its promise to those females who had been sexually assaulted. Ostensibly, the law protected women from such attacks but in a society that valued chastity above life, frowned upon premarital sex and promoted fidelity within marriage, the system had to be sure beyond a shadow of a doubt that the woman was worthy of the law's protection. If she said she had sex prior to or outside of marriage then it was widely believed that she would do so again and thus a charge

of rape was highly unlikely. Sexual awareness of young teenage girls was not condoned by the law or by the parents who pressed charges against the male for 'wronging' their daughters. The reality of the system was that the girl was as guilty, perhaps more so, for losing her virginity as was the perpetrator of the offence.

The fact that very few women laid independent charges of being sexually assaulted reveals a lack of sexual autonomy as does the court's handling of all cases brought before them. Preconceptions as to acceptable and unacceptable behaviour for women greatly influenced the handling of sex cases by the criminal justice system in late Victorian and Edwardian Western Canada. For the most part, the primary concerns in sexual assault cases, whether explicitly stated or implied, were the issue of consent, display of resistance, the amount of force used, time elapsed between the offence and the complaint, the woman's character and corroborative evidence. Such issues coupled with legal spousal immunity from a charge of rape precluded any notions of sexual equality and sexual autonomy for females.

FOOTNOTES

¹Regina Leader, 10 May 1905, p. 3. See also "Assault Cases Most Frequent," Edmonton Journal, 31 October 1906, p. 3.

²"Serious Charge," Edmonton Journal, 8 March 1906, p. 1.

³Ibid., 31 October 1906, p. 3.

⁴"Outrageous Life in Manitoba," Edmonton Journal, 17 October 1906, p. 3.

⁵"THE DEATH PENALTY," Saskatoon Phoenix, 8 August 1906, p. 6.

⁶See for example various reports of the North West Mounted Police and Saskatchewan Provincial Police. "The Annual Report of the Commissioner of the North West Mounted Police," Canada, Sessional Papers (1890-1920) and Saskatchewan Archives Board (hereafter SAB), Attorney General Papers, Saskatchewan Provincial Police, C, Divisional Reports (1917-1920).

⁷Canada, Criminal Code of Canada (1892), s. 266. The definition of rape did not change from 1892 to 1920. However, the section was later changed to section 298.

⁸Ibid., Section 267 (later 299) dealt with the punishment for rape. Section 268 (later 300) dealt with the punishment for attempt to commit rape.

⁹"Revolting Crime," Regina Leader, 21 October 1890, p. 48; "Heinous Crime," Regina Leader, 7 October 1897, p. 1; "A Little Girl Attacked by a Brute on Saturday Night at Calgary," Medicine Hat Times, 30 June 1892; "Life Imprisonment for Inhuman Brute," Calgary Herald, 7 October 1920, p. 11.

¹⁰"The Annual Report of the Commissioner of the North West Mounted Police, Canada, Sessional Papers (1890-1920) and SAB, Attorney General Papers, Saskatchewan Provincial Police, B, Annual Reports (1919-1920) and C, Divisional Re-

ports (1917-1920) and Provincial Police, Vancouver-Westminster Police Division, Vol. 1, Reports Received at Provincial Police office with notes of instruction (16 June 1899 - 7 December 1905); Vol. 2 (December 1905 - December 1908); Vol. 3 (1909); Vol. 4 (3 January 1913 - 20 July 1926) and Vol. 5 (9 August 1920 - 28 July 1923) and lastly; Canada, Debates of the House of Commons, 5 June 1895, pp. 2145-2153 and 4 May 1900, p. 4717.

¹¹Sir Matthew Hale and Sir William Blackstone quoted in C. Backhouse, "Nineteenth Century Canadian Rape Law: 1800-1892" (unpublished paper, draft, October 1981), p. 58.

¹²S. R. Clarke, A Treatise on Criminal Law as Applicable to the Dominion of Canada (Toronto: Carwell 1872), p. 264.

¹³R. Olson, "Rape--An 'Un-Victorian' Aspect of Life in Upper Canada," Ontario History (June, 1976), p. 78.

¹⁴R. v. Fick (1866), 16 Upper Canada Queen's Bench Reports, pp. 380-388.

¹⁵Victoria Daily Colonist, 28 September 1897, p. 5.

¹⁶"Annual Report of Inspector Wilson, Commanding Officer, Regina, North West Territories for the year ending 1901," in "The Annual Report of the Commissioner of the North West Mounted Police for the year ending 1901," Canada, Sessional Papers, Vol. 12 (1902), Paper 28, p. 89.

¹⁷"Defended Her Honor - Plucky Macleod Girl Fought Assailant Until Rescued by her Father," Saskatoon Phoenix, 6 June 1906, p. 7.

¹⁸Supreme Court Records (hereafter SCR), Criminal (Calgary), File #152, Case: R. v. Martin (1913), rape.

¹⁹Ibid. (Wetaskiwin), File #644a, Case: R. v. Garrett (1913), rape.

²⁰Ibid. (Calgary), File #445, Case: R. v. C. Van Scoy (1915), rape. Question: "It would save your self respect a whole lot to him (father) that you were raped rather than just a matter of having connection." The girl did not answer.

²¹Ibid., File #739, Case: R. v. Neetnay (1918), rape.

²²District Court Records (hereafter DCR), Criminal (Wetaskiwin), File #1024, Case: R. v. McMahan (1919), rape.

²³R. v. Connolly (1867), 26 Upper Canada Queen's Bench Reports, p. 317.

²⁴R. v. Walebek, 21 Canadian Criminal Cases, p. 131.

²⁵SCR, Criminal (Wetaskiwin), File #244, Case: R. v. M. Kowell (1916), carnal knowledge of a female idiot. According to section 189 (later 219) of the Criminal Code: "everyone is guilty of an indictable offence and liable to four years imprisonment who unlawfully and carnally knows, or attempts to have carnal knowledge of any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf or dumb."

²⁶Regina Leader, 17 September 1889, n. p.

²⁷"Foul Murder at South Wellington," Nanaimo Free Press, 23 July 1906, p. 2. "Further Details of South Wellington Murder," Ibid., p. 1; "Complete Report of Coroner's Inquest at South Wellington this Afternoon," Ibid., 26 July 1906, p. 1; and "Nanaimo Young Lady Murdered," Calgary Daily Herald, 25 July 1906, n. p. "Is Murdered in Defence of Honor," Edmonton Journal, 28 July 1906, p. 7.

²⁸Victoria Daily Colonist, 3 April 1907, p. 1 and Vancouver Province, 3 April 1907, p. 7.

²⁹Macleod Gazette, 28 August 1890, p. 2.

³⁰"Criminal Court - Rape - Exemplary Punishment," Regina Leader, 21 October 1890, n. p.

³¹SCR, Criminal (Calgary), File #702, Case: R. v. R. Lane (1917), attempted rape.

³²R. v. Pieco, 1 Western Weekly Reports (Calgary: Burroughs and Co., 1917), p. 896.

³³SCR, Criminal (Wetaskiwin), File #558b, Case: R. v. F. Hoppe (1913), rape.

³⁴Ibid., File #633a, Case: R. v. A. Garrett (1913)

rape.

³⁵Ibid., File #1421, Case: R. v. J. Bowie (1918), rape. The question was as follows: "Is this the first man that you ever had sexual relations with?"

³⁶Ibid., Criminal (Calgary), File #739, Case: R. v. A. Neetnay (1918), rape.

³⁷Ibid., File #1462, Case: R. v. F. Truchel (1917), rape.

³⁸S. Brownmiller, Against Our Will: Men, Women and Rape (New York: Simon and Schuster, 1975), p. 17.

³⁹"Annual Report of Sergeant Hynes for the Estevan sub-district for the year ending 1897," in "Annual Report of the Commissioner of the North West Mounted Police for the year ending 1897," Canada, Sessional Papers, Vol. XXXII (1898), Paper 15, p. 124.

⁴⁰"Clancy Not Guilty," Regina Leader, 16 February 1899, p. 1.

⁴¹SCR, Criminal (Wetaskiwin), File #273, Case: R. v. G. Sinki (1915) rape.

⁴²Ibid. (Calgary), File #481, Case: R. v. Wm. Thompson (1915), rape.

⁴³R. v. J. Spuzzum, 12 British Columbia Law Reports (1904-07), pp. 291-292.

⁴⁴R. v. Dunning, 14 Canadian Criminal Cases (1908) p. 461.

⁴⁵The two cases of rape. 'Hank,' a Blood Indian laid information against 'Black White Man' and 'Tom Daly,' two Blood who were tried and dismissed due to a lack of corroboration. "Report of Superintendent J. Howe, Commanding D Division, Macleod for the Year ending 1901," in "Annual Report of the Commissioner of the North West Mounted Police for the year ending 1901," Canada, Sessional Papers, Vol. XXXVI (1902), p. 41.

⁴⁶PABC, Yale, Magistrates' Court, Charge and Sentence Book, Vol. 3 (24 August 1896 - 30 July 1902), p. 152.

⁴⁷Canada, Criminal Code of Canada (1892), Sections 269 and 270 which became Sections 301 and 302.

⁴⁸SCR, Criminal (Wetaskiwin), File #644a, Case: R. v. P. Chartier (1913), carnal knowledge of a girl under 14.

⁴⁹SCR, Criminal (Calgary), File #450, Case: R. v. C. Spencer (1914), carnal knowledge of a girl under 14. The wife of the accused gave a mixture of tincture of iron to induce her period but she was pregnant.

⁵⁰"Heinous Crime," Regina Leader, 7 October 1897, p. 1.

⁵¹"Annual Report of Superintendent Moffatt, A Division Maple Creek for the year ending 1897," in "Annual Report of the Commissioner of the North West Mounted Police for year ending 1897," Canada, Sessional Papers, Vol. XXXII (1898), Paper 15, p. 87.

⁵²SCR, Criminal (Wetaskiwin), File #644a, Case: R. v. P. Chartier (1913), carnal knowledge. The girl testified that the accused offered her \$5.00 if she would not tell anyone.

⁵³Ibid., (Calgary), File #334, Case: R. v. J. McLees (1914), carnal knowledge of girl under 14.

⁵⁴Ibid., Files #580 and #596, Case: R. v. J. Dora (1916), carnal knowledge.

⁵⁵"Annual Report of Inspector Casey, Commanding K Division, Lethbridge for the year ending 1901," in "Annual Report of the Commissioner of the North West Mounted Police for the year ending 1901," Canada, Sessional Papers, Vol. XXXVI (1902), Paper 28, p. 98.

⁵⁶SCR, Criminal (Wetaskiwin), File #719a, Case: R. v. W. Sharpe (1919), attempted carnal knowledge.

⁵⁷Ibid., (Calgary), File #72, Case: R. v. C. Torguson (1911), carnal knowledge.

⁵⁸Ibid., File #203, Case: R. v. McNary (1912), carnal knowledge.

⁵⁹Ibid., File #508, Case: R. v. J. Dora (1916), carnal knowledge of girl under 14.

⁶⁰Ibid., File #802, Case: R. v. J. Eccles (1918), attempted carnal knowledge.

⁶¹Ibid., File #814, Case: R. v. F. Dours (1919), carnal knowledge.

⁶²Ibid., File #950, R. v. S. Williams (1920), carnal knowledge.

⁶³"Life Imprisonment for Inhuman Brute," Calgary Herald, 7 October 1920, p. 11.

⁶⁴"Annual Report of Inspector Wilson, Commanding Officer, Regina North West Territories for the year ending 1901," in "Annual Report of the Commissioner of the North West Mounted Police for year ending 1901," Canada, Sessional Papers, Vol. XXXVI (1902) Paper 28, pp. 89-90.

⁶⁵SCR, Criminal (Calgary), File #203, Case: R. v. Wm. McNary (1913), carnal knowledge.

⁶⁶Ibid., File #964 and #966, Case: R. v. O. Ternes (1917), carnal knowledge.

⁶⁷Canada, Criminal Code of Canada (1892), s. 176.

⁶⁸There were cases where both the male and female involved were charged with incest. For example, in the year ended September 30, 1894, a man and woman were acquitted on a charge of incest at Clinton, British Columbia. "Criminal Statistics for the year ended September 30, 1894," Canada, Sessional Papers, Vol. XXVIII (1895) Paper 8f, p. 86. In the year ended 30 September 1898, a man and woman were acquitted on a charge of incest in the federal judicial district of Western Manitoba. "Criminal Statistics for the year ended September 30, 1898," Canada, Sessional Papers, Vol. XXXIII (1899), Paper 8c, p. 14.

⁶⁹Canada, Debates of the House of Commons, 15 April 1890, pp. 3369-3370.

⁷⁰R. v. Smith, 8 Western Law Reporter, p. 184.

⁷¹DCR, Criminal (Calgary), File #42, Case: R. v. C. Mairz (1908-1909), sexual intercourse with his sister causing pregnancy.

⁷²SCR, Criminal (Calgary), File #397, Case: R. v. J.

Beaudry (1914), cohabit with his daughter.

⁷³DCR, Criminal (Wetaskiwin), File #1004, Case: R. v. G. Worsley (1918), incest. The accused stated: "My wife did not want me to sleep with her or have connection with her so that is the reason I bothered the girl."

⁷⁴Ibid., File #1111, Case: R. v. G. Brown (1918), incest.

⁷⁵Ibid., File #1016, Case: R. v. G. Salhen (1918), incest.

⁷⁶SCR, Criminal (Calgary), File #876, Case: R. v. J. Murray (1919), incest.

⁷⁷DCR, Criminal (Wetaskiwin), File #1032, Case: R. v. M. Dlugocz (1915), incest.

⁷⁸Ibid., File #1048, Case: R. v. L. Budde (1920), incest with his sixteen year old sister.

⁷⁹The following cases serve as but a few examples. On April 16, 1914, A. Nelson was sentenced to two years imprisonment by Judge Stoway at New Westminster: PABC, Attorney General Papers, Inspector of Gaols, New Westminster, Return of Prisoners Confined in New Westminster Gaol, Vol. 6 (November 1910 - May 1914), n. p. On October 6, 1917, John Tierney was sentenced by Judge Gregory at Victoria to four years with hard labour: Ibid., Vol. 7 (June 1914 - October 1917), p. 113. On November 24, 1914, a man was sentenced to ten years by Judge Morrison at New Westminster: Ibid., Vol. 6 (November 1910 - May 1914), p. 240. On October 22, 1907, Fritz Plum was sentenced to fifteen years and twenty-five lashes at the Victoria Penitentiary: Ibid., Nanaimo Gaol, List of Prisoners, Vol. 1 (November 1893 - February 1911), p. 104. A life sentence for the rape of a sixteen year old girl was handed out by Judge Irving at the October 23, 1906, sitting by the Assize Court at New Westminster. R. v. Spuzzum, B. C. Law Reports, Vol. 12 (1904-1907), pp. 291-293.

⁸⁰PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners confined in New Westminster Gaol, Vol. 4 (January 1884 - September 1895), See also the various cases contained in SCR, Criminal (Calgary and Wetaskiwin) and DCR (Calgary and Wetaskiwin).

⁸¹Ibid., B. C. Provincial Court (Lillooet), Charge and Sentence Book, Vol. 2 (24 September 1893 - 7 November

1902), p. 54.

⁸²"Criminal Statistics for the year ended September 30, 1904," Canada, Sessional Papers, Vol. XXXIX (1905), Paper 17, p. 274.

⁸³In his report for the year ending 1901, Superintendent J. Howe of the Mounted Police, Macleod Division, wrote: The case of incest wherein no conviction was obtained, Richard Vadnaes of Boundary Creek was arrested on information given by his wife and committed to trial by the Justice of the Peace at Cardston. He was brought before the judge at the March assizes, where the Crown prosecutors entered a nolle prosequi. "Repprt of Superintendent J. Howe, Commanding D Division for the year ending 1901," in "The Annual Report of the Commissioner of the North West Mounted Police for the year ending 1901." Canada, Sessional Papers, Vol. XXVI (1902), Paper 28, p. 41. On July 21, 1904, a man was arrested at Moose Jaw for incest committed on his thirteen-year old daughter. He was found guilty by a judge and jury and sentenced to five years imprisonment in the same penitentiary. "Report of Inspector J. Wilson, Commanding Officer Regina District for the year ending 1904," in "The Annual Report of the Commissioner of the North West Mounted Police for the year ending 1904," Canada, Sessional Papers, Vol. XXXIV (1905) Paper 28, p. 71. See also PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), Samuel Wallace, age 39, miner, Assizes court, 10 October 1900, 7 years imprisonment and DCR, Criminal (Wetaskiwin), File #1032, Case: R. v. M. Dlugocz (1915), incest, three years imprisonment.

⁸⁴"Criminal Statistics for the year ended September 30, 1908," Canada, Sessional Papers, Vol. XLIII (1909) Paper 17, p. 306. In another case, a man was sentenced to six years imprisonment on July 8, 1899 by the Assizes court at Nelson, British Columbia for an attempt to commit incest, and was released on a ticket of leave on January 30, 1903. "Criminal Statistics for the year ended September 30, 1903," Canada, Sessional Papers, Vol. XXXVII (1904), Paper 17, n. p. A sixty-year old man who had been sentenced to five years imprisonment for incest by the Supreme Court at Regina, Saskatchewan on July 29, 1904 was released on a ticket of leave in early April 1907. "Criminal Statistics for the year ended September 30, 1907," Canada, Sessional Papers, Vol. XLII (1907), Paper 17, p. 300.

CHAPTER IV

INDECENT ASSAULTS ON FEMALES

Prior to 1890 the offence of indecent assault on a female was classified under the general category of "Rape, Abduction and Defilement of Women" in Canadian criminal law. In fact, it was contained in the same section as attempted carnal knowledge of a female under twelve years of age. Both offences were considered to be misdemeanors and a conviction for either brought the possibility of imprisonment for less than two years and a whipping.¹ By placing the two offences under the same section, it would seem that indecent assault was viewed as a prelude to committing the act of carnal knowledge. In 1890, the two offences were separated from each other and the penalty for indecent assault was changed from less than two years to two years imprisonment. The law further stipulated that the consent of a child under the age of fourteen years could not be used as defence in cases of indecent assault.² But despite its separate classification, the basic definition of the offence remained the same. During the April 10, 1890 sitting of the House of Commons, the Honorable Mr. Mitchell asked Sir John Thompson, the Conservative Minister of Justice, if a male kissing a female could be considered an indecent assault. Thompson replied that an indecent assault on a female was

"an assault made in pursuance of an attempt to commit a graver offence."³

With codification of the Canadian criminal law in 1892, the offence of indecent assault on a female was reclassified and placed under the "Assaults" category. According to section 259 of the Code, everyone was

guilty of an indictable offence and liable to two years imprisonment, and to be whipped, who,--indecently assaults any female; or does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act.⁴

Then in 1909, the Criminal Code Amendment Act added a further subsection to include anyone who assaulted or beat his wife or any other female.⁵ Thus by 1920 such things as wife beating, consensual sexual acts with children, forcible acts with children, forcible sexual acts with females over fourteen years of age, fraudulent sex acts and forcible sexual or nonsexual acts had been placed under the general rubric of indecent assault on a female by the written criminal law.⁶

Despite the reclassification of the offence and the broadening of its legal parameters, it is apparent that indecent assault on a female in its truest form was still seen in terms of Thompson's definition given in 1890. The assault was not an end in itself but was a means to an end. Thus by defining indecent assault on a female as a prelude to sexual intercourse, yet another way had been found to legally protect the chastity of young girls in the late

nineteenth and early twentieth century. As a result, many of the same concerns dealt with in charges of rape, carnal knowledge of a girl under fourteen and incest (such as consent, resistance, complaint given at the first reasonable opportunity and corroborative evidence) were also expressed in cases of indecent assault.

What constituted an indecent assault on a female at the turn of the twentieth century in Western Canada? The term was applied to acts which began with a simple touch on the shoulder, a pinch, or cunnilingus, and led to an attempt to have carnal knowledge and even intercourse. In September 1904, for example, the Vancouver-New Westminster Division of the British Columbia Provincial Police told of a case where a man was "accused of assaulting little girls by taking down their drawers, etc." The 'etc.' was not defined.⁷ Thus one is left wondering whether the act of taking down the girl's drawers or the undefined 'etc.' constituted the indecent assault. In another case reported by the B. C. Provincial Police in 1906, a twenty year old woman believed that what had happened to her was an indecent assault. Beatrice Eden testified that while she and her sister were walking along a road, the accused, Hamilton had "put his arm around my legs and pulled me down; he put his hand up between my legs and gave me a good pinch and I fell down and he tore my underclothes."⁸ George Van was sentenced to one year with hard labour at the Calgary Guard Room for indecently assaulting a female on August 14, 1909. In this particular case, the accused had attempted to kiss the woman and when this

proved to be unsuccessful he proceeded to choke her.⁹ But did Van receive this sentence for attempting to kiss the girl which Thompson had said was not an indecent assault, or was the one year term meted out for choking the girl, which also did not constitute an indecent assault?

A few years later, John Forsyth was charged with indecently assaulting a female named Hazel Land. At the preliminary hearing held on May 15, 1912 in Calgary into the charge, the girl alleged that Forsyth had lain on top of her, then put a little boy on top of her and had taken down their undergarments.¹⁰ And what E. Fitzpatrick did to a female at Vulcan, Alberta on September 13, 1913 was classified as an indecent assault. Supposedly he had put his hand under a woman's clothing and tried to pinch her while they were in a public place.¹¹ Henry Bruns was charged with an indecent assault on a ten year old girl at Cousins, Alberta when he put his hand under her dress on April 18, 1915.¹² Two years later, a six year old girl by the name of Edith Carr told an Alberta Court that Alfred Orr had touched her on the leg, exposed himself and then gave her a nickel. Orr was charged with indecent assault.¹³ In another instance, Peter Boltara was charged with indecent assault on March 14, 1920 after a detective at the Palliser Hotel in Calgary caught him performing cunnilingus on a young girl. The accused is alleged to have stated "My God, What have I done. I am ruined."¹⁴ These actions were all classified as indecent assaults on females.

Even touching a female in a certain manner could be

a form of indecent assault. On August 29, 1916 John Neher, the father of nine year old Ella Neher, laid a complaint against Frank Hall, a farmer near Carbon, Alberta for indecently assaulting his daughter a few days earlier. The girl stated that the accused had tried to assault her and her sister at their home while their parents were away. When asked to describe the nature of the assault, Ella told the October 26, 1916 preliminary inquiry that the accused had not touched any other part of her body except her shoulder when he laid her on the ground. Evidently, the presiding magistrate, C. H. King believed that this action constituted an indecent assault because the accused was bound over for trial on January 15, 1917 before Justice William Simmons of the Supreme Court of Alberta.¹⁵ And in a similar fashion, James Ford charged Joseph Lapier with indecently assaulting the ten year old daughter of the complainant near Kinmundy, Alberta on May 18, 1919. The girl told her father that Lapier had laid his hand on the lower part of her abdomen. Speaking to the preliminary hearing on the charge, she told the court in her own words that the fifty-three year old accused had said "let me feel you and see if you are getting fat, he felt my stomach, not very much, then he pulled me into his lap, and gripped me half way between the ankle and the knee."¹⁶ In both cases, the simple act of touching any part of the female body, not necessarily the sexual organs was classified as an indecent assault on a female when other intentions were revealed.

In a rather peculiar case, Peter Demerie was charged

with unlawfully entering the house of G. Taylor at Drumheller, Alberta on May 18, 1917 with the intent of committing an indecent assault on Taylor's wife. Taylor did not lay a complaint against Demerie until July 9 of the same year. The facts of the case reveal that the accused broke into the Taylor house and the woman only realized it when the accused confronted her. The accused did not touch her; but Taylor assumed that Demerie had entered the house intending to commit an indecent assault. And perhaps his fears were well-founded as the following testimony would suggest. Taylor's wife told the court that for a period of time, long before the break-in, she had known the accused intimately and had become pregnant by him. As a result, she had an abortion and since that operation had not had sexual relations with Demerie. Supposedly, the baby she was carrying at the time when the complaint was made was her husband's.¹⁷

Another odd case was heard by Police Magistrate Sanders at Calgary in the summer of 1920. Two men, Jules Levine and Louis Blank, were originally charged with committing an indecent assault on a twenty year old woman named Susan Gullian. An additional charge was laid when the two men appeared before William Simmons of the Supreme Court of Alberta on September 27, 1920. The second charge claimed that they had fraudulently got the woman to indecently expose herself. It seemed that Susan wanted to be an actress in a play. Levine and Blank said there was a distinct possibility that they might be able to get her a part if her

physical attributes were favourable. So, they told her to remove all her clothes except her undergarments and they took her measurements. No attempt to sexually assault her was made. Subsequently both men were found not guilty of indecently assaulting the woman but were guilty of the second charge.¹⁸

Despite this apparently wide range of possible definitions for the offence, the majority of those actions classified as indecent assaults on females were considered as preludes to intercourse and were judged accordingly. And the police were informed and a Constable was put on the case. In one particular instance a Constable received information from a station agent at Cochrane that a man who had assaulted a girl was in the area. The Constable captured Jensen, who proceeded to escape custody and was then recaptured at Gleichen. When committed to trial the charges included rape, attempted rape and escaping lawful custody.¹⁹ No mention was made of the alleged indecent assault; obviously it was covered in the attempted rape charge. On December 12, 1901 Jensen was found guilty of all three counts. He was sentenced to five years imprisonment and twenty lashes for rape; one year for attempted rape and three months for escaping custody.²⁰

In another case, Bert Purington of Bassano laid a complaint against Roy Lane alleging that Lane had attempted to rape Purington's daughter on September 18, 1917. The woman testified that the accused had come to the house while her father was away and asked her how she had hurt her hand. Lane then grabbed her, threw her on the couch and put his

hand up her underclothes. She also stated he offered her money but when she refused he left. Bearing in mind that such actions were more in tune with a charge of indecent assault, the court still acted upon the original charge of an attempt to rape. The accused denied the action. Eventually, the Crown entered a Stay of Proceedings on December 17, 1917.²¹ But the crux of the matter is that it was virtually impossible to prove legally an attempt to rape when the accused is said to have merely placed his hand under the woman's underclothing.

Although indecent assault on a female and attempted rape were classified as separate offences under the Criminal Code, people continued to be charged with indecent assault or assault with intent to rape. On December 19, 1901 a twenty-seven year old man in Regina was sentenced to one year imprisonment and a fine or in default of payment an extra six months for an assault with intent to commit rape.²² David Shaw was found guilty of such a charge in June 1912 in Banff, Alberta. As a result, he received three months with hard labour to be served at the Lethbridge Provincial Jail.²³ Furthermore, several of the indecent assault cases read like cases of rape, attempted rape, carnal knowledge or attempted carnal knowledge of a girl fourteen years of age. And this was not the sole result of the charge being reduced to the lesser offence of indecent assault on a female because the latter formed the basis of many original charges and were processed through the justice system in such terms.

The courts often seemed to expect some physical evi-

dence of penetration as proof that an indecent assault had actually taken place. On April 16, 1913 a complaint was laid against Mike Tustanowski who had allegedly committed an indecent assault on a female two days earlier at Canmore, Alberta. The girl told the preliminary inquiry that the accused had pulled up her dress and attempted to have intercourse with her. The doctor who examined the girl at the Canmore hospital told the Court that he had paid particular attention to the girl's sex organs and checked for specific physical evidence of an attack. He noted that he had found no inflammation, no internal injuries, no blood clots and the hymen was intact. Thus he concluded, "In my opinion, there could possibly have been no sexual intercourse at any-time taken place on the part of the girl." For his part, the accused did not know what had happened as he was so drunk he did not regain his senses until nine o'clock the following morning.²⁴

In a somewhat similar case, Robert Whillams appeared before G. Sanders at a Calgary Police Court sitting on March 20, 1914 on a charge of indecent assault on a young girl. Using her own words, the four and a half year old girl told her mother that the accused had "put his finger through her." When she examined her daughter, the mother found her chafed so she applied a boracic acid solution to the affected areas. However, the examining doctor told the court that he could find no evidence to suggest that an assault had taken place.²⁵ And a March 31, 1921 sitting of a Court of Appeal at Vancouver obviously did not believe what happened to a woman

on October 13, 1920 was indecent assault. Stating that there was "no real evidence of any physical assault" or any evidence to suggest that what had happened was indecent in its nature, they allowed the appeal and quashed the conviction.²⁶ Evidently some degree of physical evidence was desired to prove indecent assault.

There were also a number of occasions where the more serious charge of rape, attempted rape, carnal knowledge, attempted carnal knowledge or incest was reduced to the lesser offence of indecent assault on a female. On December 11, 1911 for example, Christian Torguson appeared before Calgary Police Magistrate G. Sanders on a charge of carnal knowledge of a female under fourteen years of age. When Sanders committed the accused to stand trial he noted that he had forgotten to change the charge to read indecent assault. Despite this statement, Torguson was not charged with indecent assault but was tried for attempting to have carnal knowledge. And on February 22, 1912, the accused was found guilty of that offence and sentenced to eighteen months imprisonment with hard labour in addition to twenty lashes.²⁷ In this particular case, the charge should have been reduced to indecent assault but the trial judge chose to ignore the magistrate's recommendation and the accused was convicted of a more serious offence.

Two years later, on July 23, 1913, John Cameron was charged with repeatedly trying to rape his fifteen year old daughter at Okotoks, Alberta during the month of July. Upon examining the girl, one doctor found evidence of a ruptured

hymen and concluded that the only way that this could have happened was through "the insertion of some foreign body" into the vagina. He hypothesized that such an occurrence could have come from the insertion of a finger. A second doctor concurred with this opinion. When the accused appeared before William Walsh of the Supreme Court of Alberta the charge had been changed to indecent assault. Subsequently, Cameron was found not guilty.²⁸

In a similar manner, a July 19, 1915 charge of carnal knowledge of a female under fourteen was amended to an indecent assault charge. Supposedly, the accused Thomas Fairburn had indecently assaulted the girl by throwing her on the ground, pulling up her clothes and getting on top of her.²⁹ And on January 15, 1917 a charge of incest laid against John Goodman was withdrawn and replaced with an indecent assault charge.³⁰ Perhaps by reducing the charge to a lesser offence, it was hoped that the number of convictions would increase. Quite possibly, the judges and/or juries were more inclined to convict if the charge was indecent assault rather than rape, carnal knowledge or incest, all of which carried heavier penalties. In fact, in one 1910 case in Western Canada, a man was found not guilty of indecently assaulting a four year old girl but was guilty of common assault.³¹

Since several of the indecent assault cases involved young girls, the courts encountered the problem of receiving the evidence of a girl of tender years not under oath. However certain sections of the Canada Evidence Act and the

Criminal Code could be used to help alleviate such a situation when it presented itself. Section 25 of the original Canada Evidence Act (1892-93) stated that in any legal proceeding where the court felt that the child did not understand the nature of the oath, the evidence could be received if he or she was sufficiently intelligent and understood the need of telling the truth. A person could not be convicted of a crime on this evidence alone and such evidence had to be corroborated by some other material evidence.³² Section 685 of the 1892 Code merely confirmed that this particular section of the Canada Evidence Act was applicable to cases of carnal knowledge, attempted carnal knowledge and indecent assault on a female.³³ And in a few instances, the question of receiving the unsworn testimony of a girl of tender years and the problem of sufficient corroborative evidence was used by defence lawyers when they appealed their clients' conviction for indecent assault.

One case which illustrates this very well is the 1912 Whistnant case in Alberta. After Whistnant had been found guilty of indecently assaulting a twelve year old girl, questions were raised as to whether there was enough corroborative evidence as required by section 685, now known as section 1003 of the Code, to warrant conviction. The facts of the case indicate that the only evidence directly related to the offence was given by the twelve year old complainant and her nine year old sister. Both their statements were admitted without the administration of the oath. Counsel for the defence argued that the evidence of the younger sis-

ter did not constitute the necessary corroboration. However, the appeal division of the Supreme Court of Alberta ruled that there was enough other material evidence to sustain the conviction. A neighbour testified under oath that the twelve year old had come to the house and told about the offence. Furthermore, a man who was with the neighbour told the court that he heard the accused say "I won't do it again." It was felt that such a statement contained an implied admission of guilt. Consequently Whistnant's conviction was affirmed by the court.³⁴

A similar set of circumstances came to the fore in a September 1913 trial conducted by Judge Swanson at the County Court Judges' Criminal Court held at Kamloops, British Columbia. The accused, McInulty was charged with having indecently assaulted a four and a half year old girl on August 3, 1913 at Merritt. At the trial without a jury, the judge admitted as evidence the unsworn testimony of the girl and her friend aged seven who had been with the former when the offence was allegedly committed. Although the judge felt there was insufficient corroboration to warrant a conviction for indecent assault, he did think there was enough evidence to find the accused guilty of common assault. The conviction was appealed. Interestingly, both the prosecution and the defence referred to the Whistnant case to support their respective arguments. Counsel for the accused felt that the McInulty case rested solely on the unsworn testimony of two young children, whereas the Whistnant case and two others had some other material evidence. The Crown

stated that the Whistnant case did not apply in this instance as the conviction had been for common assault, not indecent assault. He concluded: "In all cases, except indecent assault, the unsworn evidence of one child is sufficient to corroborate the unsworn testimony of another child." The appeal case was heard on January 7, 1914 at Victoria, B. C. Since the accused had been acquitted of indecent assault, then section 1003 was not at issue. The basic question to be answered by the appeal court was whether the unsworn evidence of one child could be corroborated by the unsworn testimony of another child within the context of the Canada Evidence Act. The court's response was negative and the conviction was overturned.³⁵

Judge Swanson encountered a similar problem in a case tried by him on October 14, 1913 at Kamloops. At that time he found the accused McGivney guilty of indecently assaulting a six year old girl. Once again, the question as to whether there was sufficient corroboration under section 1003 of the Code to warrant a conviction for indecent assault was raised. Swanson wondered if the conviction should have been for common assault. The appeal of his judgement was heard on January 6, 1914 by Macdonald, Irving, Martin, Galligher and McPhillips of the B. C. Court of Appeal. Irving noted that the case against McGivney rested on the unsworn testimony of the six year old which was corroborated by the evidence of another child. Although he conceded that there was sufficient proof that the assault took place, he wondered if there was enough corroboration to implicate the

accused. In his words, "Proof of the offence is one thing, identity of the offender is or may be quite a different thing." Martin mentioned that the accused's wife admitted that the child and her husband were in the bedroom the afternoon of the alleged offence. Such evidence, he felt, corroborated the unsworn testimony of the girl. And finally, Galligher noted that this evidence, in addition to medical evidence as to a disease contracted by the girl at the time the offence was said to have occurred, was sufficient corroboration. As a result the appeal was rejected and the conviction sustained.³⁶

The courts also expected some degree of corroborative evidence in cases of indecent assaults committed against adult females. In May 1898, Thomas Hiscox, the Town Inspector for Regina, was charged with indecently assaulting the complainant's wife of one month. Hiscox stated that he had gone to the complainant's house to serve a notice and found the wife home alone. He also claimed that he was in the house for a matter of minutes. The woman stated that he had assaulted her and had "borne himself improperly toward her on another occasion." A witness for the defence warned the court that they should not believe her as he had intercourse with her before she had married. Despite such statements, the case was dismissed because the principal corroborative witness had told people before he entered the courtroom that he was repaying a grudge he held against the accused.³⁷

Much like cases of rape and carnal knowledge, the

McGivney case reveals a concern as to when and how the complaint of the offence was made. Usually in cases of indecent assault, the complaint was laid one to two days after the alleged offence. However in the McGivney case, the complaint was not given until nearly two weeks after the offence had occurred. When the grandmother had been bathing the girl she noticed some inflammation and discharge and asked if she had hurt herself. The child said no and made no mention of the assault at that time. After her father was told of her condition, a doctor came to examine the child and a few days later she made a statement to her grandmother. At the trial, Swanson had admitted this statement as evidence of complaint.

Judge Martin of the appeal court was of the opinion that the complaint was not given at the first reasonable opportunity. The girl should have responded to her grandmother's question about who hurt her; but she did not. He felt it was dangerous to admit such evidence, and although he stated that some allowances in time delays could be made for children, Martin concluded that there should be no difference in the case of an adult or a child when the first reasonable opportunity was established. Judge Galligher disagreed with Martin. He argued that any lapse of time in a case of this nature had to be weighed against the age of the child. Perhaps she did not understand the full implications of the offence or was fearful of punishment. In any event, Galligher expressed the following opinion: "Lapses of times might be very serious in the case of a person of mature years, where the question of consent was involved, but in the case

of this child it must be regarded in a very different light."³⁸
Evidently, the youth of the child was to be taken into consideration when judging the first reasonable opportunity of complaint in a case of indecent assault.

Unfortunately, such a luxury was not afforded to indecent assault cases involving adult females. Despite any extenuating circumstances, women were expected to raise a 'hue and cry' immediately. The R. v. Chin Chong case of 1920 serves as a good illustration of this phenomenon. On November 2, 1920, Iwaza Tanaka laid a complaint against Chin Chong for indecently assaulting the complainant's wife on October 13, 1920 at Vancouver. The accused was found guilty by a police magistrate and fined \$200.00 or in default of payment, six months imprisonment. Mrs. Tanaka testified that while washing clothes for a woman in the basement of the woman's house, Chin Chong assaulted her. On the evening of that very day when her husband returned home she told him about the assault. Counsel for the defence argued that this was not the first reasonable opportunity to make a complaint. She should have told the woman whose house she was working in. The prosecution felt it was only natural for the first complaint to be made to her husband. The police magistrate decided to admit the complaint for two reasons. Since it was apparent that the woman could not speak English, he concluded that her complaint would have to be given to someone who spoke the same language--namely, her husband. And she had told him as soon as he arrived home. The admission of this complaint as evidence formed the basis of an appeal

heard on March 31, 1921 at Vancouver.

Once again, the defence lawyer argued that Mrs. Tanaka did not make a complaint at the first reasonable opportunity. The assault had allegedly occurred at work between nine and ten o'clock in the morning, yet she did not go home until after two o'clock in the afternoon. Thus there was ample time and opportunity for her to tell her employer. Counsel for the Crown noted that the offence had occurred four miles away from her residence and she told her husband immediately upon his arrival home. Dealing specifically with this issue, Judge McPhillips stated the evidence of the husband should not have been admitted. Such a mistake, coupled with the circumstances surrounding the assault, led him to conclude that there was insufficient evidence to support a conviction. The two other judges expressed similar opinions and as a result the conviction was overturned.³⁹ Evidently, if a woman did not tell someone about the assault immediately no matter what the circumstances, then her claim that she had been assaulted became highly suspect in the eyes of the court.

The evidence suggests that the courts used the wide variety of sentences afforded to them by the law. The maximum two year term of imprisonment was rarely meted out with sentences of a few weeks, a few months and over a year with or without hard labour appearing. At times, the confinement was accompanied by a dose of the lash.⁴⁰ When first suggested in 1869, the provision for whipping was to apply only in cases where the offender was under sixteen years of age.

One Member of Parliament, Mr. Campbell, argued that if the court decided to deal leniently with a boy who had committed an indecent assault on a female, then a flogging was better than a long term of confinement. However, after heated debates in the House of Commons as to the advantages and disadvantages of flogging the offender, the age proviso was dropped. Subsequently, anyone found guilty of committing the offence was liable to be whipped.⁴¹ Thus, the judges used their discretionary powers in their sentences prescribing shorter prison terms and the lash to any male irrespective of race, colour or age.

On May 1, 1890, the Macleod Gazette carried an account of a case in Toronto where a man was found guilty of assaulting his niece. Under the caption "Lashing a Human Brute," which reveals how the person was perceived, the paper noted that the prisoner had been sentenced to twenty-three months (one month short of the maximum allowable) and fifty lashes. Twenty-five lashes were to be administered one month after his arrival at prison, and the remaining twenty-five a month before his release.⁴² Obviously this would give him something to remember when he returned to society. Similarly, in 1896 a 'Chinaman' at Kamloops was sentenced to twenty-four lashes during each month of his three month term for assaulting a young girl. Favouring such a sentence, a B. C. newspaper reported: "One thing about the short sentence and stiff dose of lashes, he was out in time to tell his friends, if he had any, of his experience."⁴³ Even teenage boys were not immune to receiving such a sen-

tence. In the fall of 1904, Sidney Humber aged fourteen years, nine months was sentenced to nine months imprisonment in the Victoria Gaol and twelve lashes for indecently assaulting a female. At the same time, a sixteen year, eleven month old youth was sentenced to one year imprisonment and twenty-four lashes.⁴⁴

In May 1905, a judge in Regina used arguments similar to the ones expressed in the late 1860s and in the 1896 Kamloops' case when he sentenced a man who pleaded guilty to attempting to indecently assault a twelve year old girl a month earlier. The defence lawyer told the court that the accused, Joseph A. Stuart, had led a respectable and reputable life, and the lawyer blamed the attempted assault on the fact that his client had been drinking. Thus he asked for leniency. Arguing that in cases such as this a little corporal punishment was better than a long stay in prison, and wanting to make an example of Stuart, Judge Newlands sentenced the prisoner to six months imprisonment and ten lashes.⁴⁵ The sentences prescribed in several other cases of indecent assault indicate that Newland's approach of a relatively short prison term and some measure of corporal punishment was apparently held by other judges. In May 1910, a fifty-eight year old American miner was sentenced to eighteen months with hard labour and ten lashes.⁴⁶ A year later, John Hede received a six month term of confinement with hard labour and fourteen lashes for an indecent assault conviction.⁴⁷

At other times, the courts relied on a term of im-

prisonment and/or the option of a fine in cases of indecent assault. On September 29, 1893 a man charged with assaulting a woman was sentenced by a judge at Lillooet, B. C. to six weeks imprisonment with hard labour or \$10.00 plus court costs. He could not afford the fine so was sent to jail. On October 10 he escaped, but was recaptured ten days later. He escaped again on October 29 and voluntarily gave himself up on November 23. A week before Christmas he was discharged.⁴⁸ Ten years later, a man named Thomas Gerhardt was sentenced to one year at hard labour for indecently assaulting a girl in Regina sometime during October 1904. In reporting on the proceedings of the Supreme Court with regards to this case, the Regina Leader noted that a stay in prison would give Gerhardt "ample time to reflect on the evils of his ways."⁴⁹ A thirty year old 'Chinaman' was found guilty of indecently assaulting little girls and fined \$10.00 plus an additional \$10.00 in court costs in April 1905.⁵⁰ The next year, a man in Edmonton was fined \$30.50 or in default one month imprisonment with hard labour after he was found guilty of being drunk and molesting young girls on the streets. Harry Hatch was found guilty on a similar charge and was fined \$30.50 or two months imprisonment with hard labour.⁵¹ In January 1911, K. Tanaka, a twenty-seven year old married Japanese tailor, was sentenced to one month imprisonment for a conviction of indecent assault.⁵² All these cases covering the broad spectrum of sentencing possibilities show that the provision of a maximum penalty in the written law does not necessarily mean that it will be handed out.

Lacking a specific legal definition under the Criminal Code, indecent assault on a female was one of the most misunderstood legal phrases used in the late nineteenth and early twentieth centuries. Legislators and adjudicators perceived it as the initial stage in a natural progression to the more serious forms of sexual assaults; namely attempted rape and rape itself. Under such circumstances, the justice system was virtually forced to apply many of the same criteria used in these cases to cases of indecent assault. Since indecent assault was a prelude to intercourse then such matters as where the girl was touched, the issue of consent, complaint made at the first reasonable opportunity and corroboration were of importance. Thus, a charge and conviction for indecently assaulting a female was yet another way of protecting the chastity and purity of young girls who would, it was hoped, grow up to serve society as Christian wives and mothers.

But this perpetual insistence that the desired end to every indecent assault was intercourse reveals a basic misunderstanding of pedophilia. Perhaps Canadians had no concept of the term as it has come to be known. Pedophilic acts such as fondling, looking and showing were not perceived as faits complets but as a means to an end. However, if the legislators and the adjudicators in the early period had thought in different terms, then new light might have been shed on several indecent assault cases (which were really cases of child molesting) which appeared before the courts in Western Canada.

Ostensibly, the indecent assault category was an attempt in law to protect young girls from sexual encounters with males in the late nineteenth and early twentieth century. Every sexual assault committed except those which could be classified as cases of bona fide rape, attempted rape, carnal knowledge, attempted carnal knowledge and incest were placed under the general rubric of indecent assault on a female. But at a time when chastity was valued above life itself, every type of sexual activity directed towards females, including indecent assault, could only be viewed as eventually ending in sexual relations. Thus there can be little doubt that the classification of indecent assault in such a way represented another conscious effort by the legislators of the law and its implementors to protect and preserve female chastity.

FOOTNOTES

¹Canada, Acts of the Parliament of the Dominion of Canada Relating to Criminal Law (Ottawa: Queen's Printer, 1887), Section 41. Prior to the separation of the two offences there were convictions for assault with intent to rape. For example, a man in British Columbia was sentenced to two years imprisonment on May 16, 1887 for such an offence. "Criminal Statistics for the year ended September 30, 1888," Canada, Sessional Papers, Vol. XXIII (1890), Paper 6a, Table VII, "Pardons and Commutations," n. p. Then on July 27, 1888 a seventeen year old man was sentenced to four years at the New Westminster Penitentiary for a similar offence. "Criminal Statistics for the year ended September 30, 1890," Canada, Sessional Papers, Vol. 24 (1891), Paper 6g, Table VII, "Pardons and Commutations," n. p.

²Canada, Statutes of Canada (1890), c. 37, s. 12.

³Canada, Debates of the House of Commons, 10 April 1890, p. 3181.

⁴Canada, Criminal Code of Canada (1892), s. 259.

⁵Criminal Code Amendment Act (1909), Canada, Statutes of Canada (1909), c. 9, s. 2.

⁶A. Gigeroff, Sexual Deviations in the Criminal Law, Homosexual, Exhibitionistic and Pedophilic Offences (Toronto: University of Toronto Press, 1968), p. 63.

⁷Provincial Archives of British Columbia (hereafter PABC), Attorney General Papers, B. C. Provincial Police, Vancouver-Westminster Police Division, Reports received at Provincial Police office with notes of instruction, Vol. 1 (16 June 1899 - 7 December 1905), p. 178.

⁸Ibid., Miscellaneous Reports (1892-1942), Vol. 3, Regarding R. v. Hamilton, indecent assault (1906).

⁹District Court Records (hereafter DCR), Criminal (Calgary), File #13, Case: R. v. G. Van (1909), indecent assault on a female.

¹⁰Supreme Court Records (hereafter SCR), Criminal

(Calgary), File #101, Case: R. v. J. Forsyth (1912), indecent assault on a female.

¹¹DCR, Criminal (Calgary), File #196, Case: R. v. E. Fitzpatrick (1913), indecent assault on a female.

¹²SCR, Criminal (Wetaskiwin), File #1113, Case: R. v. H. Bruns (1915), indecent assault on a female. The accused stated that the girl came on to him so he played along.

¹³SCR, Criminal (Calgary), File #697, Case: R. v. A. Orr (1917), indecent assault on a female.

¹⁴Ibid., File #962, Case: R. v. P. Boltara (1920), indecent assault on a female.

¹⁵Ibid., File #627, Case: R. v. F. Hall (1916), indecent assault on a female.

¹⁶Ibid., File #846, Case: R. v. J. Lapier (1919), indecent assault on a female.

¹⁷Ibid., File #689, Case: R. v. P. Demerie (1917), entering the premises with the intent to commit an indecent assault.

¹⁸Ibid., File #942, Case: R. v. J. Levine and L. Blank (1920), indecent assault on a female.

¹⁹"Report of Superintendent G. Sanders, Commanding E Division, Calgary, for the year ending 1901," in "The Annual Report of the Commissioner of the North West Mounted Police for the year ending December 1901," Canada, Sessional Papers, Vol. XXXVI (1902), Paper 28, p. 65.

²⁰"Report of Superintendent G. Sanders, Commanding E Division, Calgary, for the year ending 1902," in "The Annual Report of the Commissioner of the North West Mounted Police for the year ending December 1902," Canada, Sessional Papers (1903), Paper 28, p. 37.

²¹SCR, Criminal (Calgary), File #702, Case: R. v. Lane (1917), attempted rape.

²²"Criminal Statistics for the year ended September 30, 1903," Canada, Sessional Papers, Vol. XXXVII (1904), Paper 17, pp. 22-25.

²³DCR, Criminal (Calgary), File #156, Case: R. v. D. Shaw (1912), indecent assault with intent to rape.

²⁴SCR, Criminal (Calgary), File #183, Case: R. v. M. Tustanowski (1913), indecent assault on a female.

²⁵Ibid., File #325, Case: R. v. R. Whillams (1914) indecent assault on a female.

²⁶R. v. Chin Chong, B. C. Law Reports, Vol. 29 (1919-1921), p. 530.

²⁷SCR, Criminal (Calgary), File #72, Case: R. v. C. Torguson (1911-1912), carnal knowledge.

²⁸Ibid., File #228, Case: R. v. J. Cameron (1913), attempted rape on his daughter.

²⁹Ibid., Criminal (Wetaskiwin), File #1176, Case: R. v. T. Fairburn (1915), carnal knowledge.

³⁰Ibid., Criminal (Calgary), File #631, Case: R. v. J. Goodman (1916), incest and indecent assault.

³¹DCR, Criminal (Calgary), File #117, Case: R. v. G. Weaver (1910), indecent assault on a female. The accused received a suspended sentence.

³²"An Act Respecting Witnesses and Evidence," Canada Evidence Act (1892-93), s. 25.

³³Canada, Criminal Code of Canada (1892), s. 285, later s. 1003.

³⁴R. v. Whistnant, 20 Canadian Criminal Cases, p. 322 and 5 Alberta Law Reports, p. 211.

³⁵R. v. McInulty, 19 B. C. Law Reports (1913-1914), pp. 109-113.

³⁶R. v. McGivney, 5 Western Weekly Reports (October 1913 - March 1914), pp. 1181-1188.

³⁷"Committed For Trial," Regina Leader, 19 May 1898, p. 8 and "Hiscox Cleared," Regina Leader, 23 June 1898, p. 1.

38 R. v. McGivney, pp. 1181-1188.

39 R. v. Chin Chong, pp. 527-530.

40 The following cases serve as but a few examples. William Bastlett received a one year term of confinement and twenty-four lashes in October 1904. PABC, Attorney General Papers, Inspector of Gaols, List of Prisoners under sentence in Victoria Gaol, Vol. 16 (January 1902 - October 1910), n. p. A. Macie was sentenced to six months imprisonment on July 8, 1910. Ibid., Vol. 17 (November 1910-1914), n. p. John Hede received a six month term with hard labour and fourteen lashes in May 1911. Ibid., List of Prisoners under sentence in Nanaimo Gaol, Vol. 2 (February 1911 - August 1914), p. 9. Grant Smith was sentenced to three months imprisonment with hard labour on March 14, 1918 for common assault after he was found not guilty of indecent assault. DCR, Criminal (Calgary), File #307, Case: R. v. G. Smith (1918), indecent assault on a female.

41 See Gigeroff, Sexual Deviations in the Criminal Law, for a discussion of the debates, p. 65.

42 "Lashing a Human Brute," Macleod Gazette, 1 May 1890.

43 PABC, Newspaper Clippings, File #1, Crimes and Criminals, "Jail and 72 Lashes Stemmed Crime Wave," Clipping dated 16 March 1932.

44 PABC, Attorney General Papers, Inspector of Gaols, Victoria Gaol, Record and description list of all prisoners received in Victoria Gaol, Vol. 12 (November 1890 - February 1910), p. 95.

45 "Gets Six Months and Ten Lashes," Regina Leader, 10 May 1905, p. 3.

46 Arnold Robinson, 58 years old, miner, married, attempted rape, indecent assault, sentenced to eighteen months and ten lashes. PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 9.

47 Ibid., Vol. 2 (February 1911 - August 1914), p. 9.

⁴⁸Ibid., B. C. Provincial Court (Lillooet), Charge and Sentence Book (29 September 1893 - 7 November 1902), Vol. 2, n. p.

⁴⁹"Supreme Court Proceedings," Regina Leader, 23 November 1904, p. 1.

⁵⁰PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 95.

⁵¹"Police Court News," Edmonton Journal, 30 April 1906, p. 9.

⁵²PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 122.

CHAPTER V

'THE ABOMINABLE CRIME OF BUGGERY'

The linking of marriage, sex and procreation into a shrine-like institution by Canadians in the late nineteenth and early twentieth century drew a rigid line between acceptable and unacceptable sexual behaviour for both man and women. Advice manuals suggested that acceptable sexual activity or 'natural sex' be confined to the marriage bed, and condoned solely for the purpose of procreation. Conversely, those acts which were nonprocreative in intent such as masturbation, oral sex, anal sex, same sex contact and even marital sex with no intention to propagate, were by definition, classified as unnatural sex. Although all these acts generated varying degrees of hostility, both in terms of the written law and public pronouncements, the most unnatural of all the forms of unacceptable sexual behaviour was 'the abominable crime of buggery' which was 'wickedly' committed 'against the order of nature.'

Due to legal and attitudinal confusion over terminology, the words buggery and sodomy were used interchangeably to refer to one or all of the following activities: anal intercourse between male and female, homosexual anal intercourse and sexual intercourse with an animal. The latter activity was also called bestiality. But however and

whatever term was used, Canadians, and Western Canadians were no exception, viewed the perpetrators of such acts as sinners, criminals and perverts; persons to be hated, feared and prosecuted, while the act itself was an abomination against God, the details of which were unfit for publication. But such attitudes were not new. They merely solidified in the last decade of the nineteenth century as the need to distinguish between acceptable and unacceptable sexual behaviour became more intense in the Western Canadian experience.

Of the three acts, that is heterosexual anal intercourse, homosexual intercourse and sex with animals, adjudicators, legislators and the public expressed the most concern over sexual contact between males. In fact, it was generally assumed that all sexual encounters between males, short of anal intercourse, were merely the preliminary activities before the perverse final act. During the 1890s and 1900s Canadians in the West, indeed throughout the country, apparently had no concept of sexual preference or the lifestyle which accompanied the choice of sexual partners from the same sex. Aversion, not understanding was their response.

For example, George Markland, the Inspector General of Upper Canada resigned in 1838 after he was accused of and investigated for allegedly having sexual relations with young men, including several soldiers. The housekeeper of the west wing of the Parliament Buildings in Toronto where Markland's office was located told an inquiry conducted by

the Executive Council that she suspected there were "queer doings" going on. At a time when the legal penalty for such an offence was death, Markland was not even criminally prosecuted.¹ Two decades later, Father Clement Frachon, a priest of the Diocese of London and President of Assumption College in Windsor, Ontario was allegedly caught for having "interfered" with twelve male students at the school sometime during the 1859-1860 semester.² And the Marquess of Lorne who served as Canada's Governor General from 1878 to 1883 was said to have had sexual preference for males rather than females.³

But if any one happening forged the identity of the homosexual⁴ as a sinful, immoral and perverse person in the minds of the public and adjudicators in Western Canada, it was the negative publicity which surrounded the trials of Oscar Wilde during the mid-1890s in London, England. And although the words buggery and sodomy were still used interchangeably, the identification of a sodomite - a male person who possessed same sex attraction - with Oscar Wilde easily enabled society to label any male with same sex tendencies. It did not matter whether a male had committed only one homosexual act by choice or circumstance, or whether he actually was a homosexual; now he was immediately identified and identifiable as 'an Oscar Wilde type' by Victorian and Edwardian Canadian society.

In 1895 Wilde was in the midst of a brilliant literary career which spanned the English channel to encompass the European continent. Although rumours of Wilde's sexual

escapades with young men permeated Victorian social circles, people dismissed them as the pose of the aesthete, rather than the actual practise of the writer. One person however, was not willing to dismiss Wilde's idiosyncrasies. The Marquess of Queensberry disliked Wilde's friendship with his son, Lord Alfred Douglas. When Douglas refused to end his association with Wilde, his father left a card addressed "To Oscar Wilde posing as a somdomite. (sic)" at Wilde's social club on February 18, 1895.⁵ After Wilde received the card, he consulted with his lawyers and decided to press charges against Douglas' father for criminal libel.⁶ The ensuing trials which stemmed from this action did much to forge the identity of the homosexual in Victorian minds.

The trial against the Marquess began on April 3, 1895. When questioned about letters he had written to Douglas, Wilde defended them as examples of his extraordinary literary talents. And when counsel for the defence asked Wilde whether he had ever kissed a certain male servant of the Douglas household, Wilde replied that he had not because the boy was ugly. He did not mention the boy's sex as a reason for not having kissed him. In his criminal suit against the Marquess, Wilde had become the defendant. As a result of the damaging evidence against Wilde, Mr. Justice Henn Collins found the Marquess of Queensberry not guilty of criminal libel because Wilde had in fact posed as a sodomite.⁷

A few hours later Wilde was arrested. Although

Judge Collins had noted that Wilde had posed as a sodomite, he was not charged with sodomy or attempted sodomy. He was charged under section 11 of the 1885 Criminal Law Amendment Act which dealt with gross indecencies committed in public or private. In effect, this section defined all male homosexual encounters short of anal intercourse as illegal acts of gross indecency. A conviction for such a charge carried the possibility of two years imprisonment with hard labour.⁸

The trial against Wilde began on April 26, 1895. Once again Wilde was questioned about his association with Lord Alfred Douglas. The prosecution even attempted to get Wilde to admit that the phrase "the Love that dare not speak its name" which appeared in a poem written by Douglas was reference to unnatural love between men;⁹ Wilde discounted such claims. Although Wilde was found not guilty on several counts of the charge, the jury could not agree on the verdict in other counts. As a result, Wilde was subjected to yet another trial to hear the charges against him.

The final trial opened on May 20. The prosecution discussed the same issues and used a similar line of questioning which had been displayed in the earlier trials. After a few hours of deliberation the jury found Wilde guilty under section 11 of the Criminal Law Amendment Act. When Judge Wells sentenced Wilde to the maximum imprisonment term of two years with hard labour he stated: "It is no use for me to address you. People who can do these

things must be dead to all sense of shame, and one cannot hope to produce any effect upon them. It is the worst case I have ever tried."¹⁰ What had begun as a simple attempt to clear his name in April 1895 resulted in a prison term for Oscar Wilde by May of the same year.

The result in Canada as elsewhere was that the sodomite was identified with Oscar Wilde and vice versa. Three years after the celebrated trials, C. S. Clark insinuated in his work Of Toronto the Good, A Social Study, The Queen City as It Is that there were several Oscar Wilde types to be found in Canada. An eighteen year old boy had told Clark that he had blackmailed a member of Canada's judiciary after he had caught the judge in a compromising position with a bellboy at a hotel. Another boy told him about two merchants in Toronto who had reputations for accosting members of their own sex in order to have improper relations with them. Clark also noted that some of Canada's more prominent members of society could be implicated much like Oscar Wilde if the bellboys at the various hotels throughout the country chose to tell the public what they knew.¹¹ Once again, the concern on such matters was related to specific acts of same sex contact rather than the overall concept of sexual preference.

A pre-World War case in Saskatchewan reveals many of the same opinions found in Clark's brief account of the Oscar Wilde phenomenon in Canada. It seems that on May 13, 1912 Dr. A. E. Kelly of Swift Current wrote the Attorney General of Saskatchewan in Regina concerning the alleged

immoral conduct of an unnamed doctor in the town. Subsequent to these letters the doctor's name was revealed as being C. McArthur. Supposedly as early as 1910 McArthur's partner had warned the medical council not to permit this man to become a doctor as he had practiced some rather peculiar sexual habits. Several people claimed that he was "an Oscar Wilde" and had a revolting yet unnamed sexual habit with women. One woman told her husband that McArthur was known to drug women who came to him for medical examinations, and they could not attest to what happened while they were under the influence of the drugs.¹² Less than a year later Kelly wrote the Attorney General on the same matter. This time he referred to a certain doctor (later identified as McArthur) as being a sex pervert. He also noted that several young men had informed him "they have had to make this man keep straight as he would try to get hold of their genitals."¹³ But it was somewhat difficult for the Attorney General to take action on the information in Kelly's letters because he did not identify the mysterious doctor in print. However, the contents of the letters serve as examples of one man's attitude towards so-called sexual perversions.

But perhaps the most interesting aspect of Kelly's complaint is the fact that as a medical doctor Kelly displayed a lack of knowledge of late nineteenth and early twentieth century scholarly works on same sex attraction which appeared in Europe, primarily in Germany. These studies promoted congenital or pathological concepts of

homosexuality and the homosexual rather than the sinful and immoral aspects of sodomy and the sodomite. As early as the 1860s a German lawyer Karl Heinrich Ulrichs, a professed homosexual, popularized the theory of what he classified as the 'third sex.' According to Ulrichs, the male homosexual had been born with the soul of a female in a masculine body while the reverse was true for their female counterpart. Such people constituted the 'third sex.' And since it was natural for them to be attracted to members of their own sex, he argued that the legal category of unnatural act or offence was incorrect. But Ulrichs' theory was based upon a misconception. He assumed that a man could not love another man unless he had a feminine soul. Similarly, a woman could not love another woman unless she possessed a masculine soul. Such assumptions, as one of Ulrichs' critics was to point out, merely begged the question of same sex love.¹⁴

Although the basic premise of Ulrichs' theory, the congenital nature of homosexuality, would later appear in the works of other sexologists (most notably Havelock Ellis' Sexual Inversion, first published in 1898), the popularity of the 'third sex' idea was relatively short-lived. By 1879 it was being replaced by the medical model of homosexuality of which another German, Dr. Richard Von Krafft-Ebing, was one of the leading exponents. Having read Ulrichs' works in 1866, Krafft-Ebing was well acquainted with his theory. In fact, he credited Ulrichs with having drawn his attention to the homosexual phenomenon.¹⁵ But Krafft-

Ebing did not confine himself solely to the study of same sex love, choosing instead to include it in his general work on sexual aberration where he expounded a medical approach.

Published in 1886, Psychopathia Sexualis was a collection of case histories of what Krafft-Ebing classified as sexual abnormalities. Since he considered heterosexual intercourse for the purpose of propagation to be natural and normal, all sexual activities which were nonprocreative in intent were by definition unnatural and abnormal. Thus cunnilingus, fellatio, self or mutual masturbation, and of course homosexual encounters were considered abnormal sexual activities. Although he referred to the congenital theory of homosexuality in certain cases, Krafft-Ebing concluded that sexual perversion had its basis in some form of physical and/or mental disease. In fact, he specifically attributed homosexuality to a breakdown, possibly a hereditary defect, in the central nervous system. Thus homosexuality was no longer the by-product of sin and immorality but the consequence of some pathological illness.¹⁶

If and when Canadians were discussed in European or British studies on sexual matters, it was usually in terms of sex education in Canada or the apparently declining birthrate of English Canadians.¹⁷ No mention was made of homosexuality in Canada. Even one of the earliest studies on homosexuality in North America barely referred to the Canadian experience. Written by Edward Prime Stevenson under the pseudonym Xavier Mayne and published in 1908, The Intersexes: A History of Similisexuality as a Problem in So-

cial Life, contained case histories of several homosexuals, both men and women. Stevenson had to obtain a physician's approval before he was allowed to read any European works on homosexuality, and then he encountered severe difficulties when he tried to get his book published in the United States. Eventually he had to get it published in Italy. But despite such drawbacks, Stevenson was able to conclude:

of similisexual intercourse in the United States of America and in Canada, no possible doubt can exist, if the intelligent observer has resided there and has moved about in various social grades and circles of the larger cities.¹⁸

Apparently Dr. Kelly's ignorance on such matters was not an isolated phenomenon. In fact, if the Canadian medical profession was aware of the theories and works of Ulrichs, Krafft-Ebing, Stevenson and other sexologists, its membership did not take the time to comment on them in the medical journals. Generally speaking, those articles dealing with sexual matters which appeared in the Canadian Lancet, Canadian Medical Association Journal and Canadian Journal of Public Health, concentrated on birth control and abortion or the symptoms and treatment of syphilis.¹⁹ Even late nineteenth and early twentieth century Canadian sexual advice manuals, which were usually American publications or Canadian editions of the American counterparts, did not pay particular attention to the same sex or similisexual phenomena. And much like the articles which appeared in the medical journals, these works extolled the virtues of sexual restraint, marriage and procreative sex as well

as the evils of masturbation. Homosexual activity was not singled out for examination but was classified as an example of a dangerous sexual perversion which was synonymous with all forms of nonprocreative sex. B. G. Jefferies and J. L. Nicholas, authors of Canada's Household Guide (1894) and Searchlights on Health: Light on Dark Corners, A Complete Sexual Science and Guide to Purity and Physical Manhood (1897) believed that all sexual perversions were actually "diseases of the will" and should not be regarded from a religious or moral standpoint. Therefore, the only way to overcome these abnormal sexual desires was through the "power of suggestion, right living, and inspirational occupation."²⁰

However, it would appear that neither Canadian social nor medical attitudes towards homosexuality and the homosexual in the 1890s and the 1900s were greatly influenced or altered by scholarly works on the subject. It was the trials of Oscar Wilde which adversely cemented the homosexual identity in the minds of Canadians. Male same sex attraction was synonymous with the sodomite and the act of sodomy. Although this clarification was certainly true in terms of societal perceptions, the criminal law and criminal justice system in Canada still suffered from the legal confusion over terminology which had its origin in the English common law. The written law continued to place homosexual encounters and sex with animals under the general rubric of the ill-defined words, buggery and sodomy. And only very rarely does the specific term bestiality appear in the court

records.

The first statute which dealt with buggery in terms of secular law appeared in the 1530s during the reign of Henry VIII. Prior to that time, matters of sex and morality were under the jurisdiction of the ecclesiastical courts which had succeeded in broadening the pre-Christian concern over unnatural offences (including buggery) to include a punishment inflicted by God on those people who engaged in such activities. But according to the statute of 1533 "the detestable and abominable vice of buggery committed with mankind or beast" was made a felony, punishable by death, and loss of property; the offender was also to be denied benefit of clergy.²¹

Originally this statute was to be a temporary measure lasting until the final day of the next Parliament, but in 1540 it became perpetual. Eight years later (1548) under Edward VI's rule the penalties for the offence were reduced so that the property of the offender was no longer affected. In 1553 Mary I abolished all of those offences which had been made felonies since April 21, 1509 (the first day of the reign of Henry VIII). Then in 1563 Elizabeth I revived in full the 1533 statute because its repeal had apparently led to an increase in the incidence of buggery throughout the realm.²²

But what exactly was 'the detestable and abominable vice of buggery committed with mankind or beast'? The confusion over the legal definition of the term can be traced to the early seventeenth century when Sir Edward Coke, who

had been the Chief Justice of the King's Bench, wrote the third part of Institutes of the Laws of England. In the work, he used the words buggery and sodomy interchangeably as the title of Chapter 10, 'Of Buggery, or Sodomy' would seem to suggest, but in the chapter he defined buggery as:

a detestable, and abominable sin, amongst christians not to be named; committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.

This was somewhat different than the intent of the original statute in 1533 which appeared to include acts of heterosexual anal intercourse. However, a complete reading of Coke's chapter reveals that in his mind the word 'mankind' referred specifically to males and did not include females. Thus, in one sense of the term buggery could be committed by a male person with another male or with an animal, and in another sense it could be committed by a female with a 'brute beast.' Thus anal intercourse between male and female did not form any part of Coke's interpretation of buggery.²³

Other English legal writers referred to buggery in a variety of ways. In his work, The History of the Pleas of the Crown, Sir Mathew Hale echoed the sentiments of Coke.²⁴ William Hawkins replaced the word buggery with sodomy and wrote that "All unnatural carnal copulations, whether with man or beast, seem to come under the notion of Sodomy" in his book, A Treatise of the Pleas of the Crown.²⁵ Sir William Blackstone neatly sidestepped the

problem of definition in the Commentaries on the Laws of England by not using either term. As far as he was concerned it was "the infamous crime against nature, committed either with man or beast."²⁶ In the early nineteenth century Edward East used the word sodomy in his Treatise of the Pleas of the Crown, and defined it as "Carnal knowledge committed against the order of nature, by man with man, or in the same unnatural manner with woman, or by a man or woman in any manner with beast."²⁷ And in 1819 William Russell quoted East's definition verbatim in A Treatise on Crimes and Indictable Offences.²⁸ Thus since the passage of the original statute the definition of buggery could or could not include acts of heterosexual anal intercourse. Interestingly, all the writers ranging from Coke to Russell referred to sexual acts with animals as forming part of their definition of buggery.

The confusion implanted by the English writers carried over to the Canadian setting. According to the first Canadian statute dealing with buggery passed in 1869, the crime of buggery could be committed with mankind or animal. This was similar to the definition found in the Offences Against the Person Act passed eight years earlier in England.²⁹ And although the terminology was the same, the penalties were not. Anyone found guilty of committing buggery in England was liable to life imprisonment or a minimum of ten years in confinement.³⁰ In Canada, the maximum term of imprisonment was the same but the minimum was substantially

reduced to two years.³¹ Then in 1886 the Canadian proviso for a minimum sentence was dropped.³² But despite the differences in punishment, the English act and Canadian statute used the word buggery as the inclusive term - that is, with mankind or animal. However, when G. W. Burbidge's Digest of the Criminal Law of Canada appeared in 1890, the word sodomy was used as the inclusive term. This is not surprising as Burbidge based his work on Sir James Stephen's Digest of the Criminal Law published in 1876. Following in the tradition of Hawkins, East and Russell, Stephen defined sodomy as carnal knowledge by a man with another male or woman per anum, or carnal knowledge of an animal. What appeared in Burbidge's Digest was the same, word for word.³³

Total confusion accompanied the relevant statutes in the 1892 Criminal Code. Contained under the general category of 'Offences Against Morality' and classified as an "unnatural offence," the Code returned to Coke's dual word usage of buggery and sodomy. Both terms were used to describe carnal knowledge "with a human being or with any other living creature" per anum. For example, the Code referred to the more serious offence of actually completing the act as buggery,³⁴ while an attempt to perpetrate the offence was considered to be an attempt to commit sodomy.³⁵ Even the form of the indictment was misleading. The accused could be charged with "unlawfully, wickedly and against the order of nature" committing "that detestable and abominable crime of buggery" with another person or an animal.³⁶ In fact, in December 1920, the defence counsel in a Leduc, Al-

berta case objected to the wording in a complaint laid against his client because it was not sufficiently specific. Alex Sowayak was charged with committing "buggery either with a human being or any other living creature" on November 5, 1920. Upon reading the depositions, it becomes obvious that it was a case of buggery with a mare or, to be more specific, a case of bestiality. However, this particular aspect of the offence had not appeared in the charge and thus the defence objected.³⁷ And although sodomy was dropped from explicit word usage in the Code by 1920, and buggery was the inclusive and exclusive term, the index to the Code reveals that sodomy and buggery were still cross-referenced.³⁸ The term bestiality does not appear.

The criminal justice system in Canada and Western Canada clearly reflected the inconsistencies of definition found in the written law. At times buggery was used as the inclusive term and at other times sodomy was used. If reference was being made to carnal knowledge with an animal, the particular animal might be mentioned or it might simply be referred to as bestiality. Despite the fact that it was never legally defined, there were a number of instances where the word bestiality was used to describe the offence. But unless the offence was clearly listed as buggery with a male, female or animal; or as sodomy with male, female or animal, or as bestiality, it is virtually impossible to ascertain what type of unnatural offence was committed. For example, in April 1907 a fifty-one year old miner in British Columbia was charged with committing "the abominable crime

of buggery" with a cow which in the strict sense of terminology actually constituted bestiality.³⁹ Fortunately, the gaol report in this particular case noted that some type of animal was involved; otherwise the true nature of the offence would be lost if it was merely listed as buggery.⁴⁰ For the most part, however, the reports do not provide such information and are content to use buggery and to a lesser extent sodomy as the descriptive terms. Even the criminal statistics compiled by the federal government according to judicial districts are of little help because the offences are placed under the general category of 'Sodomy and Bestiality.'⁴¹

One can only speculate as to whether the Western Canadian setting in the late nineteenth and early twentieth century provided a more fertile environment for unnatural sex. What was the reality in the logging and mining communities, the railroad camps and the threshing gangs? Traditionally historians have assumed that the predominantly single male population, which was so much a part of the Western frontier experience, relieved their sexual frustration through frequent visits to prostitutes.⁴² Despite the fact that these males did visit brothels and have sex with the women and young girls brought to their remote camps for such a purpose, such encounters were not the only means of sexual relief. Indeed, written reports such as police records, gaol reports, criminal statistics, magistrates' charge books, court cases and even newspapers reveal that several charges of buggery, sodomy and bestiality or attempts to

commit these offences were processed through the criminal justice system in Western Canada from 1890 to 1920.

In terms of the written law, some of the provisions used in cases of serious sexual assaults against females (rape and carnal knowledge) can be found in cases involving unnatural sex. For example, it was widely thought that no one under the age of fourteen could commit rape or buggery.⁴³ In fact, a conviction of an eleven year old boy for committing an 'unnatural act' on a seven year old boy was overturned by a Nova Scotia appeal court in 1898 because the accused was supposedly incapable of committing the act.⁴⁴ Legislation passed in 1841 stipulated that in cases of buggery, rape and carnal knowledge of young girls there was no need to prove emission of seed to constitute the act of carnal knowledge. Proof of penetration to the slightest degree was all that was necessary.⁴⁵ But unlike rape and carnal knowledge of females under fourteen where consent or lack of it was an issue, it was of no importance in cases of buggery. In fact, even consenting married adults who engaged in anal intercourse were liable to prosecution under the strict sense of the law.⁴⁶ Obviously, the issue of consent was irrelevant in cases where animals were involved.

Whereas women were expected to raise a 'hue and cry' immediately after they had been assaulted, the situation was somewhat different in buggery cases. Since consent was inconsequential it naturally followed there was no need to register a complaint at the first reasonable opportunity.⁴⁷ If two people, whether they were two males or a male and fe-

male, were consenting parties to the act, then it was unlikely that they would report themselves to the authorities. Even if a wife did not consent, she would not press charges against her husband. Implicit in the marriage contract was the idea that once married a woman was subject to her husband's sexual whims. As in the case of consenting adults, it is hard to imagine a person who indulged in bestiality turning himself or herself over to the police.

Charges of this nature, whether they were classified as buggery, sodomy or bestiality, were usually laid after someone had seen the person or persons involved committing the offence and then reported it. A case heard before the Wetaskiwin division of the Alberta Supreme Court serves as a good example of this phenomenon. At that time John Harrington was charged with attempted buggery (which carried a maximum penalty of ten years imprisonment)⁴⁸ on an eleven year old boy at Provost on December 31, 1914.

Supposedly the accused had given the boy seventy-five cents and pushed him into a water closet located behind a tailor shop where he had attempted to commit the offence. One witness, Frank Washburn, told the court that he saw the accused grab the boy and push him into the closet. He further stated that he heard the boy crying and after talking to Edward Evanson, another witness, went to get the police. When the police constable, A. F. Barnes arrived he did not hear any noise as he approached the closet. However, he opened the door and took the boy out. Barnes found the accused with his pants down below his knees and in the of-

ficer's own words, "I saw the penis of the prisoner and also put my hand there to make sure and found that it was erect."⁴⁹

A similar set of circumstances can be found in a 1920 Alberta case involving bestiality. On December 18, 1920 a complaint was laid by Constable P. W. Rawson of the Alberta Provincial Police at Leduc against Alex Sowayak, charging him with committing bestiality a month earlier. This charge was issued after Frederick Hook of Calmar told the police what he had seen on the evening of November 5, 1920. Hook said he went by the house of the accused and saw him in the barn, standing on a box, having carnal knowledge with a horse. When he confronted the accused, Sowayak denied the act. Although Hook told a number of people what had happened, he did not go to the authorities until a week later after these people told him his silence in the matter was foolish. If Hook had not happened into the barn during the time the offence was allegedly committed, Sowayak's actions would have gone undetected and no charge would have been made.⁵⁰

In one particular case in British Columbia the police went so far as to place themselves in the position of being the third party witnessing the offence. As a result of such an action, Delip Singh was charged with attempting to commit buggery on a fifteen year old boy on July 20, 1918. The facts of the case were as follows. Prior to the charge being laid the accused had asked the boy to go for rides with him on a couple of occasions. Apparently the boy became suspicious of the accused's intentions and told his father. He then went to see the police and told them what

he and his son suspected. The police encouraged the boy to see him one more time. Instead of going for a drive they went to the stable owned by the boy's father where, unbeknown to the accused, two policemen were hiding in the loft. Once there the accused suggested unnatural sex which amounted to buggery, gave him fifteen cents, spread out a blanket, told him what to do, unbuttoned his pants (the accused's) and grasped the boy. At that moment the policemen grabbed Delip Singh and found that he had an erection. They immediately charged him with an attempt to commit buggery. He was subsequently convicted on October 24, 1918 by County Court Judge Cayley. When the appeal case was heard in November 1918 at Vancouver, counsel for the defence contended that the police had trapped his client. However this did not form the basis of the appeal. Instead the lawyer alleged that up until the time the police revealed themselves, the actions of the accused merely constituted 'preparations' and not an attempt to commit the offence. The five judges hearing the appeal unanimously believed that an attempt had been made to commit buggery. As a result, the appeal court sustained the conviction.⁵¹

For the most part, it is difficult to obtain any factual information about this type of offence. There are very few cases of buggery and bestiality contained in the law reports. This is even more true when one comes to examine the reports from 1890 to 1920 in Western Canada. In fact, the Delip Singh case of 1918 is the only one to appear in published form. Although listings of the offence and at

times the vital statistics of the offender are available from other sources no further information is given. Most of the cases and the factual data surrounding them are locked in the unpublished and as yet uncatalogued criminal court cases processed through the various provincial Supreme and District courts. But even this source is by no means complete. The file might only contain the name of the accused, the complainant, the nature of the offence and the date it was allegedly committed. Such information was no better than what was provided in the annual reports of the federal and provincial police, the gaol and penitentiary reports, or procedure books.

Attempts to cross-reference the cases mentioned in the legal sources with reports in the Western Canadian newspapers are for the most part futile. The papers displayed an aversion to publishing detailed accounts or even mentioning cases which apparently involved any form of unnatural sexual activity. When one does find an account in the media it reinforces the idea that such encounters were considered to be 'detestable and abominable.' For example, the Medicine Hat Weekly Times of May 23, 1895 had front page coverage of a case in Regina where three men appeared before Inspector Starnes and Justice of the Peace Henry Le Jeune on charges of committing sexual acts "of an unnatural character." Under the caption "HORRIBLE CRIME AT REGINA: Arrest of Prominent Citizens in Connection with a Most Revolting Offence," the paper reported that one of the men was a prominent member of society and a manager of a large dry goods, grocery and

wholesale liquor firm in Regina. Once again, the information in this case was obtained from two boys who allegedly witnessed the offence through a basement window.⁵² And in another instance, the August 9, 1906 issue of the Edmonton Journal noted that two men had been charged "with heinous offences of character unfit for publication." In fact, the courts were closed for the hearings of the case.⁵³

But whether the offence was called buggery, sodomy or bestiality it is evident that in the eyes of the public and the written law, homosexual encounters and sex with animals were nauseating and repulsive acts committed against God, nature and society while the offender was a horrific sinner and criminal. However, despite such notions, the available information suggests that the judges rarely resorted to the maximum penalty of life imprisonment for buggery or the ten year maximum for attempted buggery. During the late nineteenth and early twentieth century the penalties for a buggery/sodomy conviction ranged from shorter sentences of six, twelve, eighteen and twenty months to longer sentences of two, three, five, six, ten and fifteen years.⁵⁴ In one instance, a fifteen year sentence with hard labour was imposed on two single men in British Columbia, aged twenty-eight and twenty, who were found guilty of buggery on June 29, 1891.⁵⁵ Another case in the same year saw a twenty-five year old and a thirty-five year old man sentenced to fifteen years imprisonment after being found guilty of committing sodomy by the presiding judge at the November 23, 1891 sitting of the Assizes court at Victoria.⁵⁶



When the offence was specifically referred to as bestiality, the courts still appeared to be reluctant to hand out the maximum penalty under the law. On February 7, 1898 for example, Charles Harris was sentenced to five years imprisonment by Judge Spinks at Kamloops for bestiality.⁵⁷ During World War One, a Russian man was sentenced to two years and three months with hard labour by a judge at Fort St. George for a similar offence.⁵⁸ Despite the evidence of an eye witness in the Alex Sowayak case involving a charge of bestiality, Sowayak was found not guilty by Justice Scott of Wetaskiwin district of the Alberta Supreme Court on February 14, 1921.⁵⁹

Although the law made no provision for whipping to be part of the punishment for a buggery/sodomy or bestiality conviction, a dose of the lash accompanied a term of confinement on at least one occasion. On June 6, 1912 Allan Wilson was sentenced to three years imprisonment plus twelve lashes by a judge at New Westminster. Wilson's crime was referred to as buggery in a list of prisoners confined in the New Westminster Gaol.⁶⁰ However, the record keeping in this case and in others is somewhat suspect. For example, a conviction for the undefined act of gross indecency or indecent assault on a male carried the liability of being whipped.⁶¹ Therefore it is quite possible that Wilson's crime was in actual fact one of these two particular offences, but was mistakenly recorded as buggery.

At times, people charged with buggery/sodomy were convicted of attempted buggery/sodomy which carried a lesser

penalty.⁶² For example, Henry Crannan was charged with committing buggery with another male at Banff, Alberta on April 15, 1908. Although the evidence suggests that the offence was completed in toto, the presiding judge at the June 2, 1908 sitting of the Calgary district court found Crannan guilty of attempted buggery and sentenced him to three years.⁶³ A few years later Robert Wilson was charged with sodomy but was found guilty of attempted sodomy. He was sentenced to six months with hard labour for his crime.⁶⁴

A similar range of sentences is evident in those cases where a person was originally charged and subsequently convicted for attempted sodomy/buggery. Shorter sentences ranged from three, six, nine and twelve months with hard labour while longer terms of imprisonment included two, three, five and the maximum of ten years.⁶⁵ In one particular case heard in January 1898, the defendant pleaded guilty to a charge of attempted buggery at Fairview, British Columbia. A judge sentenced him to five years imprisonment. Although he had admitted his guilt, the maximum penalty was not given.⁶⁶ However, when Sam Davis pleaded not guilty on a similar charge before the Calgary division of the Alberta Supreme Court on May 21, 1912 he was found guilty and sentenced to ten years.⁶⁷ Despite the fact there was the overwhelming evidence of two eye witnesses, one of them being a police officer in the Harrington case, Judge W. Walsh sentenced the accused to three years imprisonment on February 23, 1915 for attempted buggery.⁶⁸ Once again the judges in Western Canada were displaying their powers of discretion.

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Even though the offence and the offender were thought to be detestable, wicked and despicable, at times the criminal justice system exercised its prerogative of mercy much as it did in cases involving sex assaults against females. For example, a sixty year old man who had been sentenced to two years imprisonment on November 13, 1889 for committing an "unnatural offence" received an official pardon on September 21, 1891.⁶⁹ Two men who had received fifteen year sentences on November 12, 1891 for sodomy had their sentences commuted to seven years with remission for time served, on December 7, 1895.⁷⁰ In a rather peculiar combination of crimes, a twenty-two year old man was sentenced to four years imprisonment on February 20, 1903 for robbery with violence and attempted sodomy. On August 10, 1906 his sentence was commuted provided that his relatives took him home and looked after him.⁷¹ Three years later, a man serving a prison term of between two and five years in the Manitoba Penitentiary was released on a ticket of leave. In this case the person had served a little over half of his sentence before he was released.⁷²

But the length of the sentence, whether it be long or short, is not really the issue. The very fact that prison terms were given for sex acts which were thought to be unnatural suggests that law and society possessed little understanding or concept of sexual activity due to circumstance or preference. Unnatural sexual activity threatened traditional concepts of married love and procreative sex. Consequently, unnatural sex had to be socially and legally

condemned.

Classified as one of, perhaps the most unnatural of all the forms of unnatural sexual activities, homosexual encounters between males were viewed as sins against God, crimes against nature and offences against society. Attitudinal confusion over what was buggery/sodomy in the minds of the public was somewhat alleviated with the trials of Oscar Wilde. As a direct result, the perpetrator of same sex activities between males was a sinful, immoral and criminal sodomite. But this narrow classification was not expressed in the written criminal law or used by the criminal justice system. In the legal sense of the terms, buggery/sodomy still referred to heterosexual anal intercourse, homosexual anal intercourse and sex with animals. Despite the continued use of generalizations by the law, the person who committed the crime of buggery or sodomy was still a sinner and a criminal. However, the equating of Wilde with a sodomite to produce the labelling phrase 'an Oscar Wilde type' in 1895, did not result in any noticeable increase in the sentences meted out by the judges in Western Canada.

The existence of same sex relationships and sex acts which were nonprocreative in intent threatened the very foundations of a society based on married love and procreative sex. Consequently, society made few attempts to come to some understanding of the Oscar Wildes in Canada, particularly those in the West. Instead they were feared and despised by society, while at the same time they were being persecuted and prosecuted under the law. Scholarly

works did little to change these perceptions. Acceptable sexual activity had to be protected and attempts were made to eradicate or at least limit unacceptable sexual behaviour. But in spite of the social and legal restraints homosexual activity did not dissipate. It continued to challenge traditional sexual morality which was so prevalent in the Western Canadian experience from 1890 to 1920.

FOOTNOTES

¹For a good discussion of the Markland case see R. Burns, "'Queer Doings', Attitudes Towards Homosexuality in Canada," The Body Politic, 29, Our Image, no. 6 (December 1976/January 1977), pp. 4-7.

²Proposed History Projects, Canadian Gay Archives, Toronto, Ontario, no. 40.

³Ibid., no. 28. The reference given by the Canadian Gay Archives is as follows: J. Cowan, Canada's Governors-General 1867-1952 (Toronto: York Publishing Co., 1952), pp. 24-37.

⁴Although the author does not refer specifically to the Canadian situation, the evidence indicates that the Wilde trials were extremely important in forming Canadian perceptions of homosexuality. B. Hansen, "The Historical Construction of Homosexuality," Radical History Review (Spring/Summer 1979), p. 68.

⁵This misspelling has gone down in history as such.

⁶A brief summary of the Wilde trials, similar to the one presented in the text of this paper can be found in B. Aymar and E. Sagarin, A Pictorial History of the World's Greatest Trials from Socrates to Eichmann (New York: Bonanza Books, 1977), pp. 193-198.

⁷Ibid.

⁸J. Weeks, Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present (London: Quartet Books, 1977), p. 6.

⁹The poem was entitled "Two Loves."

¹⁰Aymar and Sagarin, A Pictorial History of the World's Greatest Trials from Socrates to Eichmann, p. 199. The judge also stated: "the crime of which you have been convicted is so bad that one has to put stern restraint upon one's self to prevent one's self from describing, in language which I would rather not use, the sentiment which

must rise to the breast of every man of honour who has heard the details of these two terrible crimes."

¹¹C. S. Clark, Of Toronto the Good, A Social Study, the Queen City as It Is (Toronto: Toronto Publishing Co., 1898), p. 90.

¹²Saskatchewan Archives Board (hereafter SAB), Attorney General Papers, Saskatchewan Provincial Police, K Case Files. File #518, Immoral Conduct: Letter to the Attorney General from Dr. A. Kelly dated 13 May 1912.

¹³Ibid., Letter dated 10 March 1913.

¹⁴H. Kennedy, "The 'Third Sex' Theory of Karl Heinrich Ulrichs," S. Licata and R. Petersen (eds.), Historical Perspectives on Homosexuality (New York: Haworth Press, 1981), pp. 103-113. Ulrichs did not use the term homosexual in his studies. He referred to a heterosexual male as 'dioning' and a homosexual male as 'urning.' Similarly 'dioningin' and 'urningin' were used in reference to their female counterparts. The word homosexual was used by K. M. Benkert.

¹⁵Ibid., pp. 107-108.

¹⁶Dr. Richard Von Krafft-Ebing, Psychopathia Sexualis (New York: G. Putnam's Son, 1965 edition, original edition 1886). For a discussion of Krafft-Ebing and his theories see J. Lauriten and D. Thorstad, The Early Homosexuals Rights Movement 1864-1935 (New York: Times Change Press, 1974); V. Bullough, "Homosexuality and the Medical Model" in V. Bullough (ed.), Sex, Society and History (New York: Science History Publications, 1976), pp. 173-185, and H. Ellis, Sexual Inversion (Philadelphia: F. A. Dairs, third edition 1918).

¹⁷See for example, H. Ellis, Sexual Inversion, and the same author's The Task of Social Hygiene (Boston: Houghton Mifflin Co., 1912). In the latter work, Ellis refers to sex education in Ontario for children above the age of ten. p. 253.

¹⁸X. Mayne, The Intersexes: A History of Similisexuality as a Problem of Social Life in J. Lauriten and D. Thorstad, The Early Homosexuals Rights Movement 1864-1935, p. 36.

¹⁹See A. McLaren, "Birth Control and Abortion in Canada" Canadian Historical Review, LIX (September 1978),

pp. 319-340. Also an examination of the indexes of the periodicals mentioned in the text reveals that very few articles appeared on the subject of homosexuality.

²⁰Quoted in V. Bullough, "Homosexuality and Its Confusion with the 'Secret Sin' in Pre-Freudian America" in V. Bullough, Sex, Society and History pp. 112-125. See also M. Bliss, "Pure Books on Avoided Subjects: Pre-Freudian Sexual Ideas in Canada," Historical Papers (1970), pp. 89-108.

²¹25 Henry VIII, c. 6

²²In order of their appearance in the text, the statutes dating from 1548 were as follows: 2-3 Edward VI, c. 29; 1 Mary, c. 1 and 5 Elizabeth, c. 17. A similar discussion of the statutes can be found in A. Gigeroff, Sexual Deviations in the Criminal Law: Homosexual, Exhibitionistic, and Peodophilic Offences in Canada (Toronto: University of Toronto Press, 1968), p. 15, fn. no. 4.

²³Sir Edward Coke, The Third Part of the Institutes of the Laws of England, 1644 edition (New York and London: Garland Publishing Co., 1979 edition), Chapter 10 "Of Buggery or Sodomy," For an interpretation of Coke see Gigeroff, Sexual Deviations in the Criminal Law, pp. 7-12.

²⁴Hale stated that a woman could be found guilty of buggery with an animal under the statute. Quoted in Gigeroff, Sexual Deviations in the Criminal Law, p. 10.

²⁵W. Hawkins, A Treatise of the Pleas of the Crown quoted in ibid.

²⁶W. Blackstone, Commentaries on the Laws of England quoted in ibid., p. 14.

²⁷E. East, A Treatise of the Pleas of the Crown quoted in ibid., p. 10.

²⁸W. Russell, A Treatise on Crimes and Indictable Offences quoted in ibid.

²⁹"Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind, or with any animal" Offences Against the Persons Act (1861), 24-25 Victoria, c. 100, s. 61, Canada, Statutes of Canada (1869), c. 20, s. 63.

³⁰Canada, Offences Against the Person Act (1861), 24-25 Victoria c. 100, s. 61.

³¹Canada, Statutes of Canada (1869), c. 20, s. 63.

³²Canada, Revised Statutes of Canada (1886), 157, s. 1.

³³According to Stephen, "Every one commits the felony called sodomy, and is liable upon conviction thereof, to penal servitude for life as a maximum, and to penal servitude for ten years as a minimum, punishment who (a) Carnally knows any animal; (b) Being a male, carnally knows any man or any woman (per anum)." J. Stephen, Digest of the Criminal Law of Canada (Toronto: Carswell Co., 1980 reprint; original edition 1890), Chapter XIX, Article 213.

³⁴55-56 Victoria, c. 29, s. 174, Canada, Criminal Code of Canada (1892).

³⁵55-56 Victoria, c. 29, s. 175, ibid.

³⁶During the late nineteenth and early twentieth century every indictment issued for the crime of buggery and attempted buggery included these words.

³⁷Supreme Court Records (hereafter SCR), Criminal (Wetaskiwin), File #1662, Case: R. v. A. Sowayak (1920), buggery.

³⁸Canada, Criminal Code and Other Selected Statutes of Canada (1920). When the listing for sodomy was checked in the index, it said "see buggery"--p. 39.

³⁹Provincial Archives of British Columbia (hereafter PABC), Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, Record of Prisoners, Vol. 1 (November 1893 - February 1911), p. 100. On May 6, 1915 Mark Kulick was sentenced to two years and three months hard labour by Judge Calder at Fort St. George for the crime of bestiality. No mention was made as to the type of animal. Ibid., New Westminster Gaol, Return of Prisoners confined, Vol. 7 (June 1914 - October 1917), p. 49.

⁴⁰See the discussion of the Sowayak case on page 155 of this chapter. Although the ensuing case occurred a few months after the last year of this study, it serves as yet

another example of the problem. On July 8, 1921, John McEwan of Vancouver, British Columbia appeared before the Wetaskiwin District Court on the following charge: "With a certain heifer calf, wickedly and against the order of Nature did have a venereal affair, and then and there unlawfully, wickedly, and against the order of nature, with the said heifer calf, did commit and perpetrate, the detestable and abominable crime of Buggery." District Court Records, (hereafter DCR), Criminal (Wetaskiwin), File #1750, Case: R. v. J. McEwan (1921), buggery.

⁴¹The federal statistics for the years ending 1890-1920 can be found in Canada, Sessional Papers. The number of the paper changed in each volume of these collected papers.

⁴²J. Gray, Red Lights on the Prairies (Toronto: Macmillan, 1971) and J. Bedford, "Prostitution in Calgary, 1905-1914," Alberta History (Spring 1981), pp. 1-11.

⁴³W. Tremear, The Criminal Code and the Laws of Criminal Evidence in Canada (Toronto: Canada Law Book Co., 1902), Part XIII, s. 174, p. 126.

⁴⁴R. v. Hartlan, 2 Canadian Criminal Cases (1898), n. p.

⁴⁵"An Act for consolidating and amending the Statutes in this province relative to Offences Against the Person" 4 and 5 Victoria (1841), c. 27, s. 18, Canada, Consolidated Statutes of Canada (1859). The following year an act stipulated that a conviction for assault with intent to commit rape or with the intent to commit 'the abominable crime of buggery' could result in up to three years with hard labour at Kingston Penitentiary or up to two years in another place of confinement. "An Act for better proportioning the punishment to the offence, in certain cases." 6 Victoria (1842/43), c. 5, s. 5, Canada Consolidated Statutes of Canada (1859).

⁴⁶W. Tremear, The Criminal Code and the Laws of Criminal Evidence in Canada: "Unlike rape, sodomy may be committed between two persons, both of whom consent, and even by husband and wife." (p. 126).

⁴⁷However, in the late 1920s the Ontario court of appeal overturned a conviction on a charge of rape because the boy did not make his complaint until one month after the offence had allegedly occurred. This was much like the arguments which were used in cases involving sexual assaults against women. R. v. Elliot, 49 Canadian Criminal

Cases (1928), p. 302. The case is mentioned in A. Giger-off, Sexual Deviations in the Criminal Law, p. 103.

⁴⁸"Everyone is guilty of an indictable offence and liable to ten years imprisonment who attempts to commit the offence mentioned in the last presiding section." This referred to section 174 of the Criminal Code which was the crime of buggery. Canada, Criminal Code of Canada (1892), 55-56 Victoria, c. 29, s. 175.

⁴⁹SCR, Criminal (Wetaskiwin), File #1004, Case: R. v. John Harrington (1914), attempted buggery. Although Harrington pleaded not guilty, he was found guilty by a judge alone and sentenced to three years imprisonment.

⁵⁰Ibid., File #1662, Case: R. v. Sowayak (1920), buggery. See also DCR, Criminal (Wetaskiwin), File #1750, Case: R. v. J. McEwan (1921), buggery. A complaint was laid against McEwan charging him with buggery with a cow after the owner of the cow noticed there was something wrong with it. Upon giving a statement in which the accused admitted his guilt, he was sentenced to two years less one day imprisonment by Judge William Lees on August 2, 1921.

⁵¹R. v. Delip Singh, 26 B. C. Law Reports (1917-1919), pp. 390-396.

⁵²"HORRIBLE CRIME AT REGINA: Arrest of Prominent Citizens in Connection with a Most Revolting Offence," Medicine Hat Times, 23 May 1895, p. 1.

⁵³"Serious Police Charges," Edmonton Journal, 9 August 1906, p. 4.

⁵⁴For example: a six month sentence was imposed on J. Storm by Police Magistrate Williams at Vancouver on November 30, 1907: PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Vol. 5 (October 1895 - October 1910), n. p. J. Evans received a twelve month sentence for a buggery conviction on June 21, 1906. Ibid., G. Strickland received eighteen months imprisonment. Ibid., Vol. 7 (June 1914 - October 1917), p. 20. E. Woons received an eighteen month sentence on April 4, 1912. Ibid., Victoria Gaol, List of Prisoners under sentence in Victoria Gaol, Vol. 17 (November 1910-1914), p. 95. DCR, Criminal (Wetaskiwin), File #1750, Case: R. v. J. McEwan (1921), buggery. The accused received a sentence of two years less one day. On July 27, 1899, John Bow was sentenced to three years imprisonment. PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Vol. 5 (October 1895-October 1910), n. p. Five year sentences were popular in

1908, 1911, 1912 and 1914; Ibid., n. p., Ibid., Vol. 7 (June 1914 - October 1917), pp. 1 and 3. A ten year sentence was given to a man born in India by Judge McInnes in Vancouver during September 1910: Ibid., Vol. 5 (October 1895-October 1910), n. p.

⁵⁵Ibid., Victoria Gaol, Record and description list of all prisoners received in Victoria Gaol, Vol. 12 (November 1890 - February 22, 1910), p. 8.

⁵⁶"Criminal Statistics for the year ended September 30, 1896," Canada, Sessional Papers, Vol. XXX (1897), Paper 8d, p. 244-245.

⁵⁷PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 5 (October 1895 - October 1910), n. p.

⁵⁸Ibid., Vol. 7 (June 1914 - October 1917), p. 49.

⁵⁹SCR, Criminal (Wetaskiwin), File #1662, Case: R. v. Sowayak (1920), buggery. See also DCR, Criminal (Wetaskiwin), File #1750, Case: R. v. J. McEwan (1921), buggery. Although McEwan admitted to buggery with a cow he was sentenced to two years less one day imprisonment.

⁶⁰PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 6 (November 1910 - May 1914), p. 123. See also John Wheaton's punishment for a buggery conviction on October 2, 1906, twenty lashes: Ibid., Vol. 5 (October 1895 - October 1910), n. p.

⁶¹Canada, Revised Statutes of Canada (1906), c. 146, s. 206 and Canada, Criminal Code of Canada (1892), c. 29, s. 260.

⁶²The maximum penalty for attempt to commit sodomy/buggery was ten years imprisonment. Canada, Criminal Code of Canada (1902), s. 175 and Canada, Criminal Code of Canada (1906), s. 203.

⁶³DCR, Criminal (Calgary), File #10a, Case: R. v. H. Crannan (1908), buggery. The accused was sentenced to three years imprisonment for attempted buggery.

⁶⁴PABC, Attorney General Papers, Inspector of Gaols, Nanaimo Gaol, List of Prisoners under sentence in Nanaimo Gaol, Vol. 2 (February 1911 - August 1914), pp. 58-60. The

prisoner had been committed to trial on December 30, 1912.

⁶⁵See for example the following cases. On June 4, 1906 Frank Clarke was sentenced to three months imprisonment by Police Magistrate Williams at Vancouver: PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 5 (October 1895 - October 1910). Bram was sentenced to six months by Judge Howay at New Westminster in September 1917: Ibid., Vol. 7 (June 1914 - October 1917), p. 110. On September 16, 1915 a man was sentenced to twelve months imprisonment: Ibid., p. 59. See also SCR, Criminal, (Wetaskiwin), File #1004, Case: R. v. J. Harrington (1914), attempted buggery, sentenced to three years imprisonment.

⁶⁶PABC, Attorney General Papers, B. C. Provincial Court (Fairview), Police Charge Book, Vol. 1 (1897-1908), p. 76.

⁶⁷SCR, Criminal (Calgary), File #85, Case: R. v. S. Davis (1912), attempted buggery.

⁶⁸Ibid., Criminal (Wetaskiwin), File #1004, Case: R. v. J. Harrington (1915), attempted buggery.

⁶⁹"Criminal Statistics for the year ended September 30, 1891," Canada, Sessional Papers, Vol. 25 (1892), Paper 7e, Table VII, "Pardons and Commutations," n. p.

⁷⁰"Criminal Statistics for the year ended September 30, 1896," Canada, Sessional Papers, Vol. XXXI (1897), Paper 8d, pp. 245-246. Both men were serving their sentence in the Manitoba Penitentiary.

⁷¹"Criminal Statistics for the year ended September 30, 1906," Canada, Sessional Papers, Vol. XLI (1906-1907), Paper 17, Table VII, "Pardons and Commutations," n. p.

⁷²"Criminal Statistics for the year ended September 30, 1909," Canada, Sessional Papers, Vol. XLIV (1910), Paper 17, Table VII, "Pardons and Commutations," n. p.

CHAPTER VI

INDECENT ASSAULT ON A MALE

AND GROSS INDECENCY

During the late nineteenth and early twentieth century every male who participated in some form of sexual activity with another male, whether it was consensual anal intercourse, mutual masturbation, oral sex or the mere touching of the genital area, was identified as a sodomite and liable to be prosecuted and punished under the Canadian criminal law. Specific acts of homosexual anal intercourse were ostensibly restricted by sections 174 and 175 of the 1892 Criminal Code. Section 174, which dealt with the more inclusive crime of buggery, stipulated that a conviction for homosexual anal intercourse carried the possibility of life imprisonment,¹ while section 175 stated that any male found guilty of attempting to commit the act was liable to a prison term of ten years.² All other sexual contacts between males, short of anal intercourse, were included in the sections dealing with the legally undefined offences of indecent assault on a male and gross indecency. A conviction for either of these two offences carried a substantially reduced maximum prison term of five years for gross indecency,³ and ten years for indecent assault on a male.⁴ The offender was also liable to be whipped in both instances.

Since there was no legal definition as to what con-

stituted either offence, charges of indecent assault on a male or gross indecency were laid if there seemed to be insufficient evidence to warrant a charge of buggery or attempted buggery. Similarly, if the judge and/or jury were hesitant to convict a person on a more serious charge, a conviction for one of the two lesser offences could be given. It made little difference to the law or to the adjudicators whether or not the homosexual activity occurred in private and was between two consenting male adults; such encounters were socially and legally unacceptable. And throughout the 1890s and early 1900s the criminal justice system in Western Canada used the full range of possibilities afforded to it by the Criminal Code to legally restrict all sexual contact between males.

Prior to 1869 the offence of attempted buggery/bestiality was contained in one section of the criminal law, while assault with intent to commit buggery and indecent assault on a male formed another section. However, in 1869 indecent assault on a male, assault with intent to commit buggery and attempted buggery/bestiality were all placed in one section, more specifically chapter 20, section 64 of Canadian statute law. Adapted from chapter 100, section 62 of the English Offences Against the Persons Act passed in 1861, the Canadian statute stated that "whosoever" was found guilty under section 64 could "be kept in Penal servitude for any term not exceeding 10 years and not less than 3 years, or to be imprisoned for any term not exceeding two years, with or without Hard Labor."⁵ By using the term

"whosoever," it was quite conceivable that a female could be charged with indecent assault on a male under the strict sense of the law. However in 1886, chapter 157, section 2 restricted the offence to any male person who might commit an indecent assault on another male.⁶ This, in effect, created the first male homosexual offence within the context of the written Canadian criminal law.

With codification of the law in 1892, several substantial changes in the classification, definition and punishment of the three offences occurred. In 1869, attempted buggery, assault with intent to commit buggery and indecent assault on a male were classified as "Unnatural Offences." Then in 1886 they were placed under the "Offences against Public Morals" category. Under the Code they were included in the "Assaults" category and placed under the general rubric of "Offences Against the Person and Reputation." But more important, attempted buggery was separated from the other two offences. Subsequently, a male could be charged with attempting to commit buggery under a separate section of the law. A conviction for this offence carried a maximum penalty of ten years imprisonment.⁷ Assault with intent to commit buggery and indecent assault on a male were still classified together and a male person convicted under the pertinent section of the Code was liable to seven years imprisonment and to be whipped.⁸ Later in 1892, with little discussion of the topic, Parliament returned to the ten year maximum prison term for these two offences.⁹

Since the crime of buggery included heterosexual

and homosexual anal intercourse as well as carnal knowledge with animals, an assault with intent to commit buggery could be an assault with the intent to commit one of these very different offences. But as we have seen, according to the written law as of 1886, an indecent assault against a male could only be perpetrated by another male. This meant that one section of the Criminal Code encompassed both heterosexual and homosexual acts, while another section was exclusively homosexual in its intent. For the most part however, a charge of assault with intent to commit buggery referred to the specific act of homosexual anal intercourse while all other homosexual acts were prescribed as an indecent assault on a male.

What actually constituted an indecent assault on a male in late nineteenth and early twentieth century Western Canada? When Sir John Thompson told the April 10, 1890 sitting of the House of Commons that an indecent assault was "an assault made in pursuance of an attempt to commit a graver offence," he was referring to an indecent assault committed on either a male or a female.¹⁰ Thus, according to Thompson's statement an indecent assault on a male could be an assault made in pursuance of an attempt to commit 'the abominable crime of buggery.' However, since the offence was left undefined in the written law, it was subject to wide and varying interpretations by the authorities and the public. Thus, the term could be and was applied to simple acts of touching, fondling or oral sex and even to attempts to have carnal knowledge per anum which could be

legally classified as attempted buggery.

In late September 1912, for example, a complaint was laid against Frank Bere of Calgary, Alberta for allegedly indecently assaulting Cecil Matthews, a seven year old boy. Matthews told Police Magistrate Sanders, who presided over the Police Court hearing into the case, that the accused "made me smoke and laid me on the bed and he opened my pants down here and put his hand on my stomach and played with my dickey."¹¹ A few months later, Samuel Scott appeared before the District Court of Wetaskiwin on a charge of indecently assaulting a male under fourteen years of age on and prior to December 30, 1912. The ten year old boy told the court that on a number of occasions Scott had rubbed his penis between his legs and on the back part of him, but had not actually attempted anal intercourse. He further stated that he had performed and participated in oral sex with the accused.¹² Then in a December 1921 case in Calgary Fred Cunningham was charged with indecently assaulting Gordon Northfield, during which time the latter alleged that Cunningham had put his hands down his pants.¹³

Much like the situation involving reported cases of indecent assaults of females which were perpetrated against young girls, a large number of the indecent assault cases involving males were committed on young boys. This meant that the persons presiding over such cases were faced with the similar problem of admitting the evidence of a child not under oath and then accumulating sufficient corroboration of the child's evidence. The R. v. Iman Din case of 1910

is a prime example of such a dilemma. On September 21, 1910 Iman Din was convicted of indecently assaulting two boys on different occasions and, sentenced to ten years imprisonment by County Court Judge McInnes at Vancouver, British Columbia. Upon appeal of the conviction, counsel for the accused contended there was insufficient corroborative evidence to warrant a guilty verdict. The key witness for the prosecution was an eleven year old boy named Alexander Ashford whose evidence was received but not under oath. Although he appeared hesitant to answer questions posed by the prosecuting attorney, Alexander told the court that on one occasion he had gone to the house of the accused where the latter had locked the door, pulled the blinds, committed the offence (details not given) and gave him money. Alexander's six year old brother Joe was called to the stand to give corroborative evidence, but not under oath. His evidence contradicted that of Alexander. Joe contended that the occasion of the alleged offence was a month later than the date given by his older brother. Furthermore, Joe stated that he went to the accused's house with Alexander and it was his brother and not Iman Din who locked the door and pulled down the blinds.

The four judges who heard the appeal held diverse opinions on the corroboration requirement in the case. Judge Macdonald argued that the evidence of the younger brother contradicted Alexander's story to such an extent that it destroyed credibility. In a similar fashion, Judge Irving noted that the discrepancies between the two stories

were too great to allow for a conclusion that there was sufficient corroborative evidence. But Judge Martin and Judge Galliher expressed a different view. They argued that nearly every type of evidence admitted had some sort of discrepancy and this should not detract from the corroborative nature of the information. As a result of this problem over corroboration and the trial judge's incorrectly admitted evidence of an attempt by Iman Din to commit a similar offence with another male at another time, the appeal court ordered that a new trial be held.¹⁴

A similar problem can be seen in a January 1913 case heard before the district court at Wetaskiwin. On January 3, 1913, Carl Calvin laid a complaint against one of his farm hands, Samuel Scott, for indecently assaulting Calvin's nine year old adopted son, Edwin, on and before December 30, 1912 at Merna, Alberta. The boy, whose information was received but not under oath, told the preliminary enquiry that the accused had indecently assaulted him on several occasions, including oral genital contact at least once. Counsel for the defence attempted to destroy the reliability of the boy's testimony by asking him whether he knew the importance of telling the truth and what would happen if he lied.¹⁵ Edwin responded to both questions negatively. Although no one else witnessed the assaults, the boy's evidence was sufficiently corroborated by the sworn testimony of his father and grandmother. Carl Calvin noted that there seemed to be what he called "an undue intimacy" between Scott and his son. He became suspicious of

their relationship and decided to question Edwin. It was after this that he decided to lay a complaint against Scott. The boy's grandmother testified that she had overheard a conversation between the accused and Edwin which led her to conclude something strange was going on. Despite the fact that the corroborative evidence was apparently circumstantial and the boy's admission that he disliked Scott, the latter was committed to stand trial on a charge of indecently assaulting a male by the unsworn testimony of a nine year old boy.¹⁶

Once again, the evidence suggests that the courts meted out a variety of sentences provided to them under the letter of the law. A male convicted of committing an indecent assault on another male rarely received the maximum penalty of ten years imprisonment. Referring to the crime as "unprintable," "grave," and "unnatural," Judge Henderson sentenced James Egan to twelve months imprisonment in the common jail at New Westminster, British Columbia on August 1, 1906. In passing this sentence, Henderson noted:

I cannot help thinking that you are not wholly vicious, not a criminal by instinct or bringing up. I had thought of sending you to the penitentiary but on further consideration I do not think that will be necessary to bring about reform in your case. You have had time already to reflect upon it.¹⁷

Obviously, the judge was hoping that Egan would repent for the evils of his ways through a short prison term rather than a long term of confinement.

In other instances, the short prison term was ac-

accompanied by a dose of the lash. For example, on May 23, 1901 a twenty-seven year old man was sentenced to three years imprisonment and twelve lashes by a County Court Judge at Kamloops, British Columbia. Then on May 7, 1903, the flogging was remitted.¹⁸ And although Iman Din was sentenced to the maximum ten years imprisonment on September 21, 1910, it must be remembered that he had been found guilty of indecently assaulting two boys at different times.¹⁹ It was not a case of one specific act but at least two different occasions, and thus there was always the fear and possibility that the accused might have a disposition to committing the offence.

But a charge and conviction for indecent assault on a male was not the only avenue provided by the criminal law. In fact, the available evidence suggests that the legally undefined act of gross indecency was more prevalent than indecent assault on a male in late Victorian and Edwardian Western Canada. Perhaps this occurrence can be attributed to the fact that the maximum prison term for a gross indecency conviction was substantially less, or to be more specific, one half of the term for an indecent assault on a male conviction.²⁰ Since both offences lacked definition under the law, there is a distinct possibility that the phrases indecent assault on a male and gross indecency were used interchangeably by the legislators and adjudicators of the criminal justice system; or the inclusion of indecent assault on a male in the same section as assault with the intent to commit buggery in the Criminal Code could have led

the authorities to envision an indecent assault on a male as a prelude to committing the act of buggery. But whatever the reasons, cases involving the crime of gross indecency were processed through the courts in Western Canada from 1890 to 1920.

It was not until the year 1890 that the offence of gross indecency entered into Canadian statute law. When Sir John Thompson introduced the offence to the House of Commons on April 10, 1890 he stated that these offences were making an appearance in the country and the present law was ill equipped to handle them. Thus some provisions had to be made.²¹ Basically, the Canadian statute followed verbatim section 11 of the Criminal Law Amendment Act which had been passed five years earlier in England. In fact, the only difference between the Canadian and English statute was the maximum term of imprisonment allowable under the relevant section of each country's law. In England, a conviction for gross indecency carried the possibility of two years imprisonment,²² while in Canada the maximum was five years and the lash.²³ The longer prison term in Canada could possibly be attributed to Thompson's assertion that such offences were appearing in the Canadian scene. In any event, no changes were made in the Code of 1892 or the 1906 revisions. Thus from the last decade of the nineteenth century every male in Canada was liable to a prison term and to be whipped if he, in a public or private place committed, or was a party to, or procured or attempted to procure the commission of, "any act of gross indecency" with another male.²⁴

Unfortunately, however, the offence of gross indecency was never defined in or by the criminal law. When Sir Richard Cartwright asked Thompson to give a precise definition of the term to the House of Commons on April 10, 1890, Cartwright prefaced his question with the following statement:

I am quite aware that the particular crime which he [Thompson] has in mind is one which, I very much fear, has been on the increase in certain sections of society, and can hardly be punished too severely.²⁵

However, a careful reading of the House of Commons debates does not provide any insight as to what 'the particular crime' might be. And Thompson merely replied that it was virtually impossible to define the term gross indecency any better than what appeared in the English statute of 1885.²⁶ During the same discussion the Honourable Mr. Mitchell expressed his concern over the apparent lack of definition. Since the offence was obviously serious enough to carry the possibility of a five year prison term, he argued that a definition of the specific act of gross indecency should appear in the statute. There was also the possibility that without a definition the term gross indecency might mean various things in different parts of the country. In fact, Mitchell told the House there were at least fifty known kinds of gross indecency. Consequently, he advised Thompson "to put the exact name of the crime in the statute so that there may be no mistake about it."²⁷ But despite such warnings the offence of gross indecency remained undefined.

In fact, two years later, when the section of the Criminal Code dealing with gross indecency was being discussed in the Commons, Thompson still maintained that it was impossible to define these cases by any form of words.²⁸

As a result of this lack of definition, a simple touch, fondling, fellatio, attempted buggery and even complete homosexual anal intercourse were all referred to as acts of gross indecency by the authorities in Western Canada. On November 18, 1911 a twenty-seven year old Banff jeweller appeared before the Calgary district court on three charges of buggery allegedly committed with three different males on January 12 of the same year. John Ward, the accused, pleaded not guilty to all three charges; but he was found guilty on two counts of buggery and one count of gross indecency which never appeared in the formal charge.²⁹ Evidently a charge of buggery could lead to a conviction for gross indecency. In another case heard before the Calgary district court on June 11, 1914, Michael Noland was charged with committing an act of gross indecency with John Norman on the previous day. Although no mention was made as to the specific act in the complaint, the facts presented in the depositions reveal that it was a case of oral sex.³⁰ Thus, it is apparent that Mitchell's fears over a lack of definition for the offence were well-founded. The court's definition of gross indecency was indeed subjective. But as Thompson noted, it was better for the public to be protected by a law where the crime lacked definition than to have no protection at all.³¹

When provisions for punishment of gross indecency were being discussed in the House of Commons on May 25, 1892, one of the most respected legal minds in Parliament, the honourable member for Bothwell riding, chose to speak. Until this time David Mills had been relatively quiet in the discussion on the morality sections of the Criminal Code. However at this time Mills informed the House that 'Offences Against Morality,' of which gross indecency was now one (according to Canadian law), had originally been under the jurisdiction of the ecclesiastical courts. He argued that these so-called offences against morality were totally subjective and different from those offences which appeared in the statute book. Despite the fact that such offences were now classified as crimes according to secular law, Mills seriously wondered as to whether they should be punished by a long prison term. He concluded that they should not. Instead, he favoured whipping as a deterrent to committing the offence again. Mills' approach was much more akin to the concept of crime as a sin with a punishment of a short stay in prison and a dose of the lash. Thompson expressed no objection to the idea of a short prison term if it was accompanied by the whip.³² Whether or not judges in Western Canada were conscious of such thoughts, it is evident that they rarely handed out the maximum penalty and they used their discretionary powers in assigning terms of confinement and the amount of flogging to be inflicted.

Bearing in mind that the maximum prison term for gross indecency was five years and a whipping, lighter

sentences such as thirty days, three, six, twelve and eighteen months, without a provision for the lash can be found in the records.³³ Longer prison terms, once again without a flogging, included two, two and a half, four and even five years. The latter sentence was given to three men in British Columbia on May 4, 1907.³⁴ In one particular 1911 case in Alberta, a man charged with buggery which carried a life imprisonment proviso was found guilty of the lesser offence of gross indecency and received a three year term.³⁵ When a flogging did accompany the prison term, the number of lashes ranged from six, twelve, twenty, twenty-four and thirty.³⁶ Even an attempt to commit the act of gross indecency with another male could result in a prison term and the lash. On February 26, 1901, a forty-seven year old male received a two year, fifteen lash sentence from a Victoria Police Court Judge for committing such an offence.³⁷ Prior to the outbreak of World War One, Tah Sungh was sentenced to eighteen months with hard labour by a court in British Columbia on November 21, 1913. His sentence was to commence from the date of his arrest which was September 19 of the same year.³⁸

On several occasions the prerogative of mercy was exercised by the criminal justice system. Throughout the 1890s and early 1900s, prisoners had their terms of confinement either partially or totally commuted and/or the number of lashes remitted. For example, two men, one aged forty-five and the other aged eighteen, were found guilty of committing an undefined act of gross indecency with each other

by the judge of the Assizes Court at Vancouver, B. C. on May 15, 1894. Both men were sentenced to two years imprisonment and twenty-four lashes. Two months before they had completed their full stay in the British Columbia Penitentiary the men had twelve of their lashes remitted.³⁹

In another case, a forty year old man was sentenced to three years and thirty lashes for gross indecency by a Nanaimo County Court Judge on June 13, 1896. However, on June 24, 1898, fifteen of his lashes were remitted while he was serving his sentence in the New Westminster Penitentiary.⁴⁰

A few years later on October 15, 1901, a forty-seven year old male was sentenced to two years and fifteen lashes by a Police Court Judge at Victoria for merely attempting to commit an act of gross indecency with another male. The prisoner's total number of lashes was remitted on November 6, 1902.⁴¹

In yet another case, a fifty year old man was sentenced by a Supreme Court Judge at Red Deer, Alberta on February 1, 1907 to two years imprisonment and to be whipped twice with ten lashes on each occasion. While serving his sentence at the Provincial Penitentiary at Edmonton, the prisoner received word on July 30, 1908 that he would be released fifteen days after he received one whipping totalling ten lashes.⁴²

During the same year another man had his twelve month sentence, which he had received in July 1907 from a Supreme Court Judge at Medicine Hat, commuted on March 7, 1908.⁴³

These few examples illustrate that the system was not bound by the original sentence given in court.

Despite the inconsistencies in the judicial process,

it is readily apparent that law and society wanted to totally eradicate all sexual encounters between males. Conscious attempts by Canadian legislators to leave buggery, attempted buggery, indecent assault on a male and gross indecency without any concrete definition, enabled adjudicators in the West to place any sexual activity between males into whatever legal category they wanted. In fact, if they did not want to register a conviction for any of these offences, there was always the possibility that a charge and conviction for committing an indecent act could be laid. There can be little doubt that an indecent assault on a male and an act of gross indecency constituted indecent acts. The words were interchangeable.

Much like indecent assault on a male and gross indecency, the offence of indecent act was undefined by the criminal law. Prior to 1892 the specific term was "exposed his person," but the relevant section in the Criminal Code was changed to the more abstract phrase, 'an indecent act.' According to section 177 any person

who wilfully (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or (b) does any indecent act in any place intending to insult or offend any person was upon conviction, liable to a \$50.00 fine and/or six months imprisonment with or without hard labour.⁴⁴

The vagueness of this section made it easily applicable to a variety of actions.

On December 27, 1913 for example, a Bassano man was convicted for allegedly having suggested that a twelve

year old girl commit an indecent act with him. She told the court that the accused offered her fifty cents if she would consent to the act (unnamed) and when she refused he raised the amount to \$2.00. As a result of his conviction he was sentenced to six months imprisonment with hard labour.⁴⁵ Less than a year later a Strathcona man was charged with two counts of committing an indecent act; one with a nine year old boy and the other with an eleven year old girl. In the first instance the accused had masturbated in front of the boy, while in the second case he had exposed himself and used indecent language in the presence of Gladys Walters. Although he pleaded not guilty to both charges, the accused was sentenced to three months with hard labour on each count by the Calgary division of the Alberta Supreme Court.⁴⁶

A rather peculiar case was heard by the District Court of Wetaskiwin, Alberta in the summer of 1919. On August 21, 1919 Malcolm Smith was charged with committing an indecent act at the Providence General Hospital at Daysland. The complainant Alfred Chandler, an orderly at the hospital, stated that the accused had been under his care for approximately six weeks. He told the court the accused had the habit of repeatedly exposing his privates to anyone, male or female, who passed by. Chandler believed that Smith was not crazy but was mean and dirty. Another hospital worker, William James testified that it was a common occurrence for the accused to be indecently exposed. He further contended the accused was addicted to self-masturbation

and had seen him perform the act on numerous occasions. The department of the Attorney General decided not to press criminal charges against Smith, preferring instead to commit him to the Hospital for the Insane at Ponoka.⁴⁷

In these instances then, the term indecent act was applied to self-masturbation, indecently exposing oneself to either a male or female and to suggesting a person commit an indecent act. Yet the Frank Bere case of 1912 where the accused was charged with indecent assault on a male after a seven year old boy told his parents that Bere had fondled his penis could just as easily been classified as an act of indecency.⁴⁸ In a similar fashion, the argument is applicable to the 1912 Scott case where the accused rubbed his penis between a boy's legs.⁴⁹ Furthermore, the undefined act of gross indecency in addition to any attempt to commit that offence or indecent assault on a male obviously constituted the committing of an indecent act.

But concepts of indecency are relative to time and place. In the late nineteenth and early twentieth century several sexually orientated encounters amongst males such as exhibitionism, self-masturbation, fondling, rubbing, oral genital contact and anal intercourse were designated as either an indecent assault on a male, gross indecency or indecent act. Although the offences were never defined in statute or case law, implicit in the inclusion of an indecent assault on a male in the same section as assault with intent to commit buggery is the idea that the assault was a prelude to anal intercourse. If the ultimate aim of any in-

decent assault on a female was heterosexual intercourse then the goal of any indecent assault on a male was homosexual intercourse per anum. However, given the vagueness and ambiguity of the written law, an act of gross indecency could also include an attempt to commit homosexual anal intercourse.

In the 1890s and 1900s, Canadians in Western Canada lacked a concept of sexual preference and feared that all sexual encounters between males would lead to sexual intercourse per anum. According to law and society at the time there was no difference between consenting or nonconsenting sexual acts between males or if children were involved. As a result, consenting sexual acts between males, forcible acts with boys, oral genital contact, mutual and self-masturbation, exhibitionism and even sexual inquisitiveness were categorized under the general rubric of indecent assault on a male or gross indecency, and to a lesser extent indecent act. The perpetrator of such an act was a sinner, socially reprehensible and criminally liable no matter what the circumstances.

By not providing specific legal definitions of these terms, the criminal justice system in the West could and did use the full spectrum of the open-ended federal legislation afforded to them in their attempts to restrict consensual homosexual activity. However, despite the social and legal criminalization of same sex encounters between males by a certain segment of Canadian society, such activities did not cease. However, it is impossible to say whether or not such

activity increased. Obviously an increase in conviction rates and the number of reported cases of gross indecency and indecent assault on a male does not necessarily mean that there was a proportional increase in such homosexual encounters or homosexuality itself. It could merely reflect better policing or an ordered 'crackdown' by the authorities of such activities. Furthermore, in the early twentieth century public awareness of such happenings grew as media coverage of those cases involving some type of same sex encounter increased. Thus it is evident that attempts to restrict consensual homosexual activity were a failure. As a result, future generations of Canadians would come to reexamine the concept of criminalization of homosexuality and, perhaps more important, to reevaluate the very nature of human sexuality itself.

FOOTNOTES

- ¹Canada, Criminal Code of Canada (1892), s. 174.
- ²Ibid., s. 175.
- ³Canada, Statutes of Canada (1890), c. 37, s. 5.
- ⁴Canada, Criminal Code of Canada (1892), s. 260.
- ⁵Canada, Statutes of Canada (1869), c. 20, s. 64.
- ⁶Canada, Revised Statutes of Canada (1886), c. 157,
s. 2.
- ⁷Canada, Statutes of Canada (1892), c. 29, s. 175.
- ⁸Ibid., c. 29, s. 260.
- ⁹Ibid., c. 32, s. 1. "Everyone is guilty of an indictable offence and liable to ten years imprisonment, and to be whipped, who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person."
- ¹⁰Canada, Debates of the House of Commons, 10 April 1890, p. 3181.
- ¹¹Supreme Court Records (hereafter SCR), Criminal (Calgary), File #122, Case: R. v. F. Bere (1912), indecent assault on a male. The accused pleaded not guilty before Judge Simmons on October 15, 1912. Subsequently, he was found guilty and remanded for sentence.
- ¹²District Court Records (hereafter DCR), Criminal (Wetaskiwin), File #535, Case: R. v. S. Scott (1912), indecent assault on a male. On February 10, 1913 the accused elected speedy trial and pleaded not guilty to the charge.
- ¹³Ibid., Criminal (Calgary), File #516, Case: R. v. F. Cunningham (1921), indecent assault on a male. There is another case in the 1920s which illustrated the continuation

of the broad parameters afforded to the term indecent assault on a male. Eric Strathern was charged with having committed the offence on a thirteen year old boy at Banff, Alberta on July 30, 1923. The boy alleged that the accused, his scoutmaster, had put his hands on his privates. On September 6, 1923, Strathern pleaded not guilty and was found not guilty. Ibid., File #628, Case: R. v. E. Strathern (1923), indecent assault on a male.

¹⁴R. v. Iman Din, 16 Western Law Reporter (1910), pp. 130-142.

¹⁵A similar tactic was used in the R. v. F. Cunningham case of 1921. The child told the court that he would not go to heaven if he did not tell the truth. Supposedly, Cunningham had put his hands down the front of the boy's pants: DCR, Criminal (Calgary), File #516, Case: R. v. F. Cunningham (1921), indecent assault on a male.

¹⁶DCR, Criminal (Wetaskiwin), File # ? , Case R. v. C. Calvin (1913), indecent assault on a male. See specifically the depositions of the boy, his father and grandmother.

¹⁷"Egan Escapes with Light Term," The Province, 1 August 1906, p. 8.

¹⁸"Criminal Statistics for the year ended September 30, 1903," Canada, Sessional Papers, Vol. XXXVII (1904), Paper 17, Table VII, "Pardons and Commutations," n. p.

¹⁹R. v. Iman Din, 16 Western Law Reporter (1910), pp. 130-142.

²⁰"Every male person is guilty of an indictable offence and liable to five years plus a whipping who in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person": Canada, Criminal Code of Canada (1892), s. 177. A conviction for attempted buggery and indecent assault on a male carried the same ten year maximum imprisonment, but the latter also had the proviso for a whipping.

²¹Thompson stated: "We have upon that subject (gross indecency) very little law, and we have no remedy for offences which are now notorious in another country, and which have made their appearance in this country." Canada, Debates of the House of Commons, 10 April 1890, p. 3162.

²²Criminal Law Amendment Act (1885), 48-49 Victoria, c. 69, s. 11. British playwright Oscar Wilde was convicted under this particular section of the Act and was sentenced to the maximum two years imprisonment in 1895.

²³Canada, Criminal Code of Canada (1892), s. 177 and 178.

²⁴Ibid.

²⁵Canada, Debates of the House of Commons, 10 April 1890, p. 3170.

²⁶Ibid.

²⁷Ibid., p. 3171.

²⁸Ibid., 25 May 1892, p. 2968.

²⁹DCR, Criminal (Calgary), File #150, Case: R. v. J. Ward (1911), buggery.

³⁰Ibid., File #210, Case: R. v. M. Nolan (1914), gross indecency.

³¹Canada, Debates of the House of Commons, 25 May 1892, p. 2969.

³²Mills told the House of Commons: "The offences are wholly subjective and altogether different in that respect from crimes embraced in the Statute book; and it is a question whether crimes of this sort should be punished by long terms of service in the penitentiary. I do not think they should. I think that flogging, or something of that sort, and the discharge of the prisoner is preferable, and a far better deterrent than anything else." Ibid., 25 May 1892, p. 2968.

³³In August 1914, three men were sentenced to thirty days each for a conviction of gross indecency: Provincial Archives of British Columbia (PABC), Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 7 (June 1914 - October 1917), p. 12. On December 9, 1910 a Canadian male was sentenced to thirty-five days by Judge McInnes at Vancouver, British Columbia: Ibid., Vol. 6 (November 1910 - May 1914), p. 14. James McCormack received one month imprisonment at the New Westminster Gaol by Police Magistrate Bull at Vancouver: Ibid., Vol. 5 (October 1895 - October 1910), n. p. A man born in Sweden was

sentenced to six months in the gaol by Police Magistrate Shaw of Vancouver on November 2, 1912: Ibid., Vol. 6 (November 1910 - May 1914), p. 155. Buda Singh received a six month sentence from Judge Howay on April 4, 1912 at New Westminster: Ibid., p. 108. During the month of June 1912 an eighteen year old blacksmith was sentenced to twelve months imprisonment: Ibid., Victoria Gaol, Record and description of list of all prisoners received in Victoria Gaol, Vol. 13 (February 22, 1910 - September 1914), p. 28. Walter Abern, a forty-two year old married timbercruiser was sentenced to eighteen months imprisonment by Police Magistrate Edmonds at New Westminster on August 16, 1911: Ibid., p. 5. On July 20, 1907 a nineteen year old male was sentenced to twelve months imprisonment by a Supreme Court Judge at Medicine Hat, Alberta. He served his sentence at the Lethbridge Guard Room: Canada, Sessional Papers (1909), Vol. XLIII, Paper 17, p. 312.

³⁴PABC, Attorney General Papers, Inspector of Gaols, Victoria Gaol, List of Prisoners under sentence in Victoria Gaol, Vol. 16 (January 1902 - October 1910), n. p. The following cases are but a few examples of the various sentences meted out during this time period. "On September 4, 1900 one Francisco Rodrequez was charged with having committed an act of gross indecency and was convicted and sentenced to two years imprisonment by the Honourable Mr. Justice Craig": contained in "The Report of Inspector C. Starnes, Commanding B Division, Dawson for the year ended 1900," in "The Annual Report of the Commissioner of the North West Mounted Police," Canada, Sessional Papers (1901), Vol. XXXV, Paper 28a, p. 36. On October 10, 1910 Harry Suigh received a two and one half years sentence from Judge Murphy at Vancouver: PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 5 (October 1895 - October 1910), n. p.

³⁵DCR, Criminal (Calgary), File #150, Case: R. v. J. Ward (1911), buggery.

³⁶See for example the case of B. Rhineberger, who was sentenced to one year imprisonment and ten lashes by Judge Clement at Vancouver on September 30, 1912: PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 6 (November 1910 - May 1914), p. 160. On May 15, 1894 two men were sentenced by the judge of a Vancouver Assizes Court to two years imprisonment and twenty-four lashes each: "Criminal Statistics for the year ended September 30, 1896," Canada, Sessional Papers, Vol. XXXI (1897), Paper 8d, p. 246. Mah Singh was sentenced to twenty-three months and ten lashes by Police Magistrate Alexander on December 12, 1908: PABC, Attorney General Papers, Inspector of Gaols, New Westminster Gaol, Return of Prisoners Confined, Vol. 5 (October 1895 - October

1910), n. p. W. Gutchfield was sentenced to three years imprisonment plus twenty lashes by Judge Young at Prince Rupert on April 3, 1912: Ibid., Vol. 6 (November 1910 - May 1914), p. 114. On June 13, 1896 a man was sentenced to three years and thirty lashes by a County Court Judge at Nanaimo: "Criminal Statistics for the year ended September 30, 1896," Canada, Sessional Papers Vol. XXXI (1897), Paper 8d, n. p.

37 "Criminal Statistics for the year ended September 30, 1903," Canada, Sessional Papers Vol. XXXVIII (1904), Paper 17, n. p.

38 PABC, Attorney General Papers, Inspector of Gaols, Victoria Gaol, List of Prisoners under sentence in Victoria Gaol, Vol. 17 (November 1910 - 1914), p. 156.

39 "Criminal Statistics for the year ended September 30, 1896," Canada, Sessional Papers, Vol. XXXI (1897), Paper 8d, p. 246.

40 "Criminal Statistics for the year ended September 30, 1897," Canada, Sessional Papers, Vol. XXXII (1898), Paper 8d, Table VII, "Pardons and Commutations," n. p.

41 "Criminal Statistics for the year ended September 30, 1903," Canada, Sessional Papers, Vol. XXXVII (1904), Paper 17, Table VII, "Pardons and Commutations," n. p.

42 "Criminal Statistics for the year ended September 30, 1908," Canada, Sessional Papers, Vol. XLIII (1909), Paper 17, Table VII, "Pardons and Commutations," n. p.

43 Ibid.

44 Canada, Statutes of Canada (1892), c. 29, s. 177.

45 SCR, Criminal (Calgary), File #272, Case: R. v. Big Snake (1913), indecent proposal.

46 Ibid., File #321, Case: R. v. A. Timmeran (1914), indecent behaviour.

47 DCR, Criminal (Wetaskiwin), File # ?, Case: R. v. M. Smith (1919), indecent act.

48 SCR, Criminal (Calgary), File #122, Case: R. v. F. Bere (1912), indecent assault on a male.

⁴⁹DCR, Criminal (Wetaskiwin), File #535, Case:
R. v. S. Scott (1912), indecent assault on a male.

CHAPTER VII

Protecting Public Morality: Obscene Literature and Immoral Entertainment

As the lines between acceptable and unacceptable sexual behaviour became more rigid in the late Victorian and Edwardian era, concerted efforts were made to mould and then entrench certain sexual and moral values within Canadian society. In addition to the federal government and the criminal justice system, women's groups and moral reform organizations universally condemned premarital sex, birth control, childless marriages, infidelity and homosexuality. Arguing that both the moral fabric and the very existence of Canada as a nation rested upon a morality which valued home, marriage and motherhood, legislators, judges and reformers elevated these values to shrine-like institutions. The criminalization of all forms of homosexual encounters, the use, advertising and selling of birth control devices as well as virtually all female sexual activity without marriage through the insertion of the phrase 'of chaste character' in certain sections of the Criminal Code, serve as but a few examples of attempts to reinforce a certain type of sexual morality.

Yet the guardians of Canada's morality did not confine themselves to matters concerning sexual encounters

between and among the sexes. In fact, their campaign also included attempts to dictate what, of a sexual nature, could be written in a letter, read in a pamphlet, book or newspaper and seen at the local playhouse or movie theatre. In fact, any type of literature or any form of entertainment of a sexual nature which did not actively promote the elements of traditional sexual morality was socially condemned and liable to be prosecuted under the relevant sections of the Criminal Code as being immoral, obscene or indecent. Evidently a certain segment of Canadian society in the late nineteenth and early twentieth century firmly believed that the standards of public morality could and should be protected by statute law.

It is well beyond the scope of this chapter to examine the evolution and application of every law designed to protect public morality in Canada or even in Western Canada during the years chosen for this study. As a result, the material to be discussed has been severely limited. Firstly only those laws specifically designed to deal with obscene material and immoral entertainment have been discussed. In addition, certain precedent-setting cases in England and Canada have been examined in order to gain some understanding of what was considered to be an obscene publication or an immoral act by the courts. The cases selected indicate that legal definitions of obscenity and immorality were fluid and open-ended.

Since the invention of the moving picture pro-

foundly influenced the nature of public entertainment during this time period, a preliminary inquiry has been made into the question of how one community in Western Canada, namely Lethbridge, Alberta, attempted to influence what its residents could and could not see at the local motion picture theatres from 1918 to 1920. During this brief two year time span, a number of sex related films were shown in Lethbridge. An analysis of the movie advertisements coupled with the responses of various clergymen, policemen and prominent citizens to the films provides the historian with a set of attitudes displayed by a segment of society towards obscenity and immorality in entertainment.

Thus, this chapter has been designed to move from generalities to specifics. It begins with a discussion of what the written law of Canada and England actually said about obscene material and immoral entertainment and then it shifts to an analysis of the law's practical application in precedent setting cases. And it concludes with a case study of one community's attempt to apply its perceptions of acceptable public entertainment to its residents and thereby influence what of a sexual nature could be seen at the theatres.

The restriction of publications of an obscene nature in Canada was not a new offence created by a particular section of the 1892 Criminal Code. In fact, two years prior to codification, every one in Canada committed:
a misdemeanor who without justification,

(a.) publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition; or any publication recommending sexual immorality, even if the recommendation was made in good faith and for what the publisher considers to be the public good. (b.) publicly exhibits any disgusting object.¹

Although this article, numbered 218, contained a statement that the servicing of the public good was of little consequence when it came to selling or exposing an obscene book or an indecent exhibition to the public, G. W. Burbidge and Sir James Stephen expressed an alternate opinion. In fact, both men suggested that a person could be justified in showing certain disgusting objects and publishing obscene material if the good of the public would be served by their publication or exposure. Thus justification could be forthcoming if morality, religion, science, art, literature or the administration of justice was somehow advantageously served. However, they both argued that justification would be quickly ended when the exposure of the material went beyond what the public good required with regards to the specific matter published.²

Despite the use of such abstract words as good faith, the public good and justifiable exposure, no definition of what constituted an obscene book, print and picture, or an indecent exhibition, or a disgusting object was contained in article 218. However, it is evident that Stephen and Burbidge were suggesting a possible definition when they alluded to the fact that a necessary prerequisite for classification as an obscene publication or an indecent ex-

hibition was the recommendation of sexual immorality. Yet, for all intents and purposes, the words obscenity and indecency were devoid of legal definitions and as a result, were constantly discussed in abstract terms.

In a somewhat similar fashion, the posting of "any obscene or immoral book, pamphlet, picture, print, engraving, lithograph, photograph or other publication, matter or thing of an indecent, immoral, seditious, disloyal, scurrilous or libellous character" for delivery or transmission through the mail was classified as a misdemeanor according to article 219 in Burbidge's Digest.³ Once again, obscenity and indecency were not legally defined; and neither were the words scurrilous or libellous. Thus one section of the Criminal Code subjectively prohibited the posting of nearly every form of so-called unacceptable literature in Canada, ranging from sexual and immoral concerns to libellous and political matters. Article 219 further stipulated that a person was liable to criminal prosecution if he or she put things of an 'indecent, immoral, seditious, disloyal, scurrilous or libellous character' on an envelope, post band, post card or wrapper.⁴

When Canada adopted its Criminal Code in 1892, some substantive changes were made in the sections which dealt with obscene literature and the posting of such material through the mail. Although both offences continued to be designated as 'Offences against Morality,' they were reclassified from the category of a misdemeanor to that of an indictable offence with the possibility upon conviction of

two years imprisonment.⁵ However, the most substantial alteration was not in this reclassification, but in the terminology used in the Criminal Code. Admittedly, there was no change in the wording or intent of section 180⁶ which had been Burbidge's article 219 dealing with the posting of obscene and/or immoral publications through the mail system. But the same cannot be said for section 179 of the Code which seems to have appeared as article 218 in the earlier digest of the criminal law of Canada.

According to section 179 of the Criminal Code, every one

who knowingly (a.) publicly sells, or exposed, for public sale or to public view, any obscene book or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals⁷

was guilty of an indictable offence. Part (b.) also noted that a person could be sentenced to a maximum of two years imprisonment if found guilty of publicly exhibiting a disgusting object or an indecent show.⁸ Even at a cursory glance, there are several noticeable differences in this section when it is compared to article 218. One of the most obvious is the physical separation of obscene literature into part (a.) and indecent shows into part (b.) alongside disgusting objects. Apparently this change was merely a cosmetic one because obscene literature, indecent exhibitions and disgusting objects still remained under the general rubric of section 179.

Other changes however were not just aesthetic. For

example, the phrase 'without justification,' which had formed part of the earlier article, had been dropped and the word 'knowingly' inserted. As a result, the intent of the law was subtly changed and new legal problems emerged. Under the new section of the Criminal Code, a person could have conceivably argued that they were not guilty of the offence because they had not known what they had sold or exposed to the public. In addition and perhaps more important, a person could also claim that although they had knowledge of what they had been selling or exposing, they had not considered it to be either obscene or indecent. Thus, in order to obtain a conviction under section 179, the key word for the prosecution became 'knowingly.'⁹

Another difference between the Burbidge-Stephen article and the relevant section of the Criminal Code relates to the feeble attempts made to provide the courts with a workable definition as to what constituted obscene and/or indecent material. Burbidge and Stephen had suggested that one possible way of discerning if something was obscene was whether it recommended sexual immorality or not. But the framers of the Criminal Code chose to broaden the frame of reference. Instead of requiring an explicit or even an implicit statement recommending sexual immorality, section 179 merely equated obscene material with a tendency to corrupt public morals. Given the earlier discussion concerning the insertion of the word 'knowingly,' this is a rather interesting change. While it would be somewhat difficult to prove that an individual had 'knowingly' displayed obscene

material, it would be relatively simple to present the argument that a publication or exhibition could have a tendency to corrupt public morality. In terms of the written law, a recommendation required a definite statement; a tendency required no such statement. Thus, it would be easier to obtain a conviction for publicly selling or exposing obscene material if the prosecution contended that the material merely tended to corrupt public morality rather than bluntly recommended sexual immorality. But despite this change, obscenity and indecency still lacked any precise legal definitions.

It is readily apparent that the last major change which appeared in section 179 took into account Stephen's and Burbidge's submission concerning the feasibility of acquittal through the justification of exposure of the allegedly obscene material for the public good. Whereas article 218 made no specific statement on this matter, section 179 emphatically stated that no one could be convicted of any offence in the section "if he proves that the public good was served by the acts alleged to have been done."¹⁰ The key, of course, was to discern what was the public good.

Section 179 was to remain unchanged until 1900 when minor adjustments were made. For example, the phrase 'without lawful justification or excuse' was added and the word 'publicly' was replaced by 'to public view.' In addition, the manufacturing, distribution and circulation of obscene material was made a criminal offence. Thus at

the turn of the twentieth century the section was amended to read:

Every one is guilty of an indictable offence and liable to two years imprisonment who knowingly, without lawful justification or excuse, -- (a) manufactures, or sells, or exposes for sale or to public view, distributes or circulates, or causes to be distributed or circulated, any obscene book, or other printed, type-written or otherwise written matter, or any picture, photograph, model, or other object tending to corrupt morals; or, (b) publicly exhibits any disgusting object or any indecent show.¹¹

Three years later, federal legislators moved to expand the parameters of section 179 to include a wide variety of public entertainment which had become exceedingly popular, accessible and cheap. By the Criminal Code Amendment Act of 1903, a new section numbered 179 (a) superseded the old one. Taking effect on July 23, 1903, this amendment stated that any one who was the lessee, agent or manager of a theatre which presented or allowed to be presented on the premises, "any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation" was guilty of a criminal offence. A violation of this nature could be punishable as an indictable or summary conviction. If found guilty upon indictment, a person was liable to a maximum of one year imprisonment with or without hard labour and/or a fine of \$500.00. If the person was found guilty on a summary conviction, a six month prison term and/or a \$50.00 fine was a possibility.¹²

Even the actors and the actresses were not immune from criminal prosecution. If they were found guilty upon summary conviction of performing in an immoral or indecent performance, they were liable to three months imprisonment and/or a fine not to exceed \$20.00.¹³ And finally, any one who was summarily found guilty of wearing an indecent costume was faced with the possibility of six months in confinement and/or a monetary loss of \$50.00.¹⁴

In 1906, section 179 was split into two and re-numbered. The old section 179 which had existed prior to the Criminal Code Amendment Act of 1903 became section 207 and the 1903 additions became section 208.¹⁵ Section 180, which dealt with the transmission of obscene material through the post was reclassified as number 209.¹⁶ In fact, the only changes which were discernible in the revised statutes of 1906 revolved around these changes in the numbering system.

But despite the series of changes made in 1892, 1900, 1903 and 1906 to the relevant sections of the Criminal Code dealing with obscenity in Canada, the word obscene still lacked definition. In fact, Canadians would not receive a bona fide definition of obscenity until 1959. At that time, any publication which included the undue exploitation of sex and/or crime, war, cruelty and violence as dominant characteristics was deemed to be obscene.¹⁷ No such definition existed in the criminal law of Canada during the late nineteenth and early twentieth century. However, this is not to say that Canadians

had no thoughts on the matter or that no guidelines were provided. On the contrary, adjudicators, legislators, entertainment critics and spokesmen for moral reform groups all expressed certain basic attitudes towards the nature of obscenity in late Victorian and Edwardian society. Interestingly their opinions were not unique to the Canadian situation. In fact their origins can be traced to the English experience in general and the 1868 Queen versus Hicklin case in particular.

Throughout the eighteenth and nineteenth centuries obscenity cases were heard and anti-obscenity laws were passed in England. In 1708, for example, James Read was indicted on a charge of printing a scandalous book entitled The Fifteen Plagues of a Maidenhead. Although the judge stated that the book contained 'bawdy stuff,' he ruled that a secular court had no jurisdiction in such matters. It was a concern for a spiritual court. Nearly twenty years later in 1727, Edmund Curll, the publisher of Venus in the Cloister or The Nun in Her Smock was convicted of the crime of obscene libel and sent to the pillory. Apparently, the conviction in this case rested upon the anti-religious comments contained in the book rather than any sexual explicitness.¹⁸

By 1860, England had passed three laws which could be classified as attempts to restrict obscenity. Exposing an obscene book or picture in public and importing obscene material were prohibited in 1824 and 1853 respectively.¹⁹ Then in 1857, Lord Campbell, the Chief Justice of England

proposed what would eventually become known as the Obscene Publications Act. Designed to eliminate the dissemination of obscene material, the act stipulated that a warrant could be issued to search any premise, if, upon sworn information, it was suggested the locale was housing obscene matter for distribution and/or sale. If the material in question was found, the owner of the premises had to appear before the courts and explain its presence and why it should not be destroyed.²⁰

The Obscene Publications Act was put to the test, most notably in a precedent setting case tried in the late 1860s. In 1868, a Protestant by the name of Henry Scott was brought to court at Wolverhampton for publishing an anti-Catholic tract called The Confessional Unmasked: shewing the depravity of the Roman Priesthood, the iniquity of the Confessional and the questions put to females in confession. Upon hearing the evidence which included the mentioning of fornication and oral sex in the pamphlet, the presiding magistrate, Benjamin Hicklin ordered the seizure and destruction of all copies of The Confessional Unmasked. Appealing Hicklin's decision on the grounds that the tract was more concerned with exposing religious hypocrisy than corrupting public morality through titillating accounts of sexual improprieties, Scott took his case to Quarter Session. There, Hicklin's order for seizure and destruction was overturned. Subsequently, this decision was appealed to the Court of Queen's Bench presided over by Chief Justice Alexander Cockburn. He disagreed with the

decision given in Quarter Session and supported the original one as stated by Hicklin.²¹ More important, Cockburn stated that the test for obscenity should be "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."²²

With this statement, Chief Justice Cockburn had given obscenity a legal definition. However, it was a definition based upon subjective terminology. Although Cockburn had suggested that the test of obscenity should be whether the material tended to 'deprave and corrupt,' he neglected to define 'deprave and corrupt.' By their very nature, these words imply a subjective evaluation. Thus, the Chief Justice had merely replaced one undefined word with two of them. But despite this drawback, Cockburn's definition became the accepted barometer in measuring obscenity in those cases which were tried in Great Britain, Canada and the United States during the late nineteenth and early twentieth century.²³

Instead of making pioneer decisions²⁴ based upon the specifics of a case within Canada, judges and lawyers throughout the country constantly referred to the Queen versus Hicklin ruling as the grounds for either prosecution, conviction, acquittal or appeal. A prime example of this phenomenon was the King versus Beaver case.²⁵ On February 27, 1904, Lodema Beaver appeared before Charles Robert Horne, the county court judge of Essex, charged

under section 179 of the Criminal Code with distributing obscene material on December 24, 1903 at Windsor, Ontario. Beaver had been circulating a paper which told the story of another obscenity case involving David Livingstone McKay, the publisher of the Flying Roll and New Eve Success.

In one of these papers, McKay had carried, among other things, the explicit account of the torture and debauchery of a number of women at the hands of a male or males who repeatedly committed the assaults with medical instruments. One of the women attacked had been McKay's wife. As a result of publishing the details of the attacks McKay was charged and convicted of selling obscene material tending to corrupt morals. When Beaver was arrested she was distributing yet another paper written by McKay which contained not only a summary of the case but a statement that the man found guilty of perpetrating the assaults was, in fact, innocent and that McKay should be vindicated for publishing the facts. But more important, he alluded to the fact that the Chief of Police of Detroit, Michigan and the Mayor of Windsor were somehow involved in the sexual assaults.²⁶

Beaver's case was argued before the court on November 24, 1904. Although her lawyer, J. W. Hanna attempted to confine the defence to the parameters given within section 179 of the Criminal Code, the prosecution did not. According to Hanna, the case revolved around two basic questions. Firstly, did the words used in the paper have a tendency to corrupt morals and secondly, was there

sufficient evidence to prove that the defendant had 'knowingly' circulated the paper or that she even knew how to read? The Hicklin case did not appear in the defence. However, the prosecuting lawyer, Deputy Attorney-General John R. Cartwright dismissed Hanna's arguments and specifically cited the Queen versus Hicklin case in his statements. After hearing all the evidence, the judge found Beaver guilty as charged but reserved the two questions posed by the defence to the Court of Appeal.²⁷

On January 25, 1905, the Court of Appeal at Toronto affirmed Beaver's conviction. The judges quickly dismissed the second question as to whether the accused knew what she was distributing with an affirmative answer. Although the question as to whether the paper was obscene within the meaning of section 179 was also answered positively, two of the five judges provided some insight into the nature of obscenity. Judge Osler argued that the meaning of the word obscene was directly related to its classification within the Criminal Code. Therefore since section 179 was placed in the 'Offences against Morality' category, it must refer to some measure of indecency and sexual immorality. He further noted the definition of obscene as found in the Oxford Dictionary; 'offensive to modesty, or decency; expressing or suggesting unchaste or lustful ideas, impure, indecent, lewd.' Despite the fact that Osler thought the paper was "disgusting" rather than "suggestive" and was "the disconnected ravings of a lunatic," he still believed the conviction

should be affirmed.²⁸

Agreeing with Osler's decision, Judge Maclaren expressed his thoughts on a definition of obscenity. Originally, he noted, the word obscene had been used to describe anything which was considered to be "disgusting, repulsive, filthy, or foul."²⁹ But by 1904 it had been restricted to "something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas, or being impure, indecent, or lewd."³⁰ According to Maclaren the language that appeared in McKay's paper was "so foul and disgusting that it would prove repulsive to most persons reading it, and is so gross that there would be no danger of its corrupting their morals." However, he quickly added that there was a certain segment of society which would become excited by these ideas instead of being repulsed by them. Arguing that the true test for obscenity was Cockburn's 1868 statement as to the tendency of the material to deprave and corrupt susceptible minds, Maclaren felt that McKay's paper fell into the category of obscene literature. Thus, he too affirmed the conviction.³¹

In a similar fashion, the Hicklin rule was applied in the first reported case³² involving theatrical performances as prohibited by the new section 179a of the Criminal Code as created by the Criminal Code Amendment Act of 1903. This case, the King versus McAuliffe,³³ was heard on April 16, 1904 at Halifax, Nova Scotia and involved the behaviour and costume of a female dancer. Noting that there was no fixed meaning of the word indecent in

the written law, the presiding judge, W. B. Wallace applied the Hicklin test of depravity and corruption to the case. After hearing the evidence, he acquitted the accused and issued the following statement:

The evidence showed that these dresses were the stage costumes usually worn by ballet-dancers, and the dancing was the ordinary ballet-dancing which took place in the performances repeatedly witnessed by respectable citizens here and elsewhere throughout Canada.³⁴

The King versus McAuliffe case set a legal precedent for Canadian judges and lawyers. Henceforth, all theatrical performances could be judged according to their tendency 'to deprave and corrupt.'

The courts even went so far as to apply the Hicklin rule to a motion picture representation of a boxing match. In 1910, a judge in Nova Scotia ruled that "A moving picture representation of a prize-fight, however brutal and vulgar it may be, is not 'obscene' within the meaning of the term as explained in the Hicklin case."³⁵ Evidently then the Canadian courts applied the Cockburn test for obscenity to literature, theatrical performances and motion pictures.

Several debates which occurred in the House of Commons also reflected a similar concern with obscene literature and immoral entertainment and its tendency 'to deprave and corrupt.' Two prime examples are the discussions which took place in the March 23, 1903, and May 12, 1909 sittings of the House. In the first instance, the Liberal Minister of Justice, the Honourable Charles Fitzpatrick was arguing for stricter control over immoral en-

tainment because there had been such performances in Canada "which have a demoralizing effect on the youth of the community."³⁶ When questioned as to the definition of indecent and immoral, Fitzpatrick replied that these words appeared in a number of sections of the Criminal Code and needed no written definitions "because every man ought to know what is immoral."³⁷ The very fact that Fitzpatrick mentioned the demoralizing effects of immoral performances indicates that he adhered to the concept of depravity and corruption as the measurement of indecency, immorality and obscenity.

At the same time, Sir Charles Hibbert Tupper argued the very lack of definition in the Criminal Code created more problems than it solved. He noted there was a large segment of Canadian society which viewed all modern plays and novels as indecent and immoral. In fact, in Eastern Canada people were pasting over certain parts of placards which they considered to be immoral but were considered legitimate in England. He further added, "we must remember that in all the best plays of the present day there is perhaps in a strict application something that might have an indecent tendency."³⁸ Consequently, because of this classification, certain plays and performers might not be allowed to appear in Canada. Therefore Tupper suggested that there was in fact, a difference between the words immoral and indecent and obscene. Obscenity was a much harsher word and was an undesirable commodity whether it was produced by talent or not. As far as Tupper was concerned

the word obscene was far "less susceptible to misunderstanding than the words immoral or indecent."³⁹ Once again however, implied in Tupper's use of the word obscene was the tendency to 'deprave and corrupt.'

A few years later, Robert Borden brought it to the attention of the May 12, 1909 sitting of the House of Commons that the distribution of immoral and indecent literature in Canada was appalling. Referring to this fact, Borden raised a question concerning the nature of proof in a case involving a charge of distributing, selling or circulating obscene material. Reverend Chas. Aylesworth responded that it was very similar to providing the possession of liquor.⁴⁰ However, Aylesworth seriously wondered if any worthwhile purpose would be served by sending a teenage boy to jail who had a sexually suggestive picture in his possession. Such occurrences, he noted, were not unknown or uncommon with school boys.⁴¹ And arguing that there was a difference between corrupting one's own morals and corrupting someone else's Aylesworth stated:

It is not as serious a thing at any rate, that a man should be corrupting his own morals as that he should be corrupting the morals of somebody else, and if a man for any reason, wants to carry about in his pockets an immoral or an indecent picture for his own consumption, so to speak, I do not know that anybody is hurt except himself.⁴²

However, if Parliament did not accept this argument, which was, in fact, an early expression of what is now referred to as victimless crime, then the police would have to be given the right to arrest and/or search a person

on the suspicion that they were in possession of obscene material. Aylesworth seriously wondered if Members of Parliament were willing to undertake such measures. Surely, he argued, the protection of public morality was more important and more feasible.⁴³

Such thoughts are clearly reflected in the Graf case of April 1909 and the McCutcheon case of November 1909. In the first case, Martin Graf, alias Martin Munroe of Buffalo, New York was charged with selling obscene material in Toronto, Ontario during the month of March 1909. In delivering a guilty verdict in his chambers one month later, Judge Riddell expressed the opinion that the corruption of public morals was a serious offence. In fact, he argued that it was as serious, perhaps more serious than assault causing bodily harm. According to Riddell:

One who administers physical poison so as to inflict upon another grievous bodily harm is liable to 14 years imprisonment; one who administers mental and moral poison, and thereby inflicts grievous harm upon the mind and soul, even if this is not possibly, indeed probably, accompanied by bodily harm as well is let off with two years - rather a reversal of the injunction not to fear them that kill the body and after that have no more that they can do.⁴⁴

Obviously, Riddell was concerned with protecting the morality of the public and not just its physical well-being.

A similar attitude can be seen in the McCutcheon case. On November 5, 1909 at the Lethbridge Judicial Court, Robert McCutcheon was found guilty on two counts involving obscene material. The first charge involved the possession

of certain pictures which tended to corrupt public morals while the second charge concerned McCutcheon assisting in the circulation of the pictures. Although McCutcheon admitted that he had purchased the pictures for fifty cents from a man at Medicine Hat on October 28, 1909, he told the court that the pictures were not for himself but for someone else. After hearing the evidence, Chief Justice Sifton ruled that any one who knowingly bought an obscene picture for another person and had possession of the picture for the purpose of delivering it to the other person was guilty of having in his possession for circulation a picture which tended to corrupt public morals. Sifton further added that it was inconsequential as to whether the person who had purchased the picture had exhibited it to anyone or not.⁴⁵ Perhaps if McCutcheon had echoed Aylesworth's argument that he had purchased the pictures for himself and not for any other person, Sifton would have delivered a different verdict.

It is readily apparent that this concern over the protection of public morality was not confined to Canadian legislators and adjudicators. Women's organizations and churches all expressed a similar concern over the tendency of obscene literature and immoral entertainment 'to deprave and corrupt' public morals. For example, the Manitoba branch of the Women's Christian Temperance Union met on July 1, 1902 and passed a resolution condemning certain theatrical and immoral amusements at the Winnipeg Industrial Fair. The women also urged that every effort should be made "to prevent the circulation of impure literature,

the use of coarse posters and the reporting in newspapers of demoralizing stories and incidents."⁴⁶

Three years later, in a Pastoral letter dated November 26, 1905, Archbishop Bruchési of Montreal condemned the French theatres for producing "bad Parisian plays." In his opinion, a Catholic city like Montreal had no need "of such literature and of such plays brought from a country where morality and modesty are only vain words."⁴⁷ Less than two weeks later, Bruchési issued a second Pastoral letter. This time he denounced certain theatres and issued a warning to their managers of "measures more efficacious, perhaps, than the law of the state."⁴⁸ Then on December 24 of the same year, Archbishop Begin of Quebec City instructed that a local theatre producing immoral plays should be denounced in every pulpit in the city.⁴⁹

On July 9, 1908, the Saskatchewan Methodist Conference voiced similar concerns to those which had been expressed in the 1902 resolution by the Women's Christian Temperance Union. Limiting their criticisms to newspapers, the Conference registered a complaint over "current illustrated newspaper supplements, which it characterizes as vulgar, demoralizing and insulting to their readers, and denounces harmful advertisements and sensational criminal news."⁵⁰ And at the annual meeting of the National Council of Women, which was held on July 4 and 5, 1910 at Halifax, Nova Scotia, a resolution was passed condemning the "harmful character of many theatres and moving picture shows."⁵¹

The most important aspect of these declarations

given by various churches and women's groups and the statements made in the House of Commons was the constant reference to immorality and modesty and the harmful effects of certain types of plays, newspapers and motion pictures on public morality. Whether these groups and Members of Parliament were aware of it or not, they were echoing Cockburn's test for obscenity. The idea that obscenity was measured by the tendency of something 'to deprave and corrupt' public morals had permeated several areas of Canadian law and society. And as different forms of public entertainment, most notably the moving picture, emerged in the early twentieth century, assurances had to be given that a particular film or play was not likely to corrupt or deprave the morality of the viewer in particular or that of the public in general.

The first commercial exhibition of a moving picture in Canada was displayed in 1894 by Holland Brothers, an Ottawa firm.⁵² Two years later, on July 21, 1896, cinematography began with the presentation of an Edison Vitascope programme at Ottawa's West End Park.⁵³ In 1898, residents of Calgary and Edmonton were treated to moving pictures of Queen Victoria's Silver Jubilee.⁵⁴ In these early years of the movie industry within this country, films were usually shown in black top tents much like the twenty by sixty foot tent named the Edison Electric Theatre which could be found in Winnipeg, Manitoba in 1899.⁵⁵ Then in 1902, the first store front theatre opened in Vancouver and another one in Winnipeg the following year.⁵⁶ By 1924, Alberta alone had

eighty silent movie houses.⁵⁷ The motion picture as a form of public entertainment was here to stay.

Since the invention of the moving picture did not merely produce a momentary euphoria but a lasting impression upon society, the contents of this new form of entertainment had to be strictly controlled. As has been previously mentioned, theatre owners, critics and movie advertisers attempted to police their own industry by issuing assurances that public morality was not going to be offended by what was shown. For example, the September 5, 1912 issue of the Wetaskiwin Times carried the following statement by the owners of the Empress Theatre in the town: "Every picture shown will be absolutely pure, interesting and educating. No pictures will be shown that can possibly offend the most refined taste."⁵⁸ In a similar fashion, the owners of the new Colonial Theatre in Lethbridge, which previously had been known as the Orpheum, promised their patrons in October 1918 that "All programmes will be personally selected by the management, with a view to the absolute elimination of any possible objectionable features. Cleanliness will be predominant in all departments of the Colonial."⁵⁹

But despite such promises, the basic question as to what type of movies did Canadians actually see, still remained. Were they in fact, clean, wholesome and pure productions as promised, and if not, how did theatre owners and advertisers manage to show and promote such films without enduring legal repercussions or raising the public's ire? Prior to World War One, most films were comedies, trick films, scenic

travelogues or sentimental love stories.⁶⁰ Explicit portrayals of sexual matters or the human body were not condoned. However this was all to change with the experience of the war. Topics which had previously been untouchable became the subjects of feature length films. In fact, in the latter stages of the war and immediately afterwards, movies dealing with such things as birth control, venereal disease, the white slave traffic and illicit sex, were shown throughout Canada.

Nevertheless, the display of such films did not signal an era of total permissiveness on the screen or by society. Rather it was a qualified permissiveness or, more pointedly, permissiveness with a purpose. Its purpose was to educate and inform. For example, any movie which discussed sexual matters showed the viewer the folly of, and heartache which followed the slightest deviation from acceptable sexual behaviour. In effect then, film became a cheap medium to impress upon the movie goer, male or female, a certain brand of morality which extolled the virtues of chastity, marriage, family and motherhood. Nowhere is this statement more evident than in the sex-oriented films which were shown in Lethbridge, Alberta from 1918 to 1920.

Throughout this brief two year time span, residents of Lethbridge were treated to several return engagements of a film entitled Where Are My Children?.⁶¹ Touted as a "daring birth film"⁶² and "an uplifting drama of abortion,"⁶³ it was shown to segregated audiences, men one night and women another. In its advertisements for the

film, the Lethbridge Herald carried a number of endorsements all designed to ensure that the film was acceptable viewing. For example, on June 3, 1918, the paper told its readers that Denver clubwomen, social workers, ministers, priests and judges found Where Are My Children? well worth seeing.⁶⁴ Three days later, the Herald carried the following statement by Dr. Alexander Lyons, the Rabbi of one of the largest congregations in Brooklyn: "I should consider myself a very fortunate preacher if I could in fifty or one hundred sermons preach as effectively as this picture does the certain ideas for which it stands."⁶⁵ The following year, the entertainment critic for the paper endorsed the film saying it was necessary to discuss birth control and abortion if the human race was to survive.⁶⁶ And when the film returned for yet another engagement in May of 1920, it was met once again with favourable reviews, this time by the Alberta Social Reform League, the press and ministerial societies.⁶⁷ Evidently Where Are My Children? was well received by those people in positions of authority and the general public, otherwise it would have had only one brief appearance in the theatre.

Early in the month of December 1918, another photoplay⁶⁸ designed to teach a lesson was shown in Lethbridge. This time the topic was premarital sex and illegitimacy. Entitled The Unmarried Mother, it told the story of a girl named Elizabeth Goodwin who has sex with and becomes pregnant by a man who has no intention of marrying her. Running away from this situation, she meets and falls in love

with someone else. Although this man knows she is pregnant he still marries her. But, for her previous indiscretion, Elizabeth must atone. Consequently her baby dies and she herself falls ill. However, the death of the baby is her punishment and Elizabeth recovers. The man who led her to her downfall also does not escape unscathed for he is brought to justice before the courts.⁶⁹ Thus, the virtues of chastity and marriage are upheld while the follies of unchastity and premarital sex are proven.

In its advertisements for The Unmarried Mother the Lethbridge Herald noted it was a story of special interest to every mother and father and every female who was contemplating marriage. Forgetting the obvious moral overtones implicit in the film, the December 5, 1918 issue of the paper argued, "It teaches without fear or favor, one of the strongest lessons on the question of the unwelcome baby ever taught."⁷⁰ More specifically the entertainment critic drew a parallel between the film and a very real problem facing post World War One society. What was going to happen to all the unmarried mothers and their babies left behind after the war?⁷¹

Despite the fact that there was a lesson to be taught to girls and boys in their teens, no one under sixteen years of age was to be admitted to The Unmarried Mother. Perhaps the film would give the teenagers ideas of experimenting with sex rather than provide a lesson in deterrence. In effect, it might have a tendency to deprave and corrupt their morals instead of enhancing them. In any

event, they were barred entry to the film. A similar prohibition awaited anyone under the age of sixteen who attempted to see a film entitled Enlighten Thy Daughter in June 1919.

Dealing with the timeless problem of what happens when boys and in particular girls are not taught the facts of life, Enlighten Thy Daughter was surrounded by a tremendous amount of publicity. Calling it "the most tremendous moral force the world has ever produced," prominent doctors, clergymen and social workers in Canada heartily⁷² praised the film and its handling of the subject matter. In a June 6, 1919 letter to the manager of the Colonial Theatre in Lethbridge where the film was to be shown, Afton Elton, the President of the Lethbridge L.D.S. Relief Society wrote: "The film Enlighten Thy Daughter is a most interesting disclosure of the total effects of a modesty (so-called) which refuses to teach the human mind the true relation of the human sex."⁷³ In a similar fashion, the city's Commissioner of Public Works, H. W. Meech was greatly impressed by the lesson taught in the film as was Dr. J. E. Lovering.⁷⁴ And the Lethbridge Herald noted: "There is nothing the least bit sensual or indecent in the play, but it nevertheless drives home a lesson that is needed and badly needed in our every day social system."⁷⁵

It is interesting to note that Elton, Meech and Lovering issued their statements after they had previewed Enlighten Thy Daughter upon the expressed invitation of Len Brown, the manager of the Colonial Theatre. The prac-

tice of having certain individuals preview a film was a way of controlling what the public could and indeed would see. One wonders if these three men or a majority of prominent people had not found this film to possess a moral lesson of upholding the traditional values of their society, would people have lined up and been turned away at the Colonial? For example, Reverend Cannon Gale of Calgary expressed some reservations over the lesson taught in the film. According to Gale;

The film has one glaring fault - the two men who cause the downfall of women escaped unscathed. A proper punishment ought to be meted out to the stronger sex who are instrumental largely for women's disgrace.⁷⁶

If a majority had expressed similar reservations about Enlighten Thy Daughter, it would be safe to assume that it would not have met with as much advance publicity or fanfare as a film which had been overwhelmingly endorsed by ministers, laymen and social workers.

Another film which met with a flurry of publicity was shown from August sixth to the ninth, 1919 in Lethbridge. It had the suggestive title The Unpardonable Sin and advertisements for the film indicate that it was in the genre of Enlighten Thy Daughter and The Unmarried Mother. According to an August 8, 1919 advertisement which appeared in the Herald, the film was

wrought by degraded purposes and means - the debauchery of virtue; the murder of purity; the slaughter of exalted womanhood; the crushed rose of chastity; the defilement of which crying from earth to

the God of Vengeance, must forever
sear the honor of the brutal enemy.⁷⁷

This was obviously the type of movie in which a great moral lesson could be found.

Despite the fact that The Unpardonable Sin dealt with such topics as chastity, purity and debauchery, it was more renowned for a certain scene than any lesson it imparted on the public. In the scene in question, a girl by the name of Miss Sweet, is left alone with a man characterized as "one of the most repulsive characters that has ever been represented on the screen." The villain attacks the heroine and despite her verbal protests and physical struggling, removes all her clothes except "the last flimsy garment." One report on the filming of the assault noted it had been photographed through a diaphragm of silk which created a silhouette effect. But more important, the scene had been so tastefully presented that there was "not even the slightest suggestion that this truly sensational bit has been 'dragged in by the heels' to pander to tastes which are low or depraved."⁷⁸ Evidently then, the scene possessed nothing which would tend to 'deprave and corrupt' the morals of the viewer. In fact, children, if accompanied by their parents were allowed to see The Unpardonable Sin.

Another topic which was the subject of feature films was venereal disease. Three of the most notable presentations were Damaged Goods, Fit to Win and The End of the Road. The first had been a successful Broadway play in

1915 and as a photoplay, Damaged Goods became a "vital drama of moral uplift in seven awe inspiring parts"⁷⁹ describing the effects of venereal disease. However three years later Fit to Win appeared and it was promoted as the "first and only motion picture to speak frankly and absolutely without fear or favor on the causes and effects of venereal diseases."⁸⁰ Endorsed by the Alberta Minister of Health in April 1920 for its educational value,⁸¹ the film was to be shown throughout the province. Initially only males over the age of sixteen were going to be allowed to see Fit to Win. But on April 3, 1920, the manager of the Colonial Theatre reported that it would try to make arrangements to have the film shown to females at a later date.⁸² He must have been successful as the June 21, 1920 entertainment page of the Lethbridge Herald reported that Fit to Win was to be shown to the women of Lethbridge at an afternoon matinee. Once again, admission was restricted; no girls under sixteen years of age were to be admitted.⁸³

But in late August 1920, young boys and girls of Lethbridge had the opportunity, if accompanied by a parent or guardian, to see yet another graphic portrayal of the causes and effects of venereal disease. For a mere fifty cent admission charge one could go to the Colonial Theatre and see Claire Adams, Calgary's first motion picture star⁸⁴ in The End of the Road. As was the case with Enlighten Thy Daughter, Fit to Win and Where Are My Children?, this film was strongly endorsed by several men and women for its handling of the subject matter and the lesson it taught.

Joseph Gillispie, the Lethbridge Chief of Police believed the film possessed great educational value.⁸⁵ Reverend W. P. Freeman, the pastor of the First Baptist church in Moose Jaw, Saskatchewan noted that the discussion of sex diseases in the film was excellent. In Freeman's opinion, "The story is chastely but truly told, making very clear the End of the Road of fast living, and the awful toll Canada is paying in this way."⁸⁶ The head nurse at Toronto's General Hospital heartily endorsed the film as an educational tool because young boys and girls in college had not been advised on sexual matters by their parents.⁸⁷ Similar thoughts were expressed by E. R. Forster, the President of the Social Service League of Lethbridge and J. Norrington, the Lethbridge manager of the Metropolitan Life Insurance Company.⁸⁸ But perhaps more important, the film was endorsed by the Canadian National Council for combatting venereal disease.⁸⁹

In any event, the advance publicity on The End of the Road was phenomenal. A few days before it was scheduled to open in Lethbridge, the Herald carried a brief account of the film's story in its August 26, 1920 entertainment column under the rather unlikely heading "CASUAL KISS MAY CARRY DISEASE." Noting that venereal disease more often than not, lurks in a kiss, the article went on to state that the new film presented with dramatic clarity, a striking indictment against loose living and free love.⁹⁰ On August 30, 1920, the day the film opened, the paper said The End of the Road was sheer propaganda. But it was prop-

aganda with a worthwhile purpose; that being a warning to young boys and girls about the disasters awaiting anyone who indulged in promiscuity.⁹¹ The next day the Herald gave the following warning to the potential movie goers: "It may shock you if you are over-sensitive, it may offend you if you are prudish, but the fact remains that it will certainly leave a lasting impression on you."⁹² Thanks to these brief comments in the papers, advance publicity and endorsements, the viewers had been forewarned as to the film's subject matter, its presentation and its message. Once again, the values of traditional sexual morality were reinforced in the mind of the public.

Implicit in the previewing of a film by certain members of society before it was released for public consumption and its subsequent endorsement by such individuals in newspaper advertisements was the concept of censorship. But it was censorship with a difference. Those people involved had no official mandate for such an undertaking. This is not to say that there was no official system to exert some measure of control over the contents of motion pictures shown in Canada. In fact, prior to World War One, a number of provinces had created their own censor boards. For example, Manitoba had established a board of censors in 1911 and by the end of 1913, the other three western provinces had followed suit.⁹³ These newly created censor boards were primarily interested in protecting the public from any film which had the tendency to 'deprave and corrupt' morality. In addition to scenes depicting seduction,

infidelity and indecency, the censors also defined murder, gambling, insanity and Americanism as objectionable in motion pictures.⁹⁴ Thus, after 1913, films shown in the West were subject to both an unofficial and official system of censorship.

On June 19, 1918, the first conference of motion picture censors was held at Calgary, Alberta. Meeting at the Palliser Hotel, censors from Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia discussed the formation of an association to promote closer cooperation between the censor boards of the different provinces.⁹⁵ A year later, the boards of the four western provinces agreed to unite with those of Ontario and Quebec to create the Canadian Moving Picture Censor Board. As a result of this arrangement, if a film was condemned or approved by one provincial board, the other three boards were notified immediately. It was hoped that a national censor board would promote a national viewpoint with regards to the motion picture industry in Canada. According to a July 16, 1919 editorial on the matter, "The fact that what is rejected in one part of Canada will practically be rejected in the whole will tend largely to elevate the tone of moving pictures."⁹⁶

At times, however, the official system of censorship whether it was directed towards a film or a book was at odds with the unofficial system of censorship as displayed in public endorsements and editorial comments. One example is the reaction to a film released in early

1920 entitled The A-B-C of Love. This film was criticized by a number of morality guardians because it contained a somewhat explicit scene of the female lead character taking a bath. Accusations were made that the censor who viewed the film must have been blinded, otherwise the film would never have passed. The owner of the Colonial Theatre in Lethbridge previewed the picture and in a statement issued on April 1, 1920, he assured his patrons that there was nothing objectionable in the film.⁹⁷ Although some members of society thought the depiction of a woman taking a bath was objectionable on moral grounds, other members of society did not and perhaps more important neither did the censor.

Another prime example of divergent opinions as to what should be censored appears in yet another 1920 case involving Hall Caine's story entitled The Woman Thou Gavest Me, which was later made into a photoplay. It marked the first time that a story which had been banned in book form was allowed to be exhibited as a motion picture in Alberta.⁹⁸ The Woman Thou Gavest Me told the story of "a sweet innocent girl" whose father married her to a man she hated and who used her father's money to support his numerous affairs. Miserable with this situation, the girl meets and falls in love with another man who returns his affection to her. Eventually, she leaves her husband to find happiness with this other man. Instead of condemning her actions, Caine attempts to defend the young wife.⁹⁹ As a result, the story was banned in book form.

Although the film censor had the right to ban a photoplay if its story line dealt with domestic infidelity, the Alberta censor allowed The Woman Thou Gavest Me to be shown in the province. Why? Beyond the basic moral implications of the wife's infidelity, the film posed a much more fundamental question to the audience. Should society expect a woman to stay in a marriage such as the one depicted in this photoplay? The film suggests a negative answer. A February 2, 1920, newspaper advertisement for the movie warned the viewing public that it provided a totally new angle on the double standard of morality. The same article also told those women who were happy in their marital union not to judge the heroine of the story too harshly for her actions.¹⁰⁰

For all intents and purposes, The Woman Thou Gavest Me was in the genre of Enlighten Thy Daughter, The End of the Road, The Unpardonable Sin, Fit to Win, Where Are My Children? and The Unmarried Mother. It too was a film designated to educate the public. Whereas the previously mentioned sex education films discussed the delicate matters of birth control, venereal disease, illegitimacy and promiscuity, The Woman Thou Gavest Me tackled the very issue of morality itself. In its presentation of domestic infidelity, the film adaptation of Caine's story suggested that the two-tiered concept of morality, that is, one code of sexual conduct for males and another for females, should end. According to one account it was a film which struck a blow "for freedom from moral hypocrisy."¹⁰¹

Much like the sex education films, The Woman Thou Gavest Me was an attempt to reinforce the traditional values of chastity, modesty, purity and the institution of marriage. In her infidelity, the heroine was merely trying to obtain the happiness which was implicit in these values. She did not leave her unworthy husband to become a prostitute; she left him to go with a man who possessed all the attributes necessary to make a good husband in a marriage arrangement. While sex education films promoted certain mores through numerous displays of the follies incurred by deviating from acceptable sexual behaviour, The Woman Thou Gavest Me told the story of a woman who, despite her abominable situation, continued her search for marital bliss.

The evidence presented in this chapter suggests that concerted efforts were made throughout the 1890s and early 1900s to exert some measure of control over what Canadians were reading and seeing in print form as well as what they were viewing on the stage and later on the screen. Repeatedly, legislators, adjudicators, morality guardians and censors applied Judge Cockburn's 1869 definition of obscenity to every type of literature and every form of entertainment in Canada. Canadian customs even went so far as to compile a permanent blacklist of books and magazines which were prohibited entry into the country.¹⁰² If a book, picture, pamphlet, stage play or motion picture discussed sexual matters in such a manner that a morality based upon chastity, purity, home and marriage was not

promoted, then it was condemned by the law and society for its tendency to 'deprave and corrupt' the morals of the public.

At a time when the Social Gospel was at its zenith in Western Canada, any sexual behaviour which contradicted acceptable Christian standards of sexual morality was, by definition, a threat to the very foundations of Canadian society. As a result, Canadian law and society took precautions to ensure that unacceptable sexual behaviour, ranging from premarital sex and birth control to homosexual encounters, would not be tolerated. In addition to such actions, any literature or entertainment which did not promote the traditional values of Christian sexual morality was also condemned by social mores and relevant sections of the Criminal Code. Thus, throughout the late Victorian and Edwardian era it is evident that the morality of the public and the individual were both subject to social and legal control.

FOOTNOTES

¹G. Burbidge, Digest of the Criminal Law of Canada (Toronto: Carswell Co., 1890), article 218, pp. 163-164 and J. Stephen, A Digest of the Criminal Law (London: Macmillan and Co., 1894), article 191, pp. 132-133. The wording in both articles is exactly the same.

²Burbidge, Digest of the Criminal Law of Canada, p. 164 and Stephen, Digest of the Criminal Law, p. 134.

³Burbidge, Digest of the Criminal Law of Canada, article 219, p. 165.

⁴Ibid.

⁵Canada, Criminal Code (1892), section 179 and 180.

⁶According to section 180: "Every one is guilty of an indictable offence and liable to two years imprisonment who posts for transmission or delivery by or through the post, any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any publication, matter or thing of an indecent, immoral, or scurrilous character,..." Canada, Criminal Code (1892), section 180.

⁷Canada, Criminal Code (1892), section 179.

⁸Ibid.

⁹See for example, R. v. Beaver, 9 Canadian Criminal Cases (1903), pp. 415-425 and R. v. Britnell, 20 Canadian Criminal Cases (1911), pp. 85-95. Both these cases concerned the question as to whether the accused 'knowingly' displayed the material and whether they knew it was obscene.

¹⁰Canada, Criminal Code (1892), section 179.

¹¹Canada, Criminal Law Amendment Act (1900), section 179.

¹²Canada, Criminal Law Amendment Act (1903), section 179 (a).

¹³Ibid.

¹⁴Ibid.

¹⁵Canada, Revised Statutes of Canada (1900),
section 208.

¹⁶Ibid., section 209.

¹⁷W. Charles, "Obscene Literature and the Legal
Process in Canada," Canadian Bar Review, Vol. 44 (1966),
p. 243.

¹⁸K. Norwick, Pornography: the Issues and the Law
(Public Affairs Committee, Inc., 1972), pp. 3-4. See also
V. and B. Bullough, Sin, Sickness and Sanity: A History of
Sexual Attitudes (New York: New American Library, 1977)
p. 165.

¹⁹Norwick, Pornography: the Issues and the Law,
p. 4.

²⁰Bullough, Sin, Sickness and Sanity: A History of
Sexual Attitudes, p. 169.

²¹Ibid., p. 170.

²²W. Kesterton, The Law and the Press in Canada
(Toronto: McClelland and Stewart, 1976), p. 81.

²³In fact, "Until 1959, Canadian courts when re-
quired to determine the question of obscenity in litera-
ture, tested the material under review by its tendency to
corrupt and deprave those who might read it." Charles,
"Obscene Literature and the Legal Process in Canada,"
p. 277.

²⁴G. Parker, An Introduction to Criminal Law
(Toronto: Methuen, 1977), p. 95.

²⁵R. v. Beaver, 9 Canadian Criminal Cases (1905),
pp. 415-425.

²⁶Ibid., p. 422.

²⁷Ibid., p. 421.

²⁸Ibid., p. 422.

²⁹Ibid.

³⁰Ibid.

³¹Ibid., p. 424.

³²R. v. McAuliffe, 8 Canadian Criminal Cases (1904), pp. 21-24.

³³Ibid.

³⁴Ibid., p. 23.

³⁵R. v. L'Heureux, 17 Nova Scotia Law Reports (1910), p. 32.

³⁶Canada, Debates of the House of Commons, 23 March 1903, p. 316.

³⁷Ibid.

³⁸Ibid., p. 317.

³⁹Ibid., p. 318.

⁴⁰Canada, Debates of the House of Commons, 12 May 1909, p. 6391.

⁴¹According to Aylesworth, "I think it is certainly not an uncommon thing for boys at school, possibly not an uncommon thing for boys at school, half grown young men in the teens, to get possessed by some hook or crook of a picture that they would not like to have found in their pockets." Canada, Debates of the House of Commons, 12 May 1909, p. 6392.

⁴²Ibid.

⁴³Ibid.

⁴⁴R. v. Graf, 15 Canadian Criminal Cases (1909), p. 205.

⁴⁵R. v. McCutcheon, 15 Canadian Criminal Cases

(1909), p. 362.

⁴⁶J. C. Hopkins, The Canadian Annual Review of Public Affairs, 1902 (Toronto: The Annual Review Publishing Co., 1903), p. 395.

⁴⁷J. C. Hopkins, The Canadian Annual Review of Public Affairs, 1905 (Toronto: The Annual Review Publishing Co., 1906), p. 581.

⁴⁸Ibid. Perhaps Bruchési was threatening excommunication.

⁴⁹Ibid.

⁵⁰J. C. Hopkins, The Canadian Annual Review of Public Affairs, 1908 (Toronto: The Annual Review Publishing Co., 1909), p. 633.

⁵¹J. C. Hopkins, The Canadian Annual Review of Public Affairs, 1910 (Toronto: The Annual Review Publishing Co., 1911), p. 313.

⁵²Encyclopedia Canadiana, Vol. 7 (Ottawa: The Canadiana Company Limited, 1958), p. 172.

⁵³P. Robertson, Facts and Feats: A Guinness Record Book, New York: Sterling Publishing Co., 1980), p. 14.

⁵⁴D. Leonard, "Talking Movies Arrive," The Spirit of Alberta: an illustrated heritage (Edmonton: The Alberta Heritage Foundation, 1978), p. 165.

⁵⁵P. Morris, Embattled Shadows: A History of Canadian Cinema, 1895-1939 (Montreal: Queen's University Press, 1978), p. 15.

⁵⁶Encyclopedia Canadiana, Vol. 7, pp. 172-175 and P. Morris, Embattled Shadows: A History of Canadian Cinema, 1895-1939, Chapter One.

⁵⁷Leonard, "Talking Movies Arrive," p. 165.

⁵⁸Wetaskiwin Times, 5 September 1912, n. p.

⁵⁹"New 'Colonial' to be Most Up-To-Date Photo-play Theatre," Lethbridge Herald, 8 October 1918, p. 5.

⁶⁰P. Morris, Embattled Shadows: A History of Canadian Cinema, 1895-1939, p. 13.

⁶¹Where Are My Children? was directed by the first American female director and was a highly successful film about birth control.

⁶²"Lethbridge To See Daring Birth Film," Lethbridge Herald, 3 June 1918, p. 5 and "All Lethbridge Ladies Should See Daring Birth Film Tonight," Lethbridge Herald, 7 June 1918, p. 5.

⁶³J. Pascall and C. Jeavons, A Pictorial History of Sex in the Movies (London: The Hamlyn Publishing Group Limited, 1975), p. 16.

⁶⁴"Lethbridge To See Daring Birth Film," Lethbridge Herald, 3 June 1918, p. 5.

⁶⁵Lethbridge Herald, 6 June 1918, p. 5. In the same account, the Herald stated that it was a play which would "entertain, thrill and leave a life-long impression. This is the first time a play of this type has ever been given in Lethbridge. A dramatic portrayal of a worldwide problem."

⁶⁶Lethbridge Herald, 4 June 1919, p. 5.

⁶⁷Ibid., 3 May 1920, p. 8.

⁶⁸A photoplay is a play filmed or arranged for filming as a motion picture. The American Heritage Dictionary of the English Language (Boston: American Heritage Publishing Co., Inc., 1969).

⁶⁹The Unmarried Mother, Lethbridge Herald, 6 December 1918, p. 5.

⁷⁰The Unmarried Mother, Lethbridge Herald, 5 December 1918, p. 5.

⁷¹Lethbridge Herald, 9 December 1918, p. 5.

⁷²Enlighten Thy Daughter, Lethbridge Herald, 14 June 1919, p. 5.

⁷³Ibid. Elton also contended "The responsibility of motherhood, it seems to me, demands that a more care-

ful and patient and plain explanation of the laws of life should be imparted to our boys and girls, such as the film 'Enlighten Thy Daughter' seeks to inculcate."

74 Ibid.

75 "Crowds Turned Away from the Colonial," Lethbridge Herald, 17 June 1919, p. 5. One newspaper in Winnipeg noted "If you are looking for smut in this picture you will not find it, but you will find good wholesome entertainment." "Calgary Social Workers Praise Great Sex Film," Lethbridge Herald, 10 June 1919, p. 5.

76 "Calgary Clergyman Eulogizes Great Sex Picture Coming here," Lethbridge Herald, 11 June 1919, p. 5.

77 The Unpardonable Sin, Lethbridge Herald, 8 August 1919, p. 5.

78 Ibid., 6 August 1919, p. 5. See also "Many Big Scenes in 'Unpardonable Sin'," Lethbridge Herald, 9 August 1919, p. 5. The article noted that the biggest scene "in point of interest and suspense though paradoxically smallest in point of characters involved, is the disrobing scene which has been attracting the attention of the public wherever the tremendous photoplay feature has been exhibited."

79 Damaged Goods, Wetaskiwin Times, 29 March 1917, n. p.

80 "Fit to Win, Sex Picture, comes to Colonial Wednesday," Lethbridge Herald, 3 April 1920, p. 5.

81 "Men of Lethbridge," Lethbridge Herald, 3 April 1920, p. 5.

82 "Fit to Win, Sex Picture, comes to Colonial Wednesday," Lethbridge Herald, 3 April 1920, p. 5.

83 "Fit to Win for Women Only at Colonial Wednesday," Lethbridge Herald, 21 June 1920, p. 5.

84 "CASUAL KISS MAY CARRY DISEASE," Lethbridge Herald, 26 August 1920, p. 8.

85 According to Gillespie, "This photoplay is in my opinion of great educational value. I have no doubt but

that it will do a great deal of good." Lethbridge Herald, 27 August 1920, p. 8.

⁸⁶Lethbridge Herald, 28 August 1920, p. 8.

⁸⁷The End of the Road, Lethbridge Herald, 25 August 1920, p. 8.

⁸⁸According to Forster, the movie "is the sanest presentation of the terrible phases of the Social Evil I have ever seen. But more - Its constructive teaching has a powerful appeal. In 'Mary Lee' it presents a splendid picture of a superb womanly character resulting from such sane and sensible early teaching at home as is the best safeguard for the rising generation. Every teen age boy and girl should see it." Lethbridge Herald, 26 August 1920, p. 8. Norrington stated that it was "a good picture - one that should be seen by every young man and woman. It is instructive to parents, teaching that a word in time to the children is very often the means of preventing untold suffering in later life." Lethbridge Herald, 27 August 1920, p. 8.

⁸⁹"CASUAL KISS MAY CARRY DISEASE," Lethbridge Herald, 26 August 1920, p. 8.

⁹⁰Ibid.

⁹¹"The End of the Road Now Playing at Colonial," Lethbridge Herald, 30 August 1920, p. 8.

⁹²Lethbridge Herald, 31 August 1920, p. 8.

⁹³Morris, Embattled Shadows: A History of Canadian Cinema, 1895-1939, p. 55.

⁹⁴Ibid.

⁹⁵"Motion Picture Censors Gather," Lethbridge Herald, 21 June 1918, p. 14.

⁹⁶"Picture Censor Boards," Lethbridge Herald, 16 July 1919, p. 5.

⁹⁷The A-B-C of Love, Lethbridge Herald, 1 April 1920, p. 5.

⁹⁸Lethbridge Herald, 3 February 1920, p. 5 and 4 February 1920, p. 5.

⁹⁹Ibid., 5 February 1920, p. 5.

¹⁰⁰Ibid., 2 February 1920, p. 5.

¹⁰¹Ibid., 31 January 1920, p. 5.

¹⁰²E. Morris, To the Pure: A Study of Obscenity and the Censor (New York: Viking Press, 1928), p. 182. According to Morris, "The best organized is the Canadian customs, it has, unlike the United States customs, a permanent blacklist of prohibited books and magazines which is added to periodically. Once upon the list the book is automatically excluded. Such old favourites of the smut-hounds as The Arabian Nights, Droll Stories, Three Weeks and Ulysses are excluded."

CONCLUSION

It is not unusual to find laws in the English common law tradition which were framed as general public laws but which in fact were designed to operate against specific groups of people within society. Most certainly women provide a case in point. For example, the laws against witchcraft in late medieval and early modern Europe were long considered to be laws which reflected the rise of religiosity and a movement towards social control in an era marked by the growth of a centralized, secular state.¹ But recent studies on the topic have suggested that the laws against witchcraft represented both a social and psychological crisis in European society,² which resulted not in a hunt for witches, but for 'undesirable' women.³ Similarly, laws against sexual immorality can also be seen as emanating from a revival of religiosity in early twentieth century Canada, and this study suggests that in Western Canada morality laws were in fact chastity laws which resulted not only in a search for immoral people but also unchaste women.

While seduction under the promise of marriage, for example, was illegal when the woman was under the age of sixteen, the fact that Members of Parliament wanted to protect the chastity of women in this manner to age eighteen, twenty-one or even thirty, bears vivid testimony to the

meaning of morality laws in early Canadian development. The importance of morality laws is further revealed in the law's explicit contention that in cases of seduction, the female had to be of chaste character and in other charges of sexual assaults, the chastity of the female was an implied prerequisite in the cases. Yet the term chastity was never legally defined. The cases chosen for this study reveal that the word chastity could be used to refer to the woman's character or her physical condition; that is, her virginity. Thus the definition of chastity knew no legal or social boundaries.

It was generally assumed that women should be chaste before marriage, and loyal to their husbands afterwards. This concept was revealed and reinforced in the social perception of the institution of marriage. Women married to produce, care for, and raise children. By entering into the marriage contract, women gave their husbands sexual ownership of their bodies and the idea of sexual autonomy for females was an alien concept in both the social and legal setting. Furthermore, for a wife to have sexual intercourse with her husband without the purpose of procreation was actually styled as a form of legal prostitution.⁴ Research for this study indicates that several of the women's groups and organizations which flourished during the late nineteenth and early twentieth century equated the fulfillment of womanhood with marriage, childbearing and domesticity. This fact alone demonstrates how deeply the perception of marriage and the role of the female partner within this institution was engrained in the very fabric of Canadian society.

Although women were urged to bear children, the fear of intercourse with its attendant problems of pregnancy and childbirth led to the restriction of sex, often to one or two times a month. This limitation was further necessitated by a lack of information, and access to, birth control devices, of which advertising, sale and supply was made illegal by the Criminal Code of 1892. Even the ultimate solution of abortion was not a meaningful alternative for women with the legal penalty for a self-induced abortion being seven years imprisonment and a life sentence for procuring a miscarriage. Despite the legal restraints, women flirted with death by visiting back-alley abortionists or attempting to abort themselves with rudimentary tools. Because of these circumstances, a woman not only had to regulate sexual activity with her husband, but, was also forced to turn to harmful drugs and acids to prevent unwanted conceptions and births. The use of boric, tanic and carbolic acid and creolin, ergot and turpentine were but a few of the many hazardous substances which women resorted to in order to stay within the law. And when all else failed, infanticide could be and was practiced.

An analysis of moral and sexual offences reveals that the criminal law of Canada was intended to protect the female against male predators. Despite this fact, the body of judicial evidence demonstrates that it was difficult for a female to make a complaint, procure a conviction or gain a suitable sentence against the offender. Although the offences of rape and carnal knowledge of a female under

the age of fourteen were framed as strong laws in the Criminal Code of 1892, it would appear that they were weakly enforced in Western Canada. When and if a woman wanted to pursue her rapist through the criminal justice system, she would encounter several major problems. For example, she had to be of good moral character and reputation, yet neither term warranted legal definition. Furthermore, there was need of corroborative evidence from independent witnesses and the charge had to be laid immediately. It was not unusual for the trial to turn into an examination of the female's moral character instead of the alleged act committed against her.

Similar evidential problems can be seen in those cases involving the carnal knowledge of a female under the age of fourteen which were processed through the courts. In addition to the factors of corroboration and time, the girl was expected to comprehend what had happened even if she was too young. In those cases involving extremely young girls, the judge could, in lieu of accepting her evidence under sworn testimony, question her as to whether she clearly understood the importance of telling the truth. Usually such questions revolved around whether the girl had received sufficient religious training to know the moral difference between right and wrong in general and improper conduct in particular. Furthermore, there had to be evidence of full penetration; partial penetration, even with major physical damage, was often insufficient to warrant a conviction.

The crime of indecent assault against females was not as strong as those previously mentioned. It was more

vague and ill-defined in terms of the written law and more inconsistent in adjudication. Formerly considered to be part of the carnal knowledge category, it was separated in the 1892 Criminal Code and then included in a new group of consensual and forcible acts in the legislation of 1909. This latter category included such occurrences as wife beating and sexual and nonsexual acts perpetrated against women or children. In fact, even a pinch of a woman's anatomy with the slightest hint of sexual intercourse fell under the general rubric of this legislation. But in those cases specifically dealing with indecent assault, the chastity of the woman was a chief element of concern. Any act which could be interpreted as possibly leading to sexual intercourse was subject to possible prosecution under the strictest sense of the law.

The prosecution and punishment of moral and sex offences was not limited solely to the protection of female chastity. Men too, could defile their moral character. Buggery and sodomy were considered to be the worst aspects of a man's relationship with other beings. As a category of criminal offence, buggery had a checkered history in England and in Canada. And the discrepancies between the legislation on the one hand, and judicial precedents on the other, were not resolved by the Canadian Criminal Code of 1892. Indictments were often misleading, terms were used indiscriminately in court, evidence was not clearly defined, and convictions were difficult to obtain. Regarded as an unnatural act, buggery, which included heterosexual and

homosexual anal sex and bestiality, was perceived as a threat to the institution of marriage. Once public opinion was focussed on the term with the popularization of the Oscar Wilde trials in 1895, buggery joined the arsenal of moral offences as a crime against the social fabric and the purpose of sexual intercourse, namely, procreation. Perceived as a challenge to traditional sexual morality, buggery became representative of yet another form of unacceptable sexual behaviour, only this time it was an activity usually committed between consenting adults.

Offences like indecent assaults against males and gross indecency were equally vague in definition. For the most part, however, indecent assaults against males were regarded as assaults with the intent to commit buggery, and frequently young boys were involved in these offences. The category of gross indecency was taken directly from the English Criminal Law Amendment Act of 1885 and placed into Canadian law in 1890 thereby creating Canada's first distinctly homosexual legislation. However, this was a somewhat unusual criminal law in that the term gross indecency was never legally defined. As a result, such actions as masturbation, indecent exposure, rubbing, fondling, oral sex and buggery itself were placed under the general rubric of gross indecency. The authorities used this undefined category in whatever manner they saw fit and as such the definition of gross indecency varied from one area to another. Although the public's understanding of the undesirability of these 'unnatural acts' did not undergo any substantial

change in the late nineteenth and early twentieth century, the courts most certainly did. In fact, by the Second World War, judges found it increasingly difficult to justify a criminal conviction for those acts which lacked definition, suffered from evidentiary requirements and perhaps more important were an invasion of personal privacy and sexual freedom.

In response to the poorly drafted legislation regarding morality and sex offences, the judges exercised considerable discretion in their sentencing powers. For example, it was not unusual for a man charged with indecent assault against a female to be convicted of attempted rape despite the fact that the two offences were separated in the Criminal Code. Similarly, it was not unusual for a man who had been charged with rape to be convicted of indecent assault, attempted rape or carnal knowledge. However, the courts, especially those in Southern Alberta, would find a man not guilty of indecent assault, regardless of the evidence presented in support of a charge of carnal knowledge or attempted rape, if it doubted the moral character of the woman. Generally speaking, however, the prosecution wanted to obtain convictions for offences against morality in order to provide society with a visible deterrent to these socially unacceptable actions. Thus it would readily accept the conviction of a crime with a lesser sentence just to win a successful prosecution. For example, convictions for indecent assaults against males and gross indecency were rendered when it appeared that the evidence

was insufficient to warrant a conviction for buggery or attempted buggery.

The most crucial problem encountered in the prosecution of all these criminal offences was that of evidence. This was particularly acute in prosecuting the crimes of buggery, sodomy, gross indecency and indecent assaults against men. The fact that many of these offences were ones where both parties had agreed upon their actions made the prosecution of these acts performed in personal privacy somewhat difficult. Thus, in the majority of these cases, a charge would only be laid if a third party happened to see the participants perform the act. Furthermore, in those cases where consent was freely given, criminal prosecution of the participants was a blatant invasion of sexual freedom and personal privacy.

Since the question of consent was also at issue in the trial of rape, attempted rape and carnal knowledge, it was mandatory that a woman have evidence of significant physical damage to prove that she had, in fact, been violated against her will. Indeed, the very fact that people believed a woman's chastity was more important than her life, was indicative of how predominantly male juries would regard the evidence in such cases. And in cases involving indecent assaults against a female, the evidence required was never adequately defined by the particular section in the Criminal Code or in the courts as they heard all cases involving indecent assaults whether they were against males or females. Consequently, each locality seemed to have its

own range of criteria as to what constituted the crime in addition to what comprised sufficient evidence. Although the criminal law of Canada stemmed from the nation state, it would appear that its interpretation and implementation rested in the criminal justice system of the locality.

The sentencing in cases of moral offences reveals some of the same problems as affected their prosecution. The lack of adequate definitions of the crimes and accepted rules of evidence for their prosecution, coupled with the importance of local feelings towards the parties, led to inconsistencies in sentencing. Consequently, no clear sentencing pattern emerges. The life sentences attendant on rape convictions were rarely given; a few years of imprisonment were usually the maximum penalty. Although indecent assaults had a maximum punishment of confinement for two years, research indicates that the courts used a maximum of one year and most sentences were for a few months. A similar range of sentences were meted out to those who were convicted, respectively, of buggery and attempted buggery. In general, judges preferred short sentences for terms of imprisonment supplemented by some form of corporal punishment. They included a number of lashes or hard labour, and sometimes, both. Once again, the judges rarely used the maximum penalty afforded to them by the written criminal law.

By embodying social perceptions of sexual normality in vague and undefined sections of the Criminal Code, the federal government was providing the localities with

carte blanche in the use and manipulation of these laws to enforce the sexual customs of society. In fact, all levels of government went so far as to try to reinforce an acceptable standard of sexual morality by controlling what Canadians were reading in printed form or seeing at the local theatre. This was to be accomplished through the application of vague social and legal definitions of obscenity to literature and entertainment.

It is readily apparent that perceptions of sexual normality, abnormality, obscenity and criminality are subject to change over time. Although this study is by no means definitive, the research to date indicates that the last decade of the nineteenth and first two decades of the twentieth century were characterized by concerted efforts by both law and society to dictate acceptable sexual activity for Canadians. As a Christian nation, acceptable sexual activity for Canadians was to be confined to married couples and solely for the purpose of procreation. All else was, by definition, socially abnormal, legally criminal and a threat to the very foundation of Canadian society.

FOOTNOTES

¹J. Samaha, Law and Order in Historical Perspective (New York: Academic Press, 1974).

²K. Thomas, Religion and the Decline of Magic (New York: Charles Scribner's Sons, 1971).

³C. Lerner, Enemies of God (Baltimore: Johns Hopkins University Press, 1981).

⁴L. Gordon, Woman's Body, Woman's Right (Middlesex: Penguin Books, 1977), p. 22.

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ABBREVIATIONS

PABC - Provincial Archives of British Columbia
SAB - Saskatchewan Archives Board
SCR - Supreme Court Records
DCR - District Court Records

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